The Pact of Preference – A Comparative Analysis

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Abstract

A contract can be preceded by negotiations. Within these negotiations, the parties can conclude agreements pertaining to the essential elements of the contract they aim to conclude. Among these agreements is the pact of preference. Although the importance of the pact of preference can't be questioned, as, by its contents and effects, is contribute to the stability of contractual relations and the respect of the promises made, the contemporary Romanian lawmaker remained faithful to the conservative previous conception and avoided the express legal regulation of this institution. This approach continues to generate uncertainty and questions pertaining to the practical means of enforcing the pact of preference and even a state of legal uncertainty. By this material, we point out the need to expressly regulate the pact of preference in the Romanian Civil Code. In order to achieve this, we performed a comparative analysis of the legal nature, essential elements and the effects of the pact. Within this analysis, we considered, along with doctrine, jurisprudence and Romanian law, the doctrine and jurisprudence from other similar systems of law, such as the French and Belgian one, with mentions of legal regulations from the systems of law of certain countries from South America.

Keywords: *preference pact, legal nature, conditions, effects, compared law.*

JEL Classification: *K15*

DOI: 10.62768/TBJ/2025/15/1/02

Please cite this article as:	**Article History**
Ionaș, Diana Geanina & Cristina Salcă Rotaru, 'The Pact of Preference – A Comparative Analysis', *Juridical Tribune – Review of Comparative and International Law* 15, no. 1 (March 2025): 24-43.	Received: 18 September 2024 Revised: 10 October 2024 Accepted: 5 November 2024

1. Introduction

Contract is an expression of the freedom of the individual, as it is unanimously acknowledged that legal will is the basis of legal acts[3].

The right to enter into an agreement is a natural right of the citizen, guaranteed

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by the virtue of its membership into society[4], enshrined internationally. Doctrine has correctly appreciated that the existence of an agreement is the fundamental characteristic of a contract[5]. The contract gives rise to rights and correlative obligations where there were none previously. "But the rights and obligations created by any given contract do not arise out of thin air: the state credits voluntary obligations assumed in the course of exchange as legally binding; it recognizes a right to contract."[6] However, achieving an agreement does not occur instantaneously, as it is, most times, the result of negotiations. Within these negotiations, the parties can conclude a series of facts or legal acts, some without any contractual value, others with a variable contractual value[7]. The conclusion of specific pre contractual agreements does not pertain only to the high level of uncertainty of the pre contractual phase, but also to the attempt to facilitate this process[8] under the conditions of a volatile social and economic climate, characterized by tension and financial challenges. The main purpose of pre contractual agreements is that of preparing the content of the contract and facilitating the conclusion of the main contract. What is specific to precontractual agreements is that each party exercises its competence to offer and accept, without giving rise to the promised contract for the mere reason that such an expression of will does not create contractual obligations.[9]

An important pre contractual agreement is the preparatory contract, namely that contract which precedes the conclusion of the main contract. Among the preparatory contracts is the pact of preference, a creation of doctrine and jurisprudence, which is not characterized by a common legal regime, thus making it all the more difficult to define this institution. The notion includes all contracts concluded in the pre contractual phase, including those pertaining to the organization of negotiations, as well as those which prepare the future contract[10]. Among these, a significant role is played by the pact of preference, a creation of doctrine and jurisprudence, which has no express legal regulation in the Romanian system of law and, as a result, no legal regime of its own. However, „case law is an inconsistent, incoherent jumble with no guiding principles"[11]. This is why this legal construction requires clear theoretical approaches regarding the

[4] West, Robin. "A tale of two Rights", *Boston University Law Review*, issue 3, vol. 94(may 2014): 893-912.

[5] Schmidt-Szalewski, Joanna. "La période précontractuelle en droit français", *Revue internationale de droit comparé.* Vol. 42, No. 2 Etudes de droit contemporain(1990): 545-566.

[6] Bagchi, Aditi. "The political morality of convergence in contract", *European Law Journal*, 24(1) (2018): 36–56. doi:10.1111/eulj.12228.

[7] Pop, Liviu, Popa, Ionuț-Florin and Vidu, Stelian Ioan. *Course of civil law. Obligations*, Bucharest, Universul Juridic Publishing House, 2015: 58.

[8] Slawicki, Piotr. "Precontractual Agreements in Selected Legal Systems", *TalTech Journal of European Studies*, Vol.10, No.3(32) (2020): 26-44. DOI: 10.1515/bjes-2020-0020.

[9] Sakharova, Irina. "The Power to Contract and the Offer-and-Acceptance Analysis of Contract Formation" *Canadian Journal of Law & Jurisprudence*, Vol.37 Issue 1(2024): 261–285. https://doi.org/ 10.1017/cjlj.2023.19.

[10] Stoica, Valeriu. "The intention of concluding the contract, the intention of negotiation, requesting an offer and the offer to enter into a contract: stages of legal will in contracts with progressive formation", in Nicolae, Marian (coord.), *Contracts with progressive formation. Preliminary acts and contracts*, Bucharest, Solomon, 2023: 3-28.

[11]Citron, Danielle Keats and Solove, Daniel. Justin. „Privacy harms", *Boston University Law Review*, Vol.102 Issue 3(2022): 793-863.

legal nature, content and legal effects, as to allow the parties to choose, from the legal landscape, the one which best suits their purpose.

As, in Romania, there is a legislative void in this matter and doctrine is scarce is this domain, we have decided to research and compare the law and doctrine of other states, which have a tradition in this domain. Considering the Roman roots of our system of law, as well as the fact that French law was always a source of inspiration for the Romanian lawmaker and has, at the same time, influenced the Belgian law, we have decided to analyze the French and the Belgian systems of law. Thus, within this article, we will define the pact of preference, thus making up for the national legal void in this matter, we will establish the legal nature of this institution by analyzing the opinions expressed by internal and international doctrine in relation to other legally regulated institutions, we will describe the essential validity conditions of this pact and we will identify its legal effects in regard to the parties and third parties, all from a compared perspective.

2. History and definition

The notion of pact comes from the Latin *pactum* which is etymologically tied to *pax*, thus entailing that, in origin, pact was a form of pardon granted by the victim of a crime, a means of ending the revenge[12]. A specific form of preference was known in Roman law as *pactum promitiseos* in the matter of sale and represented an agreement whereby the vendor reserves the right to redeem in preference to every one else in case the vendee should sell the thing[13]. Except for foreclosure, Roman law did not regulate a preemptive right; however, preference could result from the parties' will[14].

The Roman system of law affected the evolution of law in the most part of western civilization, thus creating the basis for the codes of most continental european countries[15]. Influence of Roman law and, subsequently, of the French Civil Code are found in the laws of other states of the American continent, such as Chile, Mexico, Brazil, Peru and so on[16].

In France, before the French revolution, each zone had its own set of laws and habits, surely influenced by the Roman law. After the French revolution, the political unification has determined the need to pass a set of common rules for the entire French territory; as a result, on March 21st,1804, the French Civil Code was passed, honorary called the Napoleon Code. In regard to contract, in the light of the Napoleon French

[12] Lévi, Jean-Philippe and Castaldo, André. *Histoire de droit civil*, Paris, Dalloz, second edition, 2010: 783.
[13] Mackeldey, Ferdinand. *Manuel de Droit Romain, contenant la théorie des Institutes, précédée d'une introduction a l'étude du droit roman*, Bruxelles, Societe Tipographique Belge, third edition, 1846: 222.
[14] Ionescu, Ioana. *Precontract of sale*, Bucharest, Hamangiu Publishing House, 2012: 8.
[15] Stein, Peter G., Glendon, Mary Ann, Hazard, John N., Carozza, Paolo, Millner, Maurice Alfred, Kiralfy, Albert Roland, Jolowicz, Herbert Felix, Rheinstein, Max and Powell, Raphael. "Roman law". *Encyclopedia Britannica*, 2024, https://www.britannica.com/topic/Roman-law. Accessed 3 September 2024.
[16] Belo, Andres. *El Codigo Civile*, Santiago de Chile, Imprenta Cervantes, 1885: 5; Guzman, Brito Alejandro. "La influencia del Código Civil francés en las codificaciones americanas", *Cuadernos de Análisis Jurídico Serie Colección Derecho Privado*, No. II(2005): 27-60. https://derecho.udp.cl/wp-content/uploads/2016/ 08/civilfrance_codificacioneamaericanas.pdf. Accessed 3 September 2024.

Civil Code, it was formed exclusively at the convergence of the offer and the acceptance of the offer, thus from nothing to the conclusion of a contract was a very short step[17]. In time, the need to increase the security of legal relations[18] and the codification of the institution created by practice or doctrine[19] have led to the great French reform achieved by Ordinance no 2016-131 of February 10th, 2016 for the reformation of the law of contracts, the general regime and the proof of obligations[20]. This led to the appearance, on the French legal scene, of a set of rules which regulate the process of formation of contracts, thought by doctrine to be welcomed but unremarkable[21], as well as the express regulation of the pact of preference as an individual legal institution in the matter of obligations. The French Civil Code defines the pact of preference, in article 1123 first alignment, as the contract by which a party is obliged to provide its beneficiary priority in entering into a contract before concluding such a contract with a third party. In the French modern conception, the pact of preference is a contract which regulates priority in concluding a contract[22].

In 1795, the Belgian territory was incorporated in the first French Republic. As a consequence, the Napoleonic principles were taken over in the Belgian law and integrated as such. The Napoleon Code, seen as the first modern code to influence the laws of several European states who were searching for a legal identity, was maintained in Belgium even after it was liberated from the French occupation in 1815 until 2022, when, by Law no 1805/1 and 1806/1 of February 24th, 2022, the new Belgian Civil Code was passed. This was a reformed Code, aligned with modern European tendencies and introduced, as a novelty, the pact of preference. According to article 5.24, the pact of preference is a contract by which a party is obliged to grant preference to the beneficiary of the pact if he decides to conclude a contract.

In Romanian law, an early form of preference was known as *protimis.* It was specific to small village communities and entailed a right to buy back the territories which were the private property of its members[23]. On November 26th, 1864, the first Romanian Civil Code was passed, a code which was in force until 2009, when the

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[17] Baaklini, Céline and Daou, Reine. "La réforme du pacte de préférence en France: une initiative inachevée", *Revue juridique de l'USEK*, No. 17(2018): 7-20.

[18] Legal security is a component of the rule of law and entails the need for clarity of legal provisions, the purpose and content of regulations – see Shcherbanyuk, Oksana, Gordieiev, Vitalii, Bzova, Laura. "Legal nature of the principle of legal certainty as a component element of the rule of law", *Juridical Tribune - Tribuna Juridica*, Vol. 13, Issue 1(2023): 21-31.

[19] Savaux, Éric. "Quelques difficultés majeures de mise en œuvre de la réforme du droit des contrats", *Revue juridique de l'USEK*, No. 18(2019): 61-88.

[20] Ratified by Law no 16 of Law no 2018-287 of April 20th, 2018, published in JORF no 0093 of April 21st 2018.

[21] Rowan, Solène. "The new French law of contract", *International and Comparative Law Quarterly* 66, no. 4(2017): 805–31. https://doi.org/10.1017/S0020589317000252.

[22] The novelty is emphasized in comparative research such as: Momberg Uribe, Rodrigo. "La reforma al Derecho de Obligaciones y Contratos en Francia: Un análisis preliminar", *Revista chilena de derecho privado* No. 24(2015): 121-142.

[23] Ionescu, Ioana, *op cit.*; Bădoiu, Ruxandra. "The legal preemptive right", *Public Notaries Bulletin*, No. 1, Year XXIV(2020). https://buletinulnotarilor.ro/dreptul-legal-de-preemptiune/. Accessed 3 September 2024.

current Civil Code was passed[24]. The source of inspiration for both Romanian Codes, but also "a fundamental landmark for our entire legal spirituality"[25] was the Napoleon Code. Even if the current code acknowledged the existence of a pre contractual phase, the contemporary Romanian lawmaker remained faithful to the traditionalist previous conception, thus clinging to the past and manifesting a cautious attitude in regard to the pact of preference. The Romanian Civil Code exclusively regulates, under the name of preemptive right, the priority right to enter into a contract under identical conditions in the matter of sale. Thus, according to article 1730 first alignment of the Romanian Civil Code "under the conditions established by law or by contract, the holder of the preference right can purchase a good with priority". Also, article 1828 of the Romanian Civil Code states as follows "when concluding a new lease contract, the tenant is entitled to equal conditions and a preference right"; the second alignment states that "the provisions pertaining to the exercise of the right of preference in the matter of sale apply accordingly". The contemporary Romanian lawmaker exclusively regulates the right of preference in one of its two forms: a legal preemptive right, when it is regulated by law and a conventional preemptive right, also known as a preference right, when it occurs as a result of the parties' convention. However, the right of preference can't be confused with the pact of preference.[26] The pact of preference is the exterior form of expression or the legal support of the right of preference. Regardless of its source, whether it is the law or the contract, the legal regime which applies to the preemptive right is unique; as a consequence, the pact of preference which creates a right of preference will be regulated under the provisions of the preemptive right, as regulated in articles 1730-1740 of the Romanian Civil Code.

In accordance with the opinions expressed by doctrine[27], the pact of preference can be defined, in relation to its essential elements, as the contract, by which a party, called a *promisor* is obliged to grant priority to the beneficiary if he will so desire when the promisor decides to enter into a contract, under equal conditions as any other potential beneficiary.

Provisions regarding conventional preference can be found in the laws of other European states which are not under the French influence, such as Germany or Switzerland, thus concluding that it "is widely used in Europe as a convenient instrument to formalize the interests of the participants in a civil turnover"[28].

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[24] Law no 287/2009 regarding the Civil Code, published in the Official Bulletin no. 505 of July 15th, 2011.

[25] Nicolaescu, Sache. "European law of contracts, between unity and diversity", *Universul juridic* Publishing House No. 3(2017): 12-24.

[26] Vanwijck-Alexandre, Michèle and Bar, Stéphanie. "Le pacte de préférence ou le droit de conclure par priorité" in Vanwijck-Alexandre, Michèle and Wéry, Patrick (edits.) *Le processus de formation du contrat*, Bruxelles, Larcier, 2004: 133-187; Hélas, Céline. "Le pacte de préférence: sa qualification, ses sanctions", *Journal des tribunaux*, Vol. 25, No. 6737(2018): 567-569. For contrary opinion see Ilie, Anca Gabriela and Nicolae, Marian. "Discussion on the legal nature of the premeptive right", *Dreptul*, No. 1(2004): 34-64.

[27] Pop, Liviu, Popa, Ionuț-Florin and Vidu, Stelian Ioan. *op cit*: 60; Goicovici, Juanita. *The progressive formation of contracts*, Bucharest, Wolters Kluwer, 2009: 41 and following; Ionescu, Ioana. *op cit*: 13.

[28] Velichko, Veronika, Terdi, Ekaterina. "Contractual preemptive rights: Russian doctrine and european tradition in the context of Russian Civil Code reform", *Russian Law Journal*, Vol.7 Issue 1(2019): 119-137. DOI 10.17589/2309-8678-2019-7-1-119-137.

3. The legal nature of the pact of preference

As for a long period of time, this institution was unnamed, jurisprudence[29] and old European doctrine[30] stated that the pact of preference is a variety of the unilateral promise to enter into a contract. This opinion was criticized for the following reasons: a) the pact of preference, unlike the promise to enter into a contract, does not oblige the promisor to conclude the contract, but it merely obliges him to grant priority in contracting[31]; b) the price is not of the nature nor of the essence of the pact of preference, whereas the unilateral promise to contract must contain all the clauses of the promised contract; c) by virtue of its *intuitu personae* character, the beneficiary's right of preference can't be passed on, whereas the right of option of the beneficiary of a unilateral promise of sale can be passed on freely or against a fee, in which situation the third party replaces the beneficiary.

In an attempt to place the pact of preference on the known pattern of the promise to enter a contract, a part of doctrine[32] and jurisprudence[33] stated that the pact of preference is a unilateral promise affected by a double suspensory condition: the seller must decide to sell, and the beneficiary must manifest his intention to buy under the conditions and the price offered to a third party. This opinion was also criticized as "we can't define the essential elements of the contract, such as the seller's will to sell and the determining of the price as conditions"[34]. If we were to accept that consent is a suspensory condition, then its achievement, namely the manifestation of consent of the parties, would directly create the prefigured contract, with retroactive effect from the time the pact of preference was concluded; such an idea can't be accepted.

Given the lack of internal legal regulation and by considering the fact that Romanian law is inspired by French law, the thesis of the unilateral promise was embraced by a part of jurisprudence[35] and Romanian doctrine. Some authors took over this thesis as it was phrased[36] and some emphasized it with certain nuances. Thus, there

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[29] Cass. civ. 3e 16 mars 1994, rol 91-19.797. https://www.legifrance.gouv.fr/juri/id/JURITEXT000007031384/. Accessed 3 September 2024.

[30] De Page, Henri and Dekkers, René. *Traité Élémentaire De Droit Civil Belge*, Tome II - Les Obligations (1e Part) Contrat, Livre III, 2e et 3e ed, 1957-1974: 495 (https://bib.kuleuven.be/rbib/collectie/archieven/depage).

[31] Similar provision also found in specialty literature which analyzes the institution of the pact of preference in states of South America. See: Morffi Collado, Claudia Lorena. "De otros pactos accesorios al contrato de venta", in Galiano Maritan, Grisel and Delgado Vergara, Teresa (edits.). *Los contratos en el Código civil de Ecuador*, Cuba, Editorial Unijuris, 2018: 59-69.

[32] Planiol, Marcel and Ripert, Georges. *Traité pratique de droit civil français*, Paris, LGDJ, tome X, 1932: 184; Valory, Stéphane. *La potestativité dans les relations contractuelles*, Aix-en-Provence, Presses Universitaires d'Aix-Marseille, 1999: 147 apud Goicovici, Juanita. "Sanctions for the violaton of the pact of preference", *Pandectele romane*, No. 4(2008): 19.

[33] Cass. civ. 3e 15 janvier 2003, rol 01-03.700. https://www.legifrance.gouv.fr/juri/id/JURITEXT000007046073. Accessed 3 September 2024.

[34] Malaurie, Philippe, Aynes, Laurent, Gautier, Pierre Yves. *Special contracts*, Paris, Defrenois, third edition, translation from French, Romania, Bucharest, Wolters Kluwer 2013: 92.

[35] Bucharest Appeal Court, decision no 76 of February12th, 2007, irrevocable by High Court of Justice decision no 1349 of April 3rd, 2007.

[36] Moțiu, Florin. *Special contracts. university course*, Bucharest, Universul Juridic Publishing House, 2017:

were Romanian authors[37] who claimed that the pact of preference is merely a pre contract to a unilateral sale promise, as, after the promisor decides to sell and phrases an offer of sale, the pact becomes a unilateral promise of sale, with the same legal regime. This theory must be seen with some caution, as it is of the essence of the pre contract the obligation of both parties to conclude the promised contract; or, by the pact of preference, neither the promisor, nor the beneficiary are obliged to enter into a contract, but merely reserve the right to contract with priority in case they will so decide.

European doctrine[38], in agreement with jurisprudence[39], claimed that the pact of preference represents a *sui-generis* contract, "which is gifted with its own characteristics"[40]. What is specific to the pact of preference is the incipient character of contractual will[41] determined by the fact that the promisor is not obliged to enter into a contract, as is the case with the unilateral promise to contract, but is merely obliged that, in case he decides to enter into a contract, he must grant preference to the beneficiary. At the same time, the beneficiary is not obliged to enter into a contract, but merely reserves the right to enter into contract, under certain conditions. What prevents the pact of preference from transforming into a contract is the consent of the parties. In lack of an essential condition of contract, it was appreciated that we are in the presence of a potential right which provides the beneficiary with a potestative condition[42]. This last opinion had supporters in jurisprudence[43] and Romanian doctrine[44].

In French and Belgian laws, the pact of preference is a distinctive institution, a preparatory contract specific to the pre contractual phase. As opposed to this, given the lack of national internal regulations, the legal nature of the pact of preference remains a subject of doctrine and jurisprudence controversy.

4. The analysis of the essential validity elements of the pact of preference

The civil French and Belgian law does not contain provisions pertaining to the essential validity elements of the pact of preference, so they will be subject to the general rules of validity of contracts, regulated in articles 1128-1177 of the French Civil Code and articles 5.27-5.56 of the Belgian Civil Code. In regard to Romanian civil law,

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[37] Goicovici, Juanita. "Sanctions for the violation of the pact of preference", *op cit.*

[38] Vanwijck-Alexandre, Michèle and Bar, Stéphanie. Op cit.; Biquet-Mathieu, Christine, Briegleb, Alice, Colson, Pauline, George, Florence, Janssens, Olivia, Kohl, Benoit., Lambert, Charles-Edouard, Philippe, Denis, Pirlet, Benjamin, Vandermeersch, François, Walschot, Nastassja, Wery, Patrick. *Le nouveau droit des obligations*, Vol 216, Belgium, Liege, Anthemis, 2022: 106.

[39] Cass. civ. Belge, 24 January 2003, rol 55. https://bib.kuleuven.be/rbib/collectie/archieven/arrcass/2003/01.pdf. Accessed 3 September 2024; Cass. civ. 3e 12 june 2018, rol 17-23.321. https://www.legifrance.gouv.fr/juri/id/JURITEXT000037850795/. Accessed 3 September 2024.

[40] Malaurie, Philippe, Aynes, Laurent, Gautier, Pierre Yves. *Special contracts*, *op cit*: 92.

[41] Rainville, Pierre. "Du silence a l'obsolescence: l'extinction tacite des promesses de contract au Quebec et en France", *Revue du notariat*, Volume 113, No. 2(2011): pp. 335-395. DOI: https://doi.org/10.7202/1044779ar.

[42] Malaurie, Philippe, Aynes, Laurent, Gautier, Pierre Yves. *Special contracts*. *op cit:* 92.

[43] Bucharest Appeal Court, fifth civil section, decision no 28 of January 31st, 2018.

[44] Pop, Liviu, Popa, Ionuț-Florin and Vidu, Stelian Ioan. *op cit*: 60.

as is it an unnamed contract, according to the provision of article 1168 of the Romanian Civil Code, it will be subject to the general validity rules of the contract, as regulated in articles 1179-1245 of the Romanian Civil Code, both in regard to capacity, consent, object and cause, as well as form of contract; as our law is inspired by the French law, these elements are common to all previously mentioned laws.

In French and Belgian law, as none of the parties has provided his final agreement when concluding the contract and the freedom of contracting is not affected, the regulation of a term does not represent a condition of validity of the pact of preference. French jurisprudence[45] stated that the pact which does not contain a term should have a reasonable duration; although, at first sight, the promisor's obligation seems to escape the statute of limitation, the pact of undetermined duration can't be assimilated to any other legal permanent arrangement[46] as it does not contain an inalienability clause and it does not undermine any fundamental values of society[47].

In regard to Romanian law, the rule is the pact without a specific term; the exception is the situation of the pact created with a certain term. Even if the duration of the pact is undetermined, it can't be unilaterally rescinded as it does not produce any effect until the promisor decides to sell. To think otherwise would mean to allow the promisor to prevent the beneficiary from exercising his right of preference and would devoid the pact of its entire reason[48]. If the parties concluded the act for a limited period of time, the expiration of this term would result in the void of the pact. In case the pact is accessory to a main contract, then the duration of the pact will be equal to that of the contract to which it is an accessory.

Colombian law regulates, in Law no 51 of 1918 *sobre establecimientos o sociedades de crédito*, a maximum term of 1 year for the pact of preference. „Terms longer than a year are reduced to the previously mentioned term. The punishment for regulating longer terms is the legal reduction of the term to the maximum term and no other type of sanction"[49].

In regard to the price of the contract, it also does not represent a validity condition for the pact of preference. The promisor has the possibility to establish the price of the contract, whether in the content of the pact, or in the content of the offer to enter into a contract or directly in the contract concluded with the third party.

Loyal to French tradition, which, at the time of the Enlightenment and the French Revolution redefined the principles which apply in the matter of contract, by

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[45] Cass. civ. 3e, 17 décembre 2020, rol 19-19.218. https://www.courdecassation.fr/decision/ 5fe1af5f789da 231604d55b7. Accessed 3 September 2024. This opinion was criticized by doctrine. See Kenfack, Hugues. "Pacte de préférence et condition potestative „virtuel Pacte de préférence et condition potestative «virtuelle»", *Recueil Dalloz* (2003):1190. https://actu.dalloz-etudiant.fr/fileadmin/actualites/pdfs/D2003-1190.pdf. Accessed 3 September 2024.

[46] Baaklini, Céline And Daou, Reine. *op cit.*

[47] Canada Supreme Court, 28 July 2017, rol [2017] 2 RCS 59. https://scc-csc.lexum.com/scc-csc/scc-csc/fr/item/16746/index.do. Accessed 3 September 2024.

[48] Rouviére, Frédéric. "Le pacte de préférence rapproché des droits de préemption", *Répertoire du notariat,* No.12, art. 4053, ffhalshs-01143138, 2012: 629-633.

[49] Arrubla, Jaime Alberto. "El período precontractual", *Revista de la Facultad de Derecho y Ciencias Políticas* No.70(1985): 162-182.

shining a light on the beauty of pure ideas and the strength of revolutionary movements[50], the Belgian and the Romanian lawmaker regulated the consecrated consensual form of contracts, centered on the free expression of the will of the parties. The pact of preference is not an exception from this rule, even in the contract would be subject to such conditions.

5. The effects of the pact of preference

„Contract attaches legal consequences to certain acts thus enabling people to affect their entitlements, if they so desire" [51], rights which are crucial for the autonomy of will[52]. These legal consequences represent effects of contract, which we will present from a comparative perspective.

5.1. Effects over the promisor

What is characteristic to the pact of preference is the fact that, for the promisor, it does not provide the obligation to conclude the contract, but merely the obligation that, in case he will decide to conclude the contract, he will respect the beneficiary's right of priority, which provides a somewhat exclusive character of these negotiations.[53] This obligation of the promisor is regulated, in this form, in all systems of law which we are about to analyze, but the nature of the promisor's commitment is subject to some controversy. Thus, one opinion[54] supported by jurisprudence[55] believes that the promisor is held only by a positive obligation: that of suggesting to the beneficiary to conclude the contract with priority. For others, the main obligation of the promisor is to abstain throughout the entire duration of the pact, manifested by the interdiction to conclude the contract with a third party[56], whereas an isolated doctrine current denies the existence of any obligation within the pact of preference[57].

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[50] Rizzuti, Marco, Kaişli, Erhan and Rademacher, Lukas. "The Protection of Third Parties' Acquisitions of Land", *The Italian Law Journal*, Vol. 05, No. 01(2019): 173-196. https://doi.org/10.23815/2421-2156.ITALJ.

[51] Dagan, Hanoch and Heller, Michael."Specific performance: on freedom and commitment in Contract Law", *Notre Dame Law Review,* Issue 3, No. 98(2023): 1323-1372.

[52] Idem.

[53] Işitan, Pelin."Les Conventions Préparatoires", *Annales de la Faculte de Droit d'Istan*bul, No. 74(2024): 1-18. DOI: 10.26650/annales.2024.74.0001.

[54] Theron, Julien. "Nullité et substitution en cas de violation d'un pacte de préférence", *Recueil Dalloz*. (2007): 2444. https://publications.ut-capitole.fr/id/eprint/3981/1/3981_Th%C3%A9ron.pdf. Accessed 3 September 2024.

[55] Cass. civ. 3e, 26 may 2006, rol 03-19.376. https://www.legifrance.gouv.fr/juri/id/JURITEXT000070554 68/; Cass. civ. 3e, 12 june 2018, rol 17-23.321. https://www.legifrance.gouv.fr/juri/id/JURITEXT000037 850795/. Accessed 3 September 2024.

[56] De Page, Henri and Dekkers, René. *op. cit:* 495.

[57] Dincă, Răzvan. *Special civil contracts in the new Civil Code*, Bucharest, Universul Juridic Publishing House, 2013: 71; Stanislas, Barry. "*Détermination de la nature de l'obligation du promettant d'un pacte de préférence et élargissement de son champ d'action*" (2019). https://www.actu-juridique.fr/civil/determination-de-la-nature-de-lobligation-du-promettant-dun-pacte-de-preference-et-elargissement-de-son-champ-daction/. Accessed 3 September 2024.

In qualifying the nature of the promisor's commitment, we must consider several aspects. On one hand, the pact of preference does not secure the good, as the promisor is free to sell it. From this point of view, the effects of the pact of preference do not align with the definition of the obligation to abstain from an action, an obligation which entails the debtor's obligation to abstain from something he had been able to do in lack of the obligation. On the other hand, we must consider the provisions pertaining to the execution of the obligations to do and to abstain from doing (article 1528 of the Romanian Civil Code and article 1529 of the Romanian Civil Code, article 1222 of the French Civil Code, articles 5225-5236 of the Belgian Civil Code) according to which, in case of the violation of the obligation to do, the remedies are: the unjustified non execution of the obligation by the debtor, notifying the debtor (except for the case when the debtor is placed on notice by the effect of law); the notification of the debtor. In case of the violation of the obligation to abstain, in order to obtain the forceful execution of the obligation, a court decision is needed to acknowledge the violation of the obligation by the debtor, a condition which is not applied in the case of the pact of preference. Finally, a contract which provides no obligations for either of the parties lacks a cause and the cause must exist as it an essential validity condition of the contract; as a consequence, a pact by which the parties regulate no obligations for one another is inconceivable. Regardless of the positive or negative character, the promisor's obligation is one of result[58], so as the simple violation of the obligation entails guilt and obliges the debtor to payment of damages, all these being seen as „the fundamental principle and purpose in an award of a remedy for breach."[59] The legitimacy of the promisor's liability is based on the fact that the legal relation between the parties is based on the obligation of loyalty and is established at the time the negotiations begin[60].

Thus, we ask the question of whether the promisor's obligation to conclude the contract with the beneficiary of the pact could represent a violation of the principle of contractual freedom, one of the most precious forms of individual freedom whose ambivalent nature resulted in its abusive use.[61]. The answer can only be negative for more than one reasons. By the conclusion of the pact, the promisor exercises his freedom to choose with priority in case he will decide to enter into a contract, so his consent was already expressed. Also, the law does not forbid the promisor from entering into a contract, in which case the contract concluded with the third party will be affected by the suspensory condition, expressly stated or presumed[62], of the non execution of the preemptive right by the beneficiary of the pact. By the fact that he entered into a contract with a third party, knowingly violating the priority right, the promisor manifested his will to enter into a contract and took the risk of replacing the third party with another

[58] Hélas, Céline. *op. cit.*

[59] Mittlaender, Sergio. "Morality, Compensation, and the Contractual Obligation", *Journal of Empirical Legal Studies*, Vol. 6 Issue 1(2019): 119–142. DOI:10.1111/jels.12211.

[60] Lewandowska, Ewa. "Loyalty in Civil-Law Relationships as found in the Polish Law", *Bratislava Law Review*, Vol. 4 Issue 1 (2020): 33-42. DOI: 10.46282/blr.2020.4.1.169.

[61] Wilson, Nicholas S. "Freedom of Contract and Adhesion Contracts", *International & Comparative Law Quarterly*, Vol. 14 Issue 1(1965): 172-193.

[62] Vârgolici, Adrian. "Regarding the implicit character of the suspensive condition regulated in article 1731 of the Civil Code", *Law magazine*, No. 5(2013): 64-79.

person. It is also the promisor who is obliged that, after the contract is concluded with a third party in violation of the priority right, to notify the beneficiary at once. The obligation to inform the beneficiary is a practical enforcement of the obligation of good will in negotiation and is found in the Romanian system of law, as well as in the French one, but not in the Belgian system of law.

5.2. Effects over the beneficiary

As a result of its unilateral character, the pact of preference regulates no obligations for the beneficiary. By exception, when the parties agreed on a price in exchange for the preference, the beneficiary is obliged to pay the price.

The beneficiary has no right to demand the promisor to conclude the contract, as he merely has a right of preference which entails, on one hand, a priority right when the contract is concluded similar to the legal preemptive right and, on the other hand, a right of choice in concluding the contract or not. In regard to the legal nature of the beneficiary's right of preference, doctrine claimed that it represents a right of debt[63], whereas European practice suggested that it would be a real right, without any of these opinions being fully descriptive of the beneficiary's right. We also see the opinion according to which this is not a perfect right, but more of conditional right, as it depends on a future uncertain event[64].

The right of debt was defined by doctrine as "the possibility of the creditor of a legal relation to claim the debtor to fulfill his obligation to provide, to do or to abstain from doing"[65]. The creditor can exercise his prerogatives only by the performance of the debtor; if the debtor does not execute his obligation to provide, to do or to abstain from doing, then the content of the right of debt is not achieved. The promisor of a pact of preference does not commit to contract, but merely reserves the right to choose, at his own will; thus, the beneficiary is unable to demand such a conduct form the promisor. Given its specifics, the right of priority does not meet all elements specific to a right of debt.

The real right represents "the patrimonial right by which the holder can directly exercise his prerogatives over a pre-determined good, without the intervention of another person"[66]. The real right entails an exclusive relation between the good and the holder, thus the good is subjected to the power of the holder[67]. The *erga omnes* opposability of the preemptive right is seen in recent European jurisprudence (see CJUE C-438/12) as justification for classifying this right as a real right. In the conception of the European Union Court of Justice, the preemptive right is a real right, as it pertains to an immobile good and produces effects not only in relation to the debtor but

[63] Benabent, Alain. *Droit des contracts speciaux civils et commerciaux*, Paris, LGDJ, 2013: 54; Baaklini, Céline and Daou, Reine. *op cit.*

[64] Mosset Iturraspe, Jorge. *Compraventa inmobiliaria*, Buenos Aires, Ediar, 1976: 103 apud Morffi Collado, Claudia Lorena. *op cit:* pp.59-69.

[65] Ludușan, Florin. "Observations pertaining to the right of debt", *Dreptul*, No. 11(2014): 211-217.

[66] Stoica, Valeriu. *Civil law. Main civil rights*, Bucharest, C.H. Beck Publishing House, third edition, 2017: 31.

[67] Malaurie, Philippe, Aynes, Laurent. *Drept civil: bunurile*, Bucharest, Wolters Kluwer, 2013: 84.

guarantees the holder's right to pass on property to third parties. This is a passive universal obligation, opposable to all people, to respect a legal situation which arises from a legal relation and to abstain from any act or fact which would endanger the exercise of all the prerogatives of the holder. This vision of the Court corresponds to the theory of Planiol, according to which the real right is a relation between two people, an active subject, namely the holder of the right and the passive subject, namely all people who are held to respect the right of the active subject. We believe this opinion is no longer accurate, as it is unanimously acknowledged that the passive general obligation is a duty and not an obligation of all members of a society to respect the law. On the other hand, the priority right which arises by conventional means does not secure the good, but it merely provides an advantage to the holder of the right, without modifying its nature.

If the promisor decides to enter into a contract, the beneficiary simply maintains a right of choice in this matter. The beneficiary's right of choice has the legal nature of a potestative right. The beneficiary's right of choice is an exclusive right, not subject to abuse, as, in principle, potestative rights are not compatible with the abuse of law[68]. It can be exercised after the promisor decides to enter into a contract and not sooner. In regard to when the right of preference is exercised, it is possible to do so before the conclusion of the contract between the promisor and the third party, or after this time, considering that he is both the actor and the spectator at the conclusion of the contract and the legal act which arises. [69]

Unlike the French and Belgian laws, which do not expressly state a term of exercise for the right of preference, the Romanian lawmaker regulates a term of 10 days in case of mobile goods and 30 days in case of immobile goods. In both cases, the term starts from the time the offer was accepted. As it is an irrevocable offer with a specific term, when the term is met, the offer becomes invalid. The beneficiary who rejected an offer can no longer exercise this right in regard to the contract.

The exercise of the right of preference before the conclusion of the contract between the promisor and the third party is achieved by accepting the offer communicated by the promisor. Acceptance is a unilateral legal act which must not have a specific form, as, by accepting, the promised contract is not concluded, but the beneficiary merely manifests his agreement in order to conclude the promised contract under the form stated by law. The beneficiary's refusal to enter into a contract can also be express or tacit and results in "the rescind of the preemptive right"[70].

The exercise of the right of preference after the conclusion of the contract between the promisor and the third party is achieved, according to the Romanian lawmaker, by communicating agreement to the seller, followed by payment of the price. These two conditions that must be both met. In the next 30 days, the beneficiary will notify the cadastral registry about the proof of payment of the price. According to article

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[68] Idem.

[69] Chelaru, Eugen. "The holder of the legal preemptive right – a spectator or an actor?", *Revista română de drept privat,* No. 1(2020): pp. 182-191.

[70] Goicovici, Juanita. "The preemptive right in the regulation of the new Civil Code", *Analele* "*Constantin Brâncuşi*" *University of Targu Jiu, Series Ştiinţe Juridice,* No. 1(2012): 97-118.

1733 first alignment of the Romanian Civil Code "by exercising the preemptive right, the sale contract is considered to be concluded between the preemptor and the seller under the conditions of the contract concluded with the third party, and the latter contract is retroactively rescinded." Given the lawmaker's phrasing, we would be tempted to state that communicating the beneficiary's agreement and payment of the price entails the effect of cadastral registration. This could justify the opinion expressed by doctrine, namely that "sales concluded based on a preemptive right are real contracts"[71]. In this case, we ask the question of whether this provision contradicts article 888 of the Romanian Civil Code, according to which "registration in the cadastral registry is performed based on a notary authenticated act, a definitive court decision, an heir's certificate or another document issued by competent administrative authorities under the conditions of the law". The answer to this question can only be negative and we base this answer on the provision of article 187 fourth alignment or the Regulation for cadastral registration[72] according to which „deletion of the conventional preemptive right will be performed, by own initiative, …, when the property right is registered based on the sale contract concluded with the preemptor". Thus, based on the provisions of the previously mentioned regulation, we deduce that registration of the beneficiary's pact of preference will be performed exclusively based on the notary authenticated contract concluded between the promisor and the beneficiary of the pact.[73] Given all these reasons, we believe that the lawmaker's phrasing of article 1733 first alignment of the Romanian Civil Code is applied in the matter of contracts which do not entail cadastral registration.

The French Civil Code does not expressly regulate the obligation to communicate an offer to the beneficiary, it still acknowledges a right to damages for the beneficiary for prejudice suffered as a result of the violation of the pact by the conclusion of the contract with a third party, as well as the right to replace the third party when the latter acknowledged the existence of the pact and the intention of the beneficiary to make use of this pact.

Unlike French law, the Belgian Civil Code regulates an obligation for the promisor to phrase an offer to the beneficiary before the conclusion of the contract with the third party. The offer must contain, according to article 5.24 of the Belgian Civil Code, the essential and substantial elements of the contract which the promisor aims to conclude. The beneficiary has the possibility to accept the offer, in which case the contract will be concluded under the conditions of the offer or to decline in which case the promisor will be free to conclude the contract with a third party, but under the same conditions as those contained in the offer addressed to the beneficiary. If the promisor violates the pact of preference, the beneficiary is entitled to damages for non-execution, based on contractual liability.

In order for the beneficiary to invoke the conclusion of the contract, there has to be an identity of object and contractual transaction considered at the time the pact of

[71] Idem.
[72] Official Bulletin no 125 bis of February 14th, 2023.
[73] For contrary opinion, according to which the beneficiary's property right can be registered in the cadastral registry, without the need for an authentic notary document, see Vârgolici, Adrian. *op cit.*

preference was concluded. However, the French High Court urges for a more cautious position, by stating that in some cases, the violation of the pact can be appreciated *lato sensu*, when fraud by the promisor can be proven, even if there is no identity between the contract which is object of the pact and the contract which is in litigation[74].

The beneficiary's right of preference can't be transferred, whether for free or against a fee, as the provisions of article 1739 of the Romanian Civil Code are of imperative character. The reason for this interdiction is connected to the *intuitu personae* character of the pact. By this rule, the Romanian lawmaker is distancing himself from the French vision regarding the pact of preference, in which case the benefit of the pact of preference can be subject to transfer.

5.3. Effects for third parties

The pact of preference does not secure the good so as the promisor will be able to enter into a contract with a third party, in violation of the pact. In this situation, the contract concluded with the third party will be valid, but affected by the suspensory condition of the non exercise of the preference by the beneficiary of the pact. Furthermore, according to article 1737 of the Romanian Civil Code, the third party will be able to register the acquired right in the cadastral registry. But, as his right is affected by a suspensory condition and according to common law, it is not yet formed, the registration will be performed not in the form of cadastral registration, but in that of a temporary registration. The temporary registration is dependent on the suspensory condition that within 30 days, from the time the registration was performed, the beneficiary must notify the cadastral registry of the payment of the price and present evidence accordingly. If the beneficiary allowed for the term to pass without notifying the cadastral registry of the proof of payment of the price, the temporary registration will become a permanent registration, but only in case it is considered to be justified. Given the provisions of article 899 second alignment of the Romanian Civil Code, regardless of the time when it intervenes, justification operates based on authenticated consent from the beneficiary or, in lack of such consent, based on a definitive court decision. The passive attitude of the beneficiary who allows the 30 days term to pass without exercising the right of preference will not result in direct cadastral registration of the third party right. Registration of this right is performed at the same time the registration of the pact of preference is deleted. If the beneficiary exercises his right of preference within the legal term and will present proof of payment of the price to the cadastral registry, as an effect of the suspensory condition, the act concluded with the third party will be retroactively rescinded and the temporary registration will be deleted from the cadastral registry.

In case the beneficiary violated his obligation to grant preference and concluded the contract with a third party, then the effects of the pact differ depending on whether the third party was of good faith or bad faith. Thus, if the third party was of bad faith

[74] Cass. civ. 3e, 12 June 2018, rol 17-23.321. https://www.legifrance.gouv.fr/juri/id/JURITEXT000037850795/. Accessed 3 September 2024.

and the beneficiary of the pact exercised his right of preference, the contract will be retroactively rescinded and the third party is only entitled to restitution, from the beneficiary, of performances rendered, but not damages. The third party who was aware of the existence of a pact of preference and still entered into contract with the promisor can be held liable, under tort liability. If the third party was of good faith and the act was rescinded as a result of the exercise of the right of preference by the beneficiary, the promisor will be liable for actions resulting from the exercise of the right of preference. It is the task of the beneficiary who demands the rescind of the contract to prove bad faith in order to engage liability of the third party. By exercising the mechanism of the right of preference, a new contract will be concluded between the promisor and the beneficiary, under the conditions of the previously concluded contract with the third party. This is why, if the beneficiary does not exercise his preemptive right, his right will not be retroactively acquired from the time the contract was concluded with the third party, but from the time the new contract is concluded.

The solution of the Romanian Civil Code differs from the French version in regard to the situation of third parties. The French Civil Code distinguishes between the situation of the good faith third party and the bad faith third party, by stating in article 1123 second alignment as follows: if the third party was of good faith and was not aware of the existence of the pact, he will suffer no sanction, as the beneficiary is entitled to damages from the promisor; if the third party knows about the existence of the pact and the intention of the beneficiary to make use of it, the latter can demand annulment of the contract or replacement with the third party in the concluded contract[75]. By this regulation, the French lawmaker takes a step away from previous jurisprudence which allowed the beneficiary to demand annulment of the contract and the replacement with the third party; this jurisprudence was criticized in specialty literature as it allowed replacement of a party within a retroactively rescinded contract[76]. However, the French lawmaker's vision, knowing about the existence of the pact is not enough to obtain the annulment of the contract or the possibility to replace the third party; it is also required that the beneficiary intends to make use of the pact. This option was criticized in doctrine because of difficulty of proving *probatio diabolica*[77]. The French Civil Code allows for a third possibility for the third party, namely an interrogatory action by which he can demand the beneficiary to confirm, within a certain reasonable term, the existence of a pact of preference and if the intends to make use of it. The notification of the beneficiary will have to contain the express mention that, in lack of an answer within the established term, the beneficiary of the pact will not able to demand his replacement in the contract concluded with the third party or the annulment of the contract. Although the French Civil Code mentions an interrogatory action, it represents an extrajudicial

[75]The possibility of replacing the third party with the beneficiary was first regulated by jurisprudence in Cass. civ. Cam. mixte, 26 may 2006, rol 03-19.376. https://www.legifrance.gouv.fr/juri/id/JURITEXT000007055468/. Accessed 3 September 2024.

[76] Schütz, Rose-Noëlle. "La conclusion du contrat en droit français", in Université Saint-Esprit De Kaslik. *La réforme du droit des contrats en France: regards croises farnco-libanais*, Liban, Kaslik, Pusek, Université Saint-Esprit de Kaslik No. 18(2016): 19-42.

[77] Baaklini, Céline and Daou, Reine. *op cit.*

mechanism, which is not mandatory, but it is useful to third parties so as he is protected from sanctions stated by law for the violation of the pact of preference as it does not ensure proof of his good faith. The interrogatory action is an element of novelty brought by the French law by the Ordinance of February 2006; however, it is criticized by doctrine for the terms chosen by the lawmaker[78] but also for the superficial regulation.

The national regulation is distinguished from the Belgian regulation in regard to the situation of third parties in case a pact of preference exists. Thus, according to the Belgian Civil Code, if the third party was of good faith, he will be guilty of complicity to violate the pact of preference, thus the beneficiary is provided with three choices: he can either file a claim for damages for the prejudice he suffered by demanding damages from the promisor and the third party (by civil tort liability), he can invoke inopposability of the contract concluded with the third party or he can demand the replacement of the third party in the concluded contract. The complicity of the third party is obvious if he was aware of the existence of a pact of preference and if, by this behavior, he contributed to the violation of the pact, as stated in article 5111 of the Belgian Civil Code. Doctrine also added the lack of a preexisting subjective right of the third party, acquired in good faith[79]. In regard to the last two sanctions stated in the Belgian Civil Code, it was also doctrine which stated that they can be applied only in case the beneficiary of the pat manifested his will to exercise the right of preference[80].

Thus, we notice that, unlike the French modern lawmaker, the Belgian lawmaker opted for the sanction of inopposability of the contract concluded by defrauding the beneficiary and not for annulment, which was seen as a much too severe and disproportionate sanction given the prejudice suffered by the beneficiary of the pact. We also notice that both laws chose to replace the third party with the beneficiary, as a form of execution of the pact[81], under the conditions regarding complicity to commit fraud.

6. Conclusions

The pact of preference is a preparatory contract and its necessity is uncontested for the security of the civil circuit. By its contents and effects, it contributes to the stability of contractual relations and respect of the promises made by the parties; it is also an efficient mechanism for the protection of some categories of people who might enjoy the protection resulting from priority in entering into a contract; it is also a useful tool of controlling the contractual conditions.

By remaining faithful to the Napoleon conception, the Romanian lawmaker is conservative and avoids the express acknowledgement if this legal construction specific

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[78] Bénabent, Alain. "Les nouveaux mécanismes", *Revue des contracts - La réforme du droit des contrats: quelles innovations?,* Paris, LGDJ, 2016: 17-20.
[79] Biquet-Mathieu, Christine, and others. *op cit:* 312.
[80] Biquet-Mathieu, Christine, and others. *op cit:* 108-109.
[81] Sarvary-Bene, Peter. *Réflexions sur la notion de contrat préparatoire,* these pour obtenir le grade de Docteur a l'Université de Montpellier (2015). https://theses.hal.science/tel-01346696/document. Accessed 3 September 2024.

to the pre contractual phase, as the Civil Code only mentions the preemptive right in the matter of sale. By similarity, enforcing these provisions can create uncertainty and insecurity in a society undergoing permanent change. We have shown that the lack of express regulation gives rise to questions pertaining to the very essence of the institution and questions the real possibilities of enforcing it.

Although we have tried to determine the nature and legal effects of the pact of preference, doctrine is not considered a source of law, and it does not solve any issues of practice. We have also shown that European laws adapted to the new realities and regulated, in their national laws, doctrine's opinions and jurisprudence solutions in this matter. This legislative void of Romanian internal law is a deficiency of a Civil Code which was meant to be reformative, revolutionary and adapted to the new social realities.

The accelerated progress and competition in modern society force the lawmaker to elaborate codes which keep up with change determined by the establishing/ reestablishing of legal semantics, as is the case of the pact of preference. Under the pressure of destabilizing social and economic factors, a coherent law adapted to the new realities is essential to guarantee the security of legal relations on the common European market. Change entails constant reform of laws, improving and adapting it and we are confident that the lawmaker will revisit its choice in regard to the regulation of the pact of preference, thus valorizing doctrine and jurisprudence in this matter and aligning with the modern European approach. It is a certainty that European states are headed towards implementing similar mechanisms in the matter of contract. In achieving the declared goal of unifying European laws, Romania should align with the European position and follow a common path, as a coherent common law is an essential tool for a healthy and legally stable society.

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