ABSTRACT

I have established the theme of this paper before the entry into force of the new Civil Code. I did not know then how great would be the difficulty after the event.

I hope I was able to create an image on the report between the sale promise and the sale-purchase contract.

The degree of difficulty was increased by the fact that if during the Civil Code act of 1864 one could only talk of sale promises (pre-contract), after the entry into force of the new Civil Code, the pre-contract aims at all categories of contracts.

Therefore, I had to outline the details of the overall theme of the pre-contract under the new regulations and then dissociate between pre-contracts, stopping at the sale contract, in order to analyse it compared to the actual sale-purchase contract.

If we look at the overall analysis made by the doctrine on legal regulations of the current Romanian Civil Code, we observe that, invariably, ideologists reach the conclusion that it is "built" on the model of European private law. Regarding the need for its adoption and imperatives which have generated it, ideologists do not have a unified vision, but either it is considered as the effect of external conditionings or it is viewed as an internal political option or as an intrinsic element of the accession and integration process into the European legal order of the EU, the new Romanian Civil Code is defined by three main features: the unification of legislation, its update and introduction of new legislative elements for the Romanian legal system.

The current Romanian Civil Code marks, therefore, a time of major legislative change, a change designed to achieve a correlation between legislation and economic and social evolutions of the Romanian society, to unify a number of private legal institutions and laws into a single regulation and to introduce new legislative elements required by the evolution of the material source of law - society, with its continuous change and evolution.

One of the effects of the monistic system option is the unification of the law of obligations, especially regarding contracts, in the new Civil Code. Therefore, the

general rules of contracts are provided by the Romanian Civil Code through art. 1166 - 1323, and the legal issues relating to obligations and which include the articles relating to contractual matters are dealt with in Book V of the new Civil Code, book which is divided into 11 titles and which has an unified approach to all obligation reports.

The main aspects of novelty introduced by the Romanian Civil Code aim at: restructuring the obligation matter and substantiate it through the current doctrine and jurisprudence, reformulating the principles that govern this matter and redefining traditional concepts consistent with the current legal doctrine.

Regarding the development of contracts we could notice that new elements were introduced, such as: negotiating with explicit regulations on the obligation of good faith and confidentiality and recognizing the legal effects of the pre-contractual stage.

The current regulation of special contractual matters is considered by the doctrine as consistent with the evolution of society in general, and with the tendency which manifests its constant multiplication and diversification of the types of contracts and it is subject, naturally, to the contemporary evolution of special contractual law. Also, we can notice the interdependence and connection between special contracts and the scope of civil obligations, the general theory of obligations constituting common law for contractual matters. The connection and interdependence of the two areas has a dual manifestation: on the one hand, special contracts are subject, in the absence of a special regulation, to the rules concerning the conditions of contract validity, and the interpretation of contractual clauses and execution; and on the other hand, special contracts create a common law through the doctrine or jurisprudence which generates certain principles, techniques or concepts.

From the special contracts, the most used contract in practice is considered the sale-purchase contract as it is the one which ensures the legal circulation of goods and other property values.

The current legal regulation allocates the sale institution a total of 112 items, from art. 1650 to art. 1762, giving the contents of Chapter I of Title IX “Various

special contracts" in Book V "About obligations". Taken together, this regulation, compared with the previous one, has significant changes on issues such as: name, object, validity conditions and effects.

The doctrine notes that the current global economic situation, which sometimes involves economic instability leads to a more widespread use of conventions prior to contracts, increasingly more laborious and lengthy negotiation periods, and this situation has the legal effect of a more "difficult" consent formation phenomenon, a phenomenon that has been reported by the doctrine for some time.

From these reasons the new Civil Code deals with a series of legal issues related to the progressive and phased formation of consent, it regulates several legal institutions such as: negotiations – as the first step in achieving consent with issues relating to good faith in negotiation obligations, confidentiality obligation in pre-contractual negotiations; elements on which concluding a contract depends; time and place of contract conclusion; the tender; and aspects regarding the validity conditions of consent; the question of discernment and, as in the old Civil Code, the vices of consent with a slightly more detailed approach than in previous regulations.

Moreover, reserving a subtitle from the legal provisions of consent "Formation of contract" shows, explicitly, the concern of the Romanian legislature on this distinct stage, concern "dictated" by the current reality: an increasingly more evident change in the field of contract formation, development due to the current economic situation which "requires" a gradual, "progressive" formation of the contract.

The doctrine, in its majority, notes that the formation of the contract by consent immediately and simultaneously depends on the classical theory of contract formation and involves its instantaneous formation. Under the empire of practical needs, coupled with the current regulation, the theory of progressive formation of contracts is applied in relation to the classical theory of contract formation. Of course, we cannot speak of an abandonment of the classical theory of instantaneous formation of consent, but the two ways of achieving conventions, instantaneous and gradual, coexist in the current legal reality.

In my efforts to achieve a comparative analysis between important legal institutions of civil law - the sale-purchase contract and sale promises - whose connection to the relational level is one obvious, but whose legal autonomy, in terms of their structure, is also clear; the thesis is structured on three titles, in which I focused my analysis on the following issues: the sale-purchase contract, as it is regulated in the new Romanian Civil Code; a historical perspective on legislative, doctrinal and jurisprudential approaches regarding the sale promises before the entry into force of the new Civil Code and, finally, the current legislative approaches on sale promises in the new Romanian Civil Code. I made, in this last title, in Chapter IV, the final chapter of this title, a comparative analysis between the sale-purchase contract and sale promises as they are "thought" and regulated by current legislation.

Title I of the thesis, "Sale in the new Romanian Civil Code" is divided into three chapters dealing with: the analysis of the current legal regulations in the Romanian Civil Code, in sale matters (its regulations in contractual matters, notion, terminology, legal characters contract of the sale-purchase contract, the sale-purchase contract as the common law for other translative contracts), the conditions of validity of the sale-purchase contract, the effects of the sale-purchase contract and varieties of the sale-purchase contract, as they are treated in the new Civil Code and I mentioned, where appropriate, which are the major changes or new elements compared to the old civil regulation and their consequences.

Title II of the thesis was focused on presenting legislative, doctrinal and jurisprudential approaches regarding sale promises before the entry into force of the new Civil Code.

On this occasion I have shown that the ways of forming a contract were, as nowadays, two: contracts may be concluded without completing the pre-contractual stages because, in this case, the parties simultaneously agree on the contract or the agreement can have a development in time, which involves several steps: pre-contractual negotiations, the offer to contract, the promise of a contract and, as a final step, the acceptance.

In case of sale, the will agreement was not only made simultaneously, as stipulated in the Civil Code in 1865, but as a result of negotiations, or because the parties were unable or unwilling to conclude the sale yet, after prior will arrangements. These prior will agreements were called pre-contracts, temporary contracts, preliminary contracts or contract promises and they produced legal effects without any doubt.

This pre-contractual stage, that produced legal effects, did not benefit, however, from a special legal regulation in our system of law, though in many practical situations, the future parties of a convention, rather than going directly to a contract with definitive effects they preferred to undertake extensive negotiations, during various weeks, months or even years, discussing in detail the future contract. In other words, there were contractual obligations and they produced legal effects and at a practical level they became increasingly more important in the formation of the final contract.

In fact, in this title I tried to capture the aspects that I considered to be the most important issues related to the emergence and evolution of sale promises, to present different theories and systems on the matter, as they were made before the entry into force of the present civil Code.

In Title III, "Legislative approaches regarding the sale promises in the new Romanian Civil Code", I focused my approach on the sale promises in light of new regulations and tried to do a comparative analysis between the sale promises and the sale contract (whose presentation I made in Title I of the thesis).

From a structural perspective, the analysis was conducted after a scheme that targeted the following parts: defining sale promises according to current regulations, forms known (unilateral sale promise and mutually binding sale promise), conditions, effects, assumption of risks in such contracts.

The current Civil Code provides a legal regulation in Book V, Title II - Sources of obligations in Chapter I, relating to the contract for the option pact (art. 1278) and the promise to contract (art. 1279). Also, Title IX, Various special

contracts in Chapter I - The sale contract, regulates the option pact regarding the sale contract (art. 1668), the sale promise and purchase promise (art. 1669).

I tried to show that these new regulations were needed because the old regulation no longer met the status of this matter, the demands of contemporary society, either only because its provisions were limited to showing the classical scheme of the process of formation of the contract. Moreover, ideologists and practitioners have repeatedly signalled the need for change and improvement of regulations in this field, need also claimed by the "pressure" of civil contractual relations which have become increasingly more complex and extensive. However, we noted that it is not an abandonment of the classical theory of instantaneous formation of consent, but we must equally recognize that the two ways of achieving conventions, instantaneous and gradual, coexist in the current legal reality and we needed a regulation on both ways of contract formation.

The issue of contract formation mechanism has a large settlement in the current Romanian Civil Code, which took, in this matter, the solutions offered by the current most modern European legislations: the Swiss Civil Code, the Italian Civil Code, the Civil Code of Quebec, the unification projects of international trading contracts, UNIDROIT principles and Principles of European Contract Law.

In this last title, I tried to achieve a clear and current overview of sale promises and to draw attention, where necessary, on the problems that these formations still create in practical life where, in fact, they highlight their usefulness. I also pointed out in this analysis which are the inconsistencies noted by ideologists or where new regulations are needed for legal issues not yet covered by current regulations.

Starting from the idea that all legislation is perfect and that only its practical "verification" is the one leading to useful changes or the conclusion that it is suitable, we must note that although the new regulation brought some news deemed to be worthy and modern, tailored to the European legislation in the field, there are some discordant, not insurmountable, which can create application or theoretical problems of certain legal institutions, such as: the use of terms considered too loose or improper for the context, which lead to a change in the real meaning of the regulation referred

to, the improper use of terms that have different connotations in practice, the translation of texts from modern legislation (which inspired the current regulation) in a manner inconsistent with their true meanings and without an appropriate qualification with our system of law, etc.

Regarding the matter that I subjected to analysis, as I have shown, we must observe the effect of these new regulations in practical life, both in terms of concluding legal acts in the pre-contractual stage, and the pronouncement of decisions aimed at those acts, given the fact that in the doctrine and jurisprudence, this analysis and interpretation already sparked some comments.

Therefore, the scope of judicial practice has already begun to signal some inconsistencies with the provisions of the new Civil Code in the pre-contractual matters. Therefore, in a conference on the unification of jurisprudence, the National Institute of Magistracy drew attention to issues that are listed by way of example: on the form that the sale or purchase promise has to fulfill, which anticipates the conclusion of a contract for an asset, we have outlined two theses: (1) that it would not be necessary to conclude a sale or purchase promise in original, because the law does not expressly provide that requirement, as it happens, for example, in the case of a donation promise and (2) the promise must be authenticated if it prefigures the conclusion of a contract for an asset. Article 1279 par. (3) Civil Code - general part - and art. 1669 par. (1) Civil Code - the level of sale-purchase - justifies this. By applying the provisions of art. 1279 Civil Code, if the promissory refuses to sign the contract promised, the court, at the request of the party who has fulfilled its obligations, can rule a decision that takes the place of a contract when the contract nature permits it and when, the requirements of the law for its validity are met (the conference itself implied the validity of that contract, and not of the pre-agreement).

Article 1179 of the Civil Code provides that, to the extent that the law provides a certain form of contract, it must be observed, under the penalty prescribed by applicable law. Article 1244 of the Civil Code provides that, except in other cases provided by law, the conventions that constitute or relocate real rights that will be registered in the Land Book must be completed by authentic document, under the

penalty of absolute nullity. Therefore, if one seeks a ruling that replaces a pre-contract, all the conditions of validity of that contract must be met.

The reason of such debates is to achieve a uniform practice in the field and, in this respect, we have stressed that the need to fulfil the conditions of validity (form and substance) is not a general requirement for the conclusion of a sale or purchase promise, but is exclusively made where the law recognizes the right of the creditor to obtain a judgment that replaces a sale contract.

A pre-contract concluded as a document under private signature remains valid, however, if it is desired to obtain a decision for replacing a sale-purchase contract, it is necessary that pre-contract be authenticated. In other words, the authentic form is not a valid pre-contract requirement, but a requirement that, if met, allows it to obtain the decision that replaces a sale contract.

The theoretical sphere also reports inconsistencies with the current pre-contractual regulations. An example is represented by the provisions of art. 1278 Civil Code, which defines the option pact.

The will statement of the one who undertakes is considered by the legislator, in this case, an irrevocable offer, but using the concept of "offer" has sparked discussions. Therefore, in a first analysis, the doctrine considers that, regarding the legal nature of the legislature designated, as being that of an "offer", reservations may be made, because the offer, in its classical conception, is a proposal to contract, by which, the seller sets the elements that can be considered for concluding the actual contract, while in the case of the option pact, these elements are determined by the parties which conclude "the pact" and not only by "the bidder" (promissory). The fact that the will manifestation of the promissory has already been expressed, as in the case of the offer to contract, it is not likely to qualify such an offer as a legal act that is bi-or multilateral anyway, but, rather, as an "early" manifestation to conclude the contract, whose essential elements have been already established through the parties' convention.

Another thesis, on the same legal issue, speaks of "the complex legal nature" of the option pact that includes both the offer to contract and an accessory convention

under which the beneficiary becomes the creditor of a right of option on concluding or not concluding the proposed contract, the original character of the pact being that the elements of the offer are not determined exclusively by the bidder, but by agreement of the parties.

In conclusion, the regulations of the new Romanian Civil Code, regarding the pre-contractual stage, were undoubtedly necessary, knowing that in practice these legal constructions were increasingly more used. Also, we needed to legislatively "highlight" the option of the legislature to remove the confusion between the legal operations that prepare final contracts by establishing rules for the acts that are made in the pre-contractual stage, but we must admit that the current legislation is a perfectible one and, undoubtedly, it shall support changes caused by the inconsistencies raised by practitioners in the field, the need for harmonization with the whole civil legislation noticed by law theorists and, not least, with the civil circuit, regarded as a material source at a constant effervescence and change.