

# **LEGISLATION IN TOURISM**



## PREPARATORY CONTRACTS REGARDING THE PREFERENTIAL OBLIGATION

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***Abstract:** A pact of preference is a contract used by a contracting part, called promisor, to be obliged towards the other part, who accepts the promise, called beneficiary, that they will not close a certain contract with a tertiary part before they propose the closing of the respective contract to the beneficiary under the same conditions. As in the case of negotiation contract, a pact of preference can be found by a separate contract or can be included in an express contractual clause inserted into another contract.*

***Keywords:** Preparatory contracts, promisor, beneficiary*

### **1. Preparatory contracts that have as an object a preference obligation (pact of preference)**

A pact of preference is a contract used by a contracting part, called promisor, to be obliged towards the other part, who accepts the promise, called beneficiary, that they will not close a certain contract with a tertiary part before they propose the closing of the respective contract to the beneficiary under the same conditions<sup>1</sup>.

As in the case of negotiation contract, a pact of preference can be found by a separate contract or can be included in an express contractual clause inserted into another contract.

The pact of preference is the source of a *priority right to closing a contract*, similar to conventional preemption right<sup>2</sup> in favour of the beneficiary, whose correlative obligation, for the promisor, is to propose to the beneficiary a priority closing of a contract, but only in case the promisor will decide to contract in the future.

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1 P. Voirin, M. Dagot in Fl. I. Mangu, *Contracte civile si administrative de valorificare a fondurilor europene*, Ed. Eikon, Cluj Napoca, 2013, p. 132.

2 L. Pop in in Fl. I. Mangu, *Contracte civile si administrative de valorificare a fondurilor europene*, Ed. Eikon, Cluj Napoca, 2013, p. 132.

Thus, in the pact of preference there is no obligation for the promisor to contract in the future, but only to give priority, unlike the unilateral promise to contract or pre-contract unilaterally.

In case the promisor closes the contract with a tertiary part, disregarding the preferential right of the beneficiary, they will be engaged in contractual responsibility, being forced to pay damages for the caused prejudice by *disregarding his conventional duty*.

## **2. Preparatory contracts that generate the obligation to close a definitive agreement**

### **2.1 Framework agreement**

According to article 1176 from the Civil Code “(1) the Framework agreement is the agreement used by parts to negotiate, to close or to maintain contractual rapports whose essential elements are determined by it. (2) The modality to enforce a framework agreement, especially time and volume of benefits, as well as, if that is the case, their price, are stipulated by further conventions”.

The framework agreement is a contract used by contracting parties to define and establish main regulations and conditions that will govern the closing of further contracts called “application” or “enforcing” of framework contracts<sup>3</sup>.

A framework contract is a contract that aims at modalities which are established in advance, a final and rapid closing of some contracts of application<sup>4</sup>.

Thus, by a framework agreement, we prepare a multitude of further contracts whose essential elements are fixed in the contract. Starting from this contract, where only essential conditions are fixed for future collaboration among parties, these parties will be able to initiate further negotiations regarding definitive contracts, to close such contracts or, if, there already are contractual rapports at the time of closing a framework agreement, to continue under the agreed conditions in the framework agreement<sup>5</sup>.

All these future conventions which will be closed in the framework agreement will establish the modality to enforce it, as it is completed with the contents of each convention. That is why, the

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3 L. Pop in Fl. I. Mangu, *Contracte civile si administrative de valorificare a fondurilor europene*, Ed. Eikon, Cluj Napoca, 2013, p. 140.

4 C. M. Cosmin in Fl. I. Mangu, *Contracte civile si administrative de valorificare a fondurilor europene*, Ed. Eikon, Cluj Napoca, 2013, p. 140.

5 Fl. I. Mangu, *Contracte civile si administrative de valorificare a fondurilor europene*, Ed. Eikon, Cluj Napoca, 2013, p. 140.

framework agreement constitutes, for these future contracts, closed on it basis, a preparatory contract which initiates the obligation for further contracts, as it is the responsibility of both parties.

## 2.2 Unilateral promise to contract

The unilateral promise to contract is defined in literature<sup>6</sup> as being “the convention by which one of the parties, called promisor, engages to the other, called beneficiary, to close a certain contract, in the future, upon its request, a contract whose essential content is determined at present, by the promise to contract”.

From the unilateral promise to contract comes an obligational juridical rapport with a content that includes, on one side, the obligation of the promisor to close the promised contract (the obligation to do) and, on the other, the right of the beneficiary to opt (secondary right) between to request or not to request the closing of that contract, usually within the terms convened upon by the parties<sup>7</sup>. According to article 1279, line (2) Civil Code, “in case of nonperformance of the promise, the beneficiary has the right for damages –interests”, and, according to line (3) of the same article, “also, if the promisor refuses to close the promised contract, the court, on demand formulated by the party that has fulfilled its obligations, may pronounce a decision to replace the contract, when the nature of the contract allows it, and the law to validate it also allows it”.

Thus, in case that, after the beneficiary formulates an option, that is, it demands to close a definitive contract, the promisor does not fulfill the obligation promised, unjustified, the beneficiary has the possibility to address the court of justice and to require a foreclosure of the obligation of the promisor by issuing a decision to replace the contract. This can happen only if the following conditions are observed: a) the nature of the contract allows it, b) all the validity conditions are fulfilled and c) the beneficiary has not fulfilled all the obligations (in case there are any). This “remedy” can be accompanied by granting damages-interests or every time the beneficiary of the promise brings proof of damage due to the late performance of the contract or even due to nonperformance by the promisor.

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6 M. Cosmin, M. Muresan, V. Ursa in Fl. I. Mangu, *Contracte civile si administrative de valorificare a fondurilor europene*, Ed. Eikon, Cluj Napoca, 2013, p. 142.

7 L. Pop in in Fl. I. Mangu, *Contracte civile si administrative de valorificare a fondurilor europene*, Ed. Eikon, Cluj Napoca, 2013, p. 143.

If the three conditions are not all fulfilled, the beneficiary will have the right only to damages-interests, as an expression of foreclosure by the equivalent obligation of the promisor.

### **2.3 Reciprocal promise to contract**

The reciprocal promise to contract (also called pre-contract, provisional agreement etc.) is the contract where the parties are firmly and reciprocally obliged to close, in the future, a definitive contract, with essential elements fixed at present (within the promise)<sup>8</sup>.

The reciprocal promise to contract is different from the unilateral promise to contract, as each party has an obligation towards the other, their obligations being reciprocal and interdependent, whereas in the case of unilateral promise, only one party (the promisor) is obliged towards the other (the beneficiary).

The unilateral promise to contract has as a result reciprocal and interdependent obligations, which imply, in the future, the closing of an express and implicit term of the definitive contract with essential clauses which are included in the promise<sup>9</sup>. According to the article 1279, line (1) from the Civil Code, the reciprocal promise to contract should include all those clauses of the promised contract, without which the promise cannot be fulfilled.

All the other observations made under the unilateral promise to contract are valid accordingly for the reciprocal promise to contract.

### **2.4 Option agreement**

According to article 1278, line (1) Civil Code, “when the parties agree that one of them stays tied to its own agreement, and the other may accept it or refuse it, in this case this agreement is considered an irrevocable offer and may produce the effects stipulated in article 1191”.

Thus, the option agreement can be defined as a contract (the parties agree upon something) where one party, called the promisor, is obliged towards the other party called, beneficiary to close a contract (“one of them is tied to its own agreement), the beneficiary has the right to opt within a certain time period (initially determined or undetermined by the parties), to accept or refuse the closing of the contract (“and the other party may accept or refuse”)<sup>10</sup>.

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8 L. Pop in Fl. I. Mangu, *Contracte civile si administrative de valorificare a fondurilor europene*, Ed. Eikon, Cluj Napoca, 2013, p. 149.

9 D. Chirica in Fl. I. Mangu, *Contracte civile si administrative de valorificare a fondurilor europene*, Ed. Eikon, Cluj Napoca, 2013, p. 149.

10 Fl. I. Mangu, *Contracte civile si administrative de valorificare a fondurilor europene*, Ed. Eikon, Cluj Napoca, 2013, p. 151.

The option agreement is different from the contract it prepares, being the antechamber of the definitive contract, as the most advanced form of preparatory contract. This is due to the fact that the option agreement includes the consent of the promisor for the closing of the definitive contract, even if for the valid form of the definitive contract, a mutual consent of the parties is needed, whereas the consent of the beneficiary is lacking the consent of the beneficiary, being reserved for the future. In this case, the beneficiary accepts the agreement of the promisor who only gets the right for an option, having the freedom to offer or not the consent to close the future definitive contract, within the terms established by both parties in the content of the agreement or, if such a stipulation is missing, in the term fixed by the court of justice, by presidential ordonnance, with both parties cited (article 1278 line (2) Civil Code). This option right of the beneficiary is a true reciprocal right and it characterizes the option agreement, being a particularity for this agreement, setting it apart from the other agreements and from the promised contract<sup>11</sup>.

Under these circumstances, the definitive contract is closed by exercising an option, that is the beneficiary accepts the agreement of the other party, under the conditions agreed upon (article 1278 line (4) Civil Code). Thus, it is sufficient that he beneficiary raises the option, that is to accept without any reservations the proposal made by the promisor in order to close the definitive contract. That is why the option agreement must include all the elements of the contract that the parties must close, so that they may be able to close it simply when the beneficiary accepts the option (article 1278, line (3) Civil Code).

After the beneficiary raises the option, if the essential conditions to validate the definitive contract are fulfilled, the definitive contract is written, without any further prestations.

#### **NOTE ON THE AUTHOR**

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11 Ph. Malaurie, L. Aynes, P. Y. Gautier in Fl. I. Mangu, *Contracte civile si administrative de valorificare a fondurilor europene*, Ed. Eikon, Cluj Napoca, 2013, p. 151-152.