The option agreement and the promise to contract according the new code of civil law

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Abstract: Concluding a contract has the juridical meaning of achieving the will agreement of the parties on its clauses, further the conjunction of the two constitutive elements of any convention: the offer and its acceptance, and the effects to follow are to be produced as from that moment, excepting the case when, according the parties’ will or according the law they should be produced at another moment.

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1. Traditionally, concluding a contract has the juridical meaning of achieving the will agreement of the parties on its clauses [1], further the conjunction of the two constitutive elements of any convention: the offer and its acceptance, and the effects to follow (the specific rights and obligations) are to be produced as from that moment (excepting the case when, according the parties’ will or according the law they should be produced at another moment). However, nothing opposes, but it is even acknowledged expresis verbis by the law, that the parties may conclude preliminary agreements to the contract (the so called preparatory agreements [2]), through which it is prefigured or projected the conclusion of an agreement for the future, this being an often met in practice juridical way, where the parties although do not conclude the projected contract they legally agree between themselves to conclude it in the future achieving thus a certainty regarding its conclusion. In such a case, the assumed juridical agreement having as object the obligation “to do” or even more, as we shall notice, there are situations where, one of the parties already expresses in advance its consent when concluding that contract. Such a “juridical agreement” on its term, represents a genuine contract (art.1.166 New civil code), different from the subsequent, foreseen one. Obviously, one cannot overlook the hypothesis when a simple offer to contract is issued, in which case this, as a juridical physiognomy shall be an unilaterally agreement.

2. Settling the general part of the obligations, respectively the sources of the obligations (Book V, Title II), inside chapter I, regarding the Contract, the New Code of Civil Law comprises dispositions related to the option agreement as being that convention through which one of the parties may remain restrained by its own declaration of will and the other one to be able to accept or refuse it, that declaration being considered an irrevocable offer that produces the effects provided by the art. 1.191 (art. 1.278 the New Code of Civil Law) as well as to the promise to contract (art. 1.279), that does not benefit of a legal definition but which is understood in the doctrine [3] as being that convention where the parties or only one of them agree to conclude a contract in the future. As regards the promise to contract, as the obligation to conclude the contract in the future (to do) is assumed only by one of the contracting parties
or alike by both of them, we face either an unilaterally promise to contract or, in case of the latter, a bilaterally promise (synalagmatic) to contract.

3. We notice thus, the legislator’s firm option not only to use alike the option of a “preference agreement” and the “promise to contract”, but most important, to settle especially the two juridical operations, where from we can easily conclude that there is no identity between them. This remark must be enhanced, as until now, part of the Romanian [4] and foreign [5] doctrine, voiced by some authors of certain authority who have affirmed in a determined way that the unilaterally promise (to contract) and the option agreement are in fact “one and the same thing”, appreciating that the second syntagm is suggested just to mark the fact that a promise is not always an unilaterally contract (in case an immobilization indemnity is stipulated) [6].

But, as shown, the difference between the two juridical operations is beyond doubt solved by the legislator, one has to remark elements which particularise and differentiate each of the two juridical acts, confessing that the confusion risk is significantly enough as long as both the option agreement and the unilaterally agreement are contracts which confer a right, depending on one of the parties’ will, to its beneficiary of option, respectively to decide or not concluding the foreseen contract. But, alongside comparing analysis of the two operations one is interested in the type of the assumed obligation in case of each of them, leading to the juridical qualification of each as well as of the mechanism where, in case of positive option, the foreseen contract will be concluded.

3.1 As regards the unilaterally promise to contract as shown above, this raises for the promissory part the obligation to conclude the contract in the future so in case the beneficiary of the promise decides to conclude it, the promissory part shall be kept to express his consent to conclude the subsequent contract and in case of refusal, his obligation is being susceptible of forced execution (indirect), which case the instance, substituting his consent shall pronounce a decision that keeps place of a contract [7]. We retain thus that the obligation descending to the promissory part’s in case of concluding such a contract is “to do” (implies a further positive conduct, other than that of “to give”), correlating to the beneficiary’s claiming right of option, meaning to decide and pretend the contract’s conclusion. We can qualify then the act as having the juridical nature of a pre-contract, respectively a convention where one of the parties obliges itself to conclude in future a contract whose essential content is determined [7], being a preliminary convention, different from the preliminary one.

3.2 Apart from these, in case of concluding an option agreement, the promissory part is not committing anymore to conclude the contract in the future (to do) but he actually manifests in advance his consent to conclude the subsequent contract, thus, when the beneficiary shall also choose to conclude it, expressing his own will, the will agreement being achieved ipso jure, the contract is considered to be concluded. In fact the legislator has defined that the will being thus expressed, according art. 1.278 the New Code of Civil Law, represents an irrevocable offer which produces the effects foreseen by article 1.191 the New Code of Civil Law. As regards the juridical nature expressed by the legislator as being that of an “offer” we keep ourselves reserved, as the offer (in classical concept) represents a proposal to contract through which the offerer fixes the elements that may be taken into consideration for concluding the contract or in case of the option agreement, these elements are established by the parties concluding the contract and not only by the offerer (promissory part). That the expression of will from the promissory part is already expressed, as the case of the offer to contract, does not
have the nature to qualify the offer as such a juridical act which is anyway bi or multilaterally but more likely represents an “anticipated” expression to conclude the contract whose essential elements have already been established by the parties’ agreement. At the same time, in the doctrine is sustained [8] that such an act might have a complex juridical nature, combining an offer (to contract) as well as an accessory agreement which grants the beneficiary the power to become the creditor of an option right upon concluding or not. Without denying the justice of the thesis according which it might have a complex juridical nature, although the fact that the beneficiary is being granted the option right does not represent an element of absolute novelty, as well as any offer (being so qualified by the legislator) grants to its beneficiary the option to decide if he shall receive it or not. Thus, as shown, the original character which particularises this juridical instrument resides in the fact that the offer’s elements are not being exclusively established by the offerer but by parties’ agreement.

4. The correct qualification of such a preliminary convention as being the promise to contract or option agreement expresses a particularly practical interest, on one side to remark the way the subsequent (projected) contract shall be concluded, respectively in case of the promise to contract, in “two times” being necessary that both parties to express the consent to conclude the subsequent contract, but in case of option agreement the contract is concluded by beneficiary’s simple will expression, in which case the will agreement is achieved. On the other side, we are interested in the form such act has, because in case of preference agreement, the legislator has settled the form of the act as that being requested by the law for contract that parties wish to conclude (art. 1.278, line 5), such a settlement is missing in case of a promise to contract, from which results that the general rule is applied, that of consensuality (art.1.178 the New Code of Civil Law, “Liberty of form”) no matter if the projected contract is one for which the law is asking for a conclusion in solemn form.

5. Settling a particular case where such an act is met, respectively the Option agreement regarding the selling contract, the legislator registers in art.1.668, line 1 (the New Code of Civil Law) that in case of Option agreement regarding a selling contract regarding an individually determined good, between the date of contract conclusion and date of option application or after case, that of option expiry term one cannot use the good that is object of the option, speaking about a temporary cause of the good’s unavailability, reason for which, parties may provide an immobility indemnity in the concluded convention [9], the option right may become onerous and synalagmatical. When the agreement has tabular rights, the option right is noted in the book of the land and the option right is erased ex officio if until the option term expiry date no declaration of rights exercise has been registered, altogether with the proof of notifying it to the other part.

6. As well, by settling the selling and the buying promise, the new Code of civil law provides at art. 1.669, line 1, that when one of the parties that has concluded a bilaterally promise to buy, unjustified refuses to conclude the promised contract, the other party may ask for a decision that takes place of a contract, if all other validity conditions have been fulfilled. And the right to action shall be prescribed in a six months term from the date the contract had to be concluded.

References:
[6] J. Huet...p. 120-121, no.11174, bailiff D. Chirica, op.cit., p.158;