

Applying the Principle of "A Contract is the Law of the Contracting Parties" to Preliminary Contracts (A Comparative Analytical Study)

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ABSTRACT:

This study examines the applicability of the long-established legal principle "a contract is the law of the contracting parties" to preliminary contracts preceding the final contract. The study's conceptual framework defines and clarifies the concept in legal, jurisprudential, and Islamic law, while also identifying its flawed basis. It highlights clear examples of such contracts, including the promise of preferential treatment, the promise to contract, and the construction contract, in Iraqi law and emerging legal systems (Egyptian, Kuwaiti, French, and German) established for this purpose. The research concludes that these contracts are fully valid, if not inferior, to the final contract.

Keywords: The rule (a contract is the law of the contracting parties), preliminary contracts, the promise of preference, the promise to contract, the negotiation contract.

1. Introduction

1.1 Introductory Overview of the Research Topic

The rule (a contract is the law of the contracting parties) is the cornerstone of contract theory, as it ensures the protection of the contracting parties' rights by binding each party to what is contained in the substance of the agreement. This rule means that what the parties have agreed upon of their own free will becomes like the "law" that governs their relationship; therefore, it cannot be revoked or amended except by their

mutual agreement or for legal reasons. The problem of applying this rule appears clearly in "preliminary" or "preparatory" contracts, which are contracts concluded in the pre-final contracting stage to pave the way for the birth of the future contractual relationship.

1.2 Importance of Research

The importance of the research lies in the fact that it sheds light on a critical stage of contracting (the preliminary stage), which has become necessary in modern transactions and major deals. This importance arises from the scarcity of

detailed legislative regulation for these contracts in some laws, making research into their binding force and the penalties resulting from their breach vital for the stability of legal and economic transactions.

1.3 Research Problem

The problem centers around the extent to which preliminary contracts (such as the promise of preference or the promise to contract) are subject to the same binding force to which the final contract is subject, and researching the nature of the legal basis for applying the rule "a contract is the law of the contracting parties" to them in light of the absence of an integrated legislative regulation for some of their forms in the Iraqi Civil Law and comparative civil laws.

1.4 Research Methodology

In our research, we adopted the comparative analytical approach; we applied the analytical approach through the analysis of legal texts and jurists' opinions related to our topic, and we also adopted the comparative approach by comparing the provisions of Iraqi legislation and comparative legislations represented by (Egyptian, Kuwaiti, French, German).

1.5 Research Structure

Our research consists of two sections and a conclusion that includes a set of findings and recommendations that we reached through our research. We have dedicated the first section to the conceptual framework of the rule (a contract is the law of the contracting parties), and we will address in the second section the legal framework for applying the rule (a contract is the law of the contracting parties) to preliminary contracts.

2. Chapter one: The Conceptual Framework of the Rule (A Contract is the Law of the Contracting Parties)

The rule (a contract is the law of the contracting parties) represents the law's explicit protection of the contracting parties' rights by ensuring the commitment of both parties to the contract to what is contained in its substance. Through this section, we will explain the concept of this rule and then its legal basis through two requirements, as follows:

2.1 Sub-Chapter one: The Concept of the Rule (A Contract is the Law of the Contracting Parties)

The rule (a contract is the law of the contracting parties) means that: "what the contracting parties have agreed upon of their own free will binds them. The two wills that determined the elements of the obligation are the ones that possess the power to amend any of its elements, and a single will from them, or an external will outside of them, cannot make this amendment, as a general principle).¹ As soon as the contract is validly formed, the contracting parties are bound to execute the obligations placed upon them with respect to everything the contract includes, and this is the substance of the rule (a contract is the law of the contracting parties). This rule means that the obligation arising due to the contract serves as a law for the contracting parties, as well as for the judge. Even if the contract does not possess the generality of a legal rule, it constitutes a law between its two parties, as the contracting parties must abide by what it contains. The judge must also, under this rule, abide by applying what the contract includes, and compel the contracting parties to respect the contract concluded between them just as he compels them to respect the law. Neither of them can independently amend or terminate the contract unless they obtain the consent of the other party. Therefore, this rule forms the general basis in contract theory, and it applies to all contracts: ordinary and electronic, nominate and innominate, bilateral and unilateral, consensual, formal, and real.²

¹ Mohammed Riyadh Daghaman, *The Binding Nature of the Contract (A Comparative Study)*, 1st ed., Zain Legal Publications, Beirut – Lebanon, 2010, p. 51.

² Dr. Ahmed Al-Ghareeb Shibl Al-Banna, *Effects of the Contract (A Detailed Study in Light of Jurisprudential Opinions and Judicial Rulings)*, 1st

This rule is based on several considerations (social, economic, philosophical),¹ and these considerations explain the great importance of contracts, noticeably in people's daily lives. Simple daily contracts can be perceived through purchasing daily needs, whether that is by an ordinary method or through electronic means, such as using an online store or an electronic application. The idea is not to delve into the specific nature of each contract, but rather the substance of contracts in general, and consequently, shedding light on the various social, economic, and philosophical movements and practices prevailing during a specific period and surrounding the field of contracts, in order to know its binding force and its basis, away from it being a static legal and economic tool. For these considerations are what drive the legislator to impose the strict framework on the contract; social policy and the directed economy necessitate respecting the terms of the contract and applying the rule (a contract is the law of the contracting parties).

This rule has been explicitly stated in the first paragraph of Article (147) of the Egyptian Civil Code²: **(A contract is the law of the contracting parties; it may not be revoked or amended except by the agreement of both parties, or for the reasons prescribed by law.)** Similarly, Article (196) of the **Kuwaiti Civil Code**³ states: **(A contract is the law of the**

contracting parties; neither of them may independently revoke it or amend its provisions, except within the limits permitted by the agreement or as otherwise provided by law.)

This rule corresponds to the principle **"Pacta Sunt Servanda"** in Latin⁴, which means that the contract, once validly established, is a law between the two parties who must perform their obligations in accordance with the terms stipulated therein. This means that the contract binding on both parties must be respected, under penalty of sanction; the party who does not abide by what the contract contains and what was agreed upon with the other party is subject to a sanction (civil liability). Thus, this principle represents the exact same substance but in another expression. The French legislator adopted this principle under Article (1103) of its Civil Code⁵: **(Contracts legally formed take the place of law for those who have made them.)**⁶

As for the Iraqi and German legislators, they have adopted the substance of this rule by stipulating the binding nature of the contract, or in other words, the "binding force of the contract," as a direct consequence of the rule (a contract is the law of the contracting parties) as soon as the contract is validly formed. The first paragraph of Article (146) of the Iraqi Civil Code⁷ states: **(If the contract is executed, it becomes binding, and neither of the contracting parties may**

ed., Dar Al-Nahda Al-Arabiya, Cairo – Egypt, 2018, pp. 140-143.

¹ Hélène Juillet-Regis, *La force obligatoire du contrat, réflexion sur l'intérêt au contrat*, Thèse de doctorat, Paris-Panthéon-Assas University, Paris - France, 2015, p. 35-36; Alain Supiot, *Un faux dilemme : la loi ou le contrat?*, Article paru in *Droit Social*, Comptresac (UMR-CNRS 5114), de l'Université Montesquieu-Bordeaux IV, Volume 1, 2003, p. 22-23.

² Amended Egyptian Civil Code No. (131) of 1948.

³ Amended Kuwaiti Civil Code No. (67) of 1980.

⁴ It is a Latin phrase; the noun *Pacta* is the plural of *Pactum*, meaning agreements or covenants; the word *Sunt* is a term indicating the plural form; the word *Servanda* means "attention," "observation," "consideration," or "respect." Linguistically, this principle means (the obligation of the parties to

respect the agreements, covenants, and contracts they have concluded). Quoted from: Raphael Magno et Vianna Gonçalves, *Le principe Pacta Sunt Servanda "Considérations sur la force obligatoire des contrats dans le transport maritime"*, *Neptunus*, e.revue, Université de Nantes, Nantes - France, vol.24, 2018/ 2, p.1-3.

⁵ The French Civil Code (Code civil) of 1804, as amended, published on the official website for French legislation Légifrance at the web link: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070721?etatTexte=VIGUEUR&etatTexte=VIGUEUR_DIFF.

⁶ The original text of Article (1103) of the French Civil Code in the French language: *Les contrats légalement formés tiennent lieu de loi à ceux qui les ont faits.*

⁷ Amended Iraqi Civil Code No. (40) of 1951.

revoke or amend it except pursuant to a provision in the law or by mutual consent.) We suggest amending this text by replacing the term "(فلا يجوز)" with "(ولا يجوز)" as a consequence of the statement that preceded it. It is observed through this text that the Iraqi legislator has prioritized the law over the agreement using the term "mutual consent." The first paragraph of Article (241) of the German Civil Code (BGB)¹ states: **(By virtue of an obligation, the creditor is entitled to claim performance from the debtor. This performance may also consist of an omission.)**² It appears from this text the legislative policy of the German legislator through including several principles and contents within the substance of the text itself. This text refers to the substance of the obligation on one hand, whether it consists of doing an act or abstaining from it, and it also refers to the binding force of the obligation in general, whatever its source may be, and the possibility of compelling the debtor to execute it by the creditor. The second paragraph relates to everything that can arise from an obligation in the period preceding the conclusion of the contract. The German Federal Court of Justice explicitly stated the principle of "Pacta Sunt Servanda" in a decision³

belonging to it, by saying that it is the fundamental principle of every legal system.

Thus, the contract, according to what we have explained above, is considered like the law for the contracting parties, so the contracting parties are bound by what is contained in it. This restriction is conferred by the principle of binding force, which is considered an application of the rule (a contract is the law of the contracting parties) and a fulfillment of it. It expresses the idea of the "obligatory content of the contract," and that the contracting parties are bound by what they agreed upon, considering the contract a law for those who concluded it; however, this binding force arises with respect to them only.⁴

The rule (a contract is the law of the contracting parties) finds its roots in Islamic jurisprudence. Among the evidence for it is the saying of the Almighty: **"O you who have believed, fulfill [all] contracts"**⁵, and also: **"And fulfill [every] commitment. Indeed, the commitment is ever [that about which one will be] questioned"**⁶. These two noble verses indicate the obligation to abide by contracts and the covenants and pledges that a person takes upon himself, and the impermissibility of revoking the contract and the necessity of adhering to it.⁷

¹ The German Civil Code (BGB) Bürgerliches Gesetzbuch No. (21) of 1900, as amended, published on the official website of the German Ministry of Justice / the page designated for German legislation in the German language at the web link: <https://www.gesetze-im-internet.de/bgb>.

² The original text of the first paragraph of Article (241) of the German Civil Code (BGB) in the German language: **1.**

Kraft des Schuldverhältnisses ist der Gläubiger berechtigt, von dem Schuldner eine Leistung zu fordern. Die Leistung kann auch in einem Unterlassen bestehen.

³ Urteil VII R 7/18, BFH 7. Senat, 19/10/2021. Decision No. (VII R 7/18), German Federal Court of Justice, date of the decision: 19/10/2021, published on the official website of the German Ministry of Justice / the page designated for judicial precedents at the web link: <https://shorturl.at/XOBF6>, date of visiting the website: 3/10/2024.

⁴ Dr. Jawad Kadhim Jawad Sumaysim, Stages of the Contract between Contractual and Legislative Will

(An Analytical Comparative Study), research published in the Tikrit University Journal for Rights, Volume 3, Issue 2, Part Two, Year 2, 1440 AH - 2018 AD, pp. 87-88; Reem Abdulbaqi Hamza, The Binding Force of the Contract (A Comparative Study), Doctoral Dissertation, College of Law – Al-Neelain University, Khartoum – Sudan, 2017, pp. 41-42.

⁵ Surat Al-Ma'idah, Verse 1.

⁶ Surat El-Isra', Verse 34.

⁷ Imam Abi Mohammed Al-Hussein bin Masoud Al-Baghawi, Tafsir Al-Baghawi (Ma'alim At-Tanzil), Volume Three, investigation by: Mohammed Abdullah Al-Nimr and others, 1st ed., Dar Taybah, Riyadh - Kingdom of Saudi Arabia, 1409 AH - 1989 AD, Surat Al-Ma'idah, Verse 1, pp. 5-6; Imam Abi Mohammed Al-Hussein bin Masoud Al-Baghawi, Tafsir Al-Baghawi (Ma'alim At-Tanzil), Volume Five, investigation by: Mohammed Abdullah Al-Nimr and others, 1st ed., Dar Taybah, Riyadh - Kingdom of Saudi Arabia, 1409 AH - 1989 AD, Surat El-Isra', Verse 34, p. 92.

It is stated in Islamic jurisprudence¹: (The basis in contracts is the consent of the contracting parties, and their legal effect is what they have imposed upon themselves through contracting.) The principle of consensualism in contracts is the basis, but when a contract is validly formed, the contracting parties become bound by what they have agreed upon, and they must fulfill their obligations in accordance with the provisions of Sharia.

2.2 Sub-Chapter Two: The Legal Basis of the Rule (A Contract is the Law of the Contracting Parties)

Jurisprudence has differed into two trends regarding the legal basis of the rule (a contract is the law of the contracting parties), between the principle of the autonomy of will² and the law.

The first trend³ sees that the principle of the autonomy of will constitutes the legal basis of the rule (a contract is the law of the contracting parties), as the binding force of the contract according to this view stems from the will of the contracting parties and what they consented to. Thus, the will is what confers the binding force upon the contract by establishing certain rules by

the two parties that take the place of law for those who laid them down, and the creditor has granted their trust to the debtor upon concluding the contract, which conferred binding force upon its effects. According to this trend, the contract enjoys an extremely strict binding force; the parties are free to bind themselves or not, but once the contract is concluded, everything it includes must be executed as it is, and what the parties want to be binding upon them under the same circumstances they indicated in the contract. Consequently, the contract cannot be amended, suspended, or terminated except by the mutual agreement between the two contracting parties, and neither the judge nor even the legislator possesses the authority to intervene in the life of the contract; therefore, the judge cannot amend it, it cannot be affected by legislative changes, and the judge may not interpret the terms of the contract on his own initiative except after inviting both parties to interpret the clauses of the contract in their presence.

An opinion⁴ from the first trend adds that the general principles of positive law are considered a secondary source for the binding force of the

¹ Shaykh al-Islam Ahmad bin Abdul-Halim Al-Harrani Al-Dimashqi, known as Ibn Taymiyyah, *Al-Qawa'id Al-Nooraniyyah Al-Fiqhiyyah*, investigation and verification of Hadiths by: Dr. Ahmad Mohammed Al-Khalil, Dar Ibn al-Jawzi, without place of publication, without year of publication, p. 280.

² The principle of the autonomy of will means: "a philosophical and legal theory that tends to explain the legal act, and specifically the contract, organizing its formation, effects, and expiration." Its substance is represented by the fact that the will is the basis of the binding force of the contract, and several consequences result from this theory, which are: (the individual is free to contract or not "contractual freedom", the individual is responsible for the execution of the contract they previously concluded according to its binding force, the contract is the main source of obligations, the role of the law is a complementary role to the will of the parties). For more, see: Dr. Ayman Ibrahim Al-Ashmawy, *The Concept of the Contract and its Development (A Comparative Study)*, Dar Al-Nahda Al-Arabiya, Cairo – Egypt, 2002, p. 12 and

pp. 23-29; Fathia Sayyid Othman, *The Role of the Will in Formulating the Contract*, research published in the *Al-Adl Journal*, Ministry of Justice (Department of Codification, Research, and Training), Sudan, Volume 10, Issue 23, 2008, pp. 104-106.

³ This is the trend of: Dr. Mustafa Al-Awji, *Civil Law, Part One (The Contract with an Introduction to Civil Obligations)*, 1st ed., Bahsoun Foundation, Beirut – Lebanon, 1995, pp. 111-118; Dr. Mohammed Labib Shanab, *Lessons in the Theory of Obligation, Sources of Obligation, First Book (Legal Acts / Contract and Will)*, Dar Al-Nahda Al-Arabiya, Cairo - Egypt, 1976-1977, p. 252; Jacques Ghestin, *Traité de droit civil - La formation du contrat*, LGDJ, Paris - France, 1988, pp. 166-168.

⁴ This is the opinion of: Dr. Mustafa Al-Awji, previously cited source, pp. 117-118; Dr. Bashar Adnan Malkawi, *The Relationship between the Pillars of a Contract and its Binding Force*, research published in the *Arab Researcher Journal*, Jordan Judicial Institute, Jordan, Volume 1, Issue 2, 2020, pp. 21-22.

contract. The primary source of the binding force according to this opinion is the personal source stemming from the will of the two parties, whether the motive is (moral, ethical, economic, utilitarian, intangible, supporting trust in dealing, good faith, equity, or justice). If the personal source is absent, then each of the contracting parties may resort to the general principles consecrated by positive law to execute the contract by compulsion against the other party, and then the judge may also intervene to grant the contract its binding force.

The second trend, which is the prevailing view in legal jurisprudence¹, holds that the legal basis of the principle of the binding force of the contract is the law. According to this view, the law is deemed to approve the contract once it fulfills its essential elements, with the aim of achieving the public interest, safeguarding interests related to trade and commerce, and respecting the principle of contractual freedom, whereby individuals assume the obligations to which they have consented. Every contract possesses its own binding force. If the contract is a nominate contract, its binding force is derived from the legal provisions governing it in addition to the general rules; whereas, if it is an innominate contract, the basis of its binding force lies solely in the general rules. This is also evident with respect to all conditions stipulated by the contracting parties. As a general principle, the contracting parties enjoy the freedom to incorporate into the contract whatever

conditions they wish; however, this freedom is restricted by the requirement that such conditions must not be contrary to the provisions of the law.²

And we agree with the second trend. For although the two parties bind each other under the contract concluded between them—whether it is a simple contract, as in selling bread to a specific individual or a specific store, where the buyer (the ordinary individual or the shopkeeper) pays the price and the seller (the baker) delivers the bread to him, as well as in a lease contract where the lessor, by virtue of the lease contract, enables the lessee to benefit from the leased property, and in return, the lessee pays the rent to the lessor, these being two examples of simple contracts—there are other contracts that involve highly complex relationships and very high amounts. However, in all these contracts, the two parties are bound under the law to negotiate, conclude, and execute the contract according to what it includes, which results in its expiration. The law provides for the freedom of the two parties to bind themselves through a contract they conclude by their agreement and to establish whatever conditions they consent to; nevertheless, they must respect the boundaries specified by the law.

3. Chapter Two: The Legal Framework for Applying the Rule (A Contract is the Law of the Contracting Parties) to Preliminary Contracts

¹ Among the proponents of this view are: Dr. Abdul Razzaq Al-Sanhuri, *Al-Waseet fi Sharh Al-Qanoon Al-Madani Al-Jadeed (The Intermediary in Explaining the New Civil Law)*, Part One (General Theory of Obligations / Sources of Obligations), Vol. 1, 3rd ed., Nahdat Misr, n.p., 2011, pp. 148–149, 623; Dr. Mustafa Ibrahim Al-Zalmi, *Obligations in Light of Logic and Philosophy*, 1st ed., Dar Ihsan, Iran, 1435 AH/2014 AD, pp. 28–31; Dr. Abd El-Fattah Abd El-Baki, *Theory of Contract and Unilateral Will (An In-Depth Study Compared with Islamic Jurisprudence)*, Book Two, n.p., n.p., 1984, pp. 538–539; our professor Dr. Akram Mahmoud Hussein Al-Badu, *Lectures on Civil Law*, Dar Noon, Nineveh, 2021, p. 170; Dr. Abd El-Moneim Faraj Al-Saddah, *Sources of Obligation*,

Dar Al-Nahda Al-Arabiya, Cairo, Egypt, 1984, pp. 48–51; Dr. Samir Tanagho, *The Essence of Law*, 1st ed., Maktabat Al-Wafaa Al-Qanuniyyah, Alexandria, Egypt, 2014, pp. 177–180.

² Dr. Saja Omar Shaban, “Regulations of Conditions Associated with Contracts in Sharia and Law (A Comparative Study),” research published in the *Journal of the College of Law for Legal and Political Sciences*, University of Kirkuk, Vol. 10, No. 37, 2021, pp. 233–234; Dr. Qasim Hayal Rasan, “The Role of the Legislator in Arranging the Effects of the Contract (A Comparative Study Between the Iraqi Civil Law and Islamic Jurisprudence),” research published in the *Journal of the College of Law for Political and Legal Sciences*, University of Kirkuk, Vol. 11, No. 43, 2023, pp. 106–108.

In this Chapter, we will demonstrate the extent to which preliminary contracts are subject to the rule (a contract is the law of the contracting parties) in general, and then we will proceed to clarify this with respect to three forms of these contracts through two requirements, as follows:

3. Sub-Chapter one: The General Framework for Applying the Rule (A Contract is the Law of the Contracting Parties) to Preliminary Contracts

Preliminary contracts are defined as: (the forms of contracts that emerge in the pre-final contracting stage and are considered a preparatory stage that leads, in a certain or uncertain manner, to the final stage.)¹ They are also known as preliminary, phased, temporary, or preparatory contracts. These contracts are concluded in the pre-contractual stage to pave the way for entering into the final contract. They have become necessary for many final contracts where both parties tend to rely on the pre-contractual stage before proceeding to conclude the final contract. The parties pay close attention to contractual negotiations and the conclusion of preliminary contracts to ensure their desire and the realization of their interest in concluding the final contract. Nevertheless, laws have not given significant importance to preliminary contracts; these contracts emerged through practical application among individuals, which is considered a lack of legislative precision. However, this vacuum is filled by the attention given by jurisprudence and the judiciary.

The termination of preliminary contracts revolves around three possibilities. The first is the conclusion of the final contract; the second is the occurrence of a breach by one of the parties, which may cause damage to the other party,

thereby giving rise to contractual liability on the part of the breaching party. The third and final possibility is that these contracts end without concluding the final contract if the contracting parties realize that entering into the final contract does not align with their interests, or if one or both of them express this². Consequently, these contracts enjoy a binding force under the rule (a contract is the law of the contracting parties) pursuant to the first paragraph of Article (146) of the Iraqi Civil Code and parallel comparative texts³. They are also valid contracts in the legal sense, though their binding force is weaker compared to that of the final contract.

Preliminary contracts, like other ordinary contracts, give rise to certain obligations on their parties. Both parties must respect and perform these obligations. In the event of a breach of these obligations, the breaching party will bear the consequences of their violation, and the penalty they face varies from one legislation to another and from one preliminary contract to another. In the following, we will address three examples of these contracts, namely: (the promise of preference, the promise to contract, and the negotiation contract), to demonstrate the application of the rule (a contract is the law of the contracting parties) in each of them, and the sanction that the party breaching the obligations arising from any of them may face.

3.2 Sub-Chapter Two: Forms of Preliminary Contracts Subject to the Rule (A Contract is the Law of the Contracting Parties)

The forms of preliminary contracts in which their subjection to the rule (a contract is the law of the contracting parties) is manifested consist of (the promise of preference, the promise to contract,

¹ Our professor Dr. Akram Mahmoud Hussein Al-Baddo, Preliminary Contracts (A Comparative Analytical Study in Light of the Project Period), research published in the Al-Rafidain Journal of Rights, College of Law, University of Mosul, Issue 29, Year 2006, pp. 1-3.

² Umm Kulthum Sabih Mahmoud, Pre-contractual Negotiations (Their Nature and Provisions / A Comparative Study between Practical Reality and

the Legislative Vacuum), research published in the Journal of the College of Law, Al-Nahrain University, Volume 16, Issue 1B, 2014, pp. 294-295.

³ The first paragraph of Article (147) of the Egyptian Civil Code; Article (196) of the Kuwaiti Civil Code; Article (1104) of the French Civil Code; Article (241) of the German Civil Code (BGB).

the negotiation contract), and we will address them through the following:

First: The Promise of Preference:

The promise of preference is defined, as one of the types of preliminary contracts, as (a preparatory agreement by virtue of which the promisor undertakes to choose the promisee to the exclusion of others, in the event that he actually decides to contract in the future regarding the thing that is the subject matter of the contract)¹. It is also defined as: (the preference contract is a preliminary contract by virtue of which the promisor undertakes, if he decides to conclude a specific contract, to present the proposal to the beneficiary by way of priority)². Thus, the promisor undertakes, by virtue of this preparatory contract, to give priority and precedence to the beneficiary of this promise if he wants to dispose of the promised thing. The preference agreement occurs as a preparatory contract in preparation for the birth of a contractual relationship in the future, as in the sale of real estate in the future, contracts related to intellectual property rights, and other contracts. This promise is a form necessitated by commercial transactions and practices.

The Iraqi legislation did not regulate the promise of preference, and neither did the comparative legislations (Egyptian, Kuwaiti, German), unlike the French legislator, who regulated the provisions of the promise of preference as a preparatory contract that precedes the conclusion of the contract. The first paragraph of Article (1123) of the French Civil Code defined the promise of preference as: **(The promise of preference is the contract by which one of the parties underscores to give priority to its beneficiary to deal with him, in the event that**

the promisor decides to contract)³. The French legislator applied the term "contract" to it as a preliminary contract. Thus, the promise of preference or the preference agreement is a reservation contract that guarantees contractual priority to a specific person called the beneficiary or the promisee, as in a preference agreement concluded between a property owner and a beneficiary, under which the former undertakes, in the event of selling his property, to give preference to the beneficiary of the agreement if he pays the same price offered by other concerned persons. Therefore, the promise of preference is the obligation to maintain preference for the beneficiary if it is decided to sell or buy, and consequently directing an offer to him as a priority before presenting the offer to another person. This promise takes place without the need to determine the essential elements, such as the price and the item sold, in a contract of sale.

And this promise is binding on the promisor, who must present his offer to the beneficiary before proposing it to any other person, as it will be duty-bound upon him to direct the offer to the beneficiary by way of priority. Thus, the beneficiary (the promisee of preference) enjoys a personal right against the promisor, and he must wait until the promisor decides to dispose of the promised thing so that he can show his desire to contract or not. Given that the promisor does not undertake to conclude a contract, it is not necessarily required to determine the essential elements merely upon the conclusion of the promise of preference as a preliminary contract, as it is simply sufficient for the subject matter of the proposed contract to be defined and legally valid. For example, determining the price is not a condition for the validity of the promise of

¹ Dr. Belhadj Larbi, The Legal Framework of the Promise to Contract: A Comparative Jurisprudential and Judicial Study, research published in the Kuwait International Law School Journal, Kuwait, Volume 3, Issue 35, Year 9, 1442 AH - 2021 AD, p. 261.

² François Collart Dutilleul et Philippe Delebecque, Contrats civils et commerciaux, 9e édition, Dalloz, Paris - France, 2011, p. 71.

³ The original text of Article (1123) of the French Civil Code in the French language: **Le pacte de préférence est le contrat par lequel une partie s'engage à proposer prioritairement à son bénéficiaire de traiter avec lui pour le cas où elle déciderait de contracter.**

preference. Since the preference agreement or the promise of preference in its nature is considered a contract, the debtor (the promisor) is required to comply with the obligations arising from it, and his performance of his obligations would lead to its expiration. This contract also expires, even if it is preparatory, and its expiration is either through the conclusion of the final contract or the lack thereof¹. It is immaterial whether this promise is specified for a period of time—meaning that the promisor is bound to prefer the promisee during a specific period of time only if he wants to dispose of the promised thing—or this promise may arise without specifying a duration.²

However, it is observed at times that the debtor (the promisor) does not comply with his obligations. Since the promise of preference is a contract, it enjoys binding force according to the rule (a contract is the law of the contracting parties), even if this is in a lighter manner than the final contract. Therefore, the promisor must respect his obligation and present an offer, by way of priority, to the beneficiary of the promise (the promisee). Consequently, a breach of this occurs when the promisor concludes a contract with a third party without previously presenting the offer to the beneficiary. A breach can also occur merely by the promisor presenting an offer to another person from among third parties without presenting it first to the beneficiary of the agreement. The reasons for this violation are often purely personal, such as if the debtor (the promisor) no longer wishes to contract with the beneficiary, or due to his forgetting the promise he granted to the beneficiary.³

In the event of a violation of the preference agreement, the creditor (the promisee) has several options according to the second paragraph of Article (1123) of the French Civil Code, which states: **(If the promisor concludes a contract with a third party that violates the preference agreement, the beneficiary may claim compensation for the damage suffered by him. When the third party knows of the existence of the contract and the beneficiary's intention to adhere to it, the latter may also claim nullity or ask the judge to substitute him for the third party in the concluded contract.)**⁴ Thus, the beneficiary has three options, which are:

1. Claiming compensation for the damage that befell him if the third party was aware of the existence of the promise.
2. Claiming the nullity of the contract concluded between the promisor and the third party.
3. Claiming substitution for the third party in the contract concluded between the promisor and the third party.

It appears that compensation may be combined with the claim for nullity or substitution. It is noted through this text the binding force that the French legislator has granted to the promise of preference as one of the preparatory contracts; consequently, the promisor bears liability, which can reach the extent of annulling the contract concluded with the third party and replacing the third party with the beneficiary (the promisee) of the preference agreement.

¹ Dr. Said Gabr, *The Promise of Preference*, Dar Al-Nahda Al-Arabiya, Cairo – Egypt, 1993, pp. 24-25.

² Ekaterina Pannebakker, *Pre-Contractual Phase: Reflections on the Attractiveness of the New French Rules for the Parties to International Commercial Transactions*, an article published in: Stijns S, Jansen S, eds. *The French Contract Law Reform: A Source of Inspiration?*. IUS Commune: European and Comparative Law Series, Intersentia, United Kingdom, 2016, p. 23.

³ Dr. Mohammed Hassan Qasim, *Effects of the Promise of Preference between the Stages of*

Anticipation and Determination (A Comparative Jurisprudential and Judicial Study), Dar Al-Jami'ah Al-Jadeedah, Alexandria – Egypt, 2016, p. 10 et seq.

⁴ The original text of Article (1123) of the French Civil Code in the French language: **Lorsqu'un contrat est conclu avec un tiers en violation d'un pacte de préférence, le bénéficiaire peut obtenir la réparation du préjudice subi. Lorsque le tiers connaissait l'existence du pacte et l'intention du bénéficiaire de s'en prévaloir, ce dernier peut également agir en nullité ou demander au juge de le substituer au tiers dans le contrat conclu.**

Despite the legal protection provided by the French legislator to the beneficiary of the promise of preference, he sought, on the other hand, to achieve stability of transactions when the promisor concludes a contract with a third person in violation of the promise. Thus, he permitted the third party to take the initiative first by inquiring from the promisee of preference as to whether he will adhere to the promise or not, and within a certain period of time. If the beneficiary does not reply, the contract concluded with the third person contrary to the promise becomes valid. This is what was brought by the third and fourth paragraphs of Article (1123) of the French Civil Code: **(The third party may request the beneficiary in writing to confirm to him, within a time period he specifies and which must be reasonable, the existence of a promise of preference and whether he intends to take advantage of it. The writing mentions that in the absence of a response within this specified period, the beneficiary of the promise will no longer be able to request his substitution in the contract concluded with the third party or the nullity of the contract).**¹

Second: The Promise to Contract:

The promise to contract or the unilateral promise is (a contract consisting of an offer and an acceptance, by virtue of which one of the parties promises or undertakes to the other party, who is the promisee, to conclude a specific contract if the promisee expresses his desire to contract within the period specified in the promise)², unlike the preference agreement (the promise of preference). The promise to contract is an

agreement by virtue of which one of the parties (the promisor) undertakes to the other party (the beneficiary or the promisee) to conclude a contract if the latter exercises an option resulting from the promise before the expiration of a specified period, as the promisee has the freedom to exercise his option or not—meaning to agree to conclude the final contract or not to conclude it—but the exercise of this option is limited to a specific period. For the promise to contract to be validly formed, it requires determining all its essential elements, specifying the period within which the final contract must be concluded before its expiration, and satisfying the form required by law with respect to the final contract.³

The Iraqi legislator has regulated the promise to contract through Article (91)⁴ of the Iraqi Civil Code: **(1- The preliminary agreement by virtue of which both contracting parties or one of them undertakes to conclude a specific contract in the future shall not be valid unless the essential matters of the contract to be concluded and the period within which it must be concluded are determined. (2- If the law requires a specific form to be satisfied, this form must also be observed in the preliminary agreement that includes a promise to conclude this contract.)** However, the legislator was not successful in this, as the Iraqi legislator confused the preliminary agreement with the promise to contract. For the preliminary agreement or the preliminary contract differs from the promise to contract, because the former is nothing but the final contract in its initial form, including what has been negotiated, and its completion results in the

¹ The original text of Article (1123) of the French Civil Code in the French language: **Le tiers peut demander par écrit au bénéficiaire de confirmer dans un délai qu'il fixe et qui doit être raisonnable, l'existence d'un pacte de préférence et s'il entend s'en prévaloir. L'écrit mentionne qu'à défaut de réponse dans ce délai, le bénéficiaire du pacte ne pourra plus solliciter sa substitution au contrat conclu avec le tiers ou la nullité du contrat.**

² Amna Abdul Karim Ali Ahmad, The Promise to Contract and its Applications in Civil Law (A

Comparative Study), Master's Thesis, College of Law – Al-Nahrain University, 1429 AH - 2008 AD, p. 15.

³ Dr. Mahmoud Abdul Hakam, The Promise to Contract (A Comparative Analytical and Foundational Study), research published in the Journal of Legal and Economic Research, College of Law - Mansoura University, Egypt, Issue 32, 2002, p. 406 et seq.

⁴ Corresponding to Article (101) of the Egyptian Civil Code.

completion of the final contract. As for the promise to contract, it is not the final contract intended to be concluded, but rather a means to reach it. Despite this fundamental difference between them, both are considered to belong to the category of preliminary or preparatory contracts.

The Kuwaiti legislator was successful in distinguishing between the promise to contract and the preliminary contract, as he regulated each of them independently of the other in his civil code, devoting Articles (70-71) to the preliminary contract and regulating the promise to contract through Articles (72-73); Article (72) of the Kuwaiti Civil Code states: **(The agreement by virtue of which one of its parties promises to conclude, for the benefit of the other party, a specific contract shall not be formed unless the essential matters of the contract promised to be concluded and the period within which it must be concluded are specified therein)**, and the first paragraph of Article (70) clarified what is meant by the preliminary contract, stating: (If it is implied by the contract that it is to be concluded a second time, or in another form, each of its parties must conclude it in its final status, within the deadline specified by the preliminary contract, otherwise within a reasonable period), and it appears clearly that the Kuwaiti legislator has demonstrated the difference between the promise to contract and the preliminary contract through these two texts; the promise to contract is independent of the preliminary agreement, because the latter is

nothing but the final contract, but in its initial form.

The French and German legislators have also regulated the promise to contract, as the first paragraph of Article (1124) of the French Civil Code states: **(A unilateral promise is the contract by which one party, the promisor, grants to the other, the beneficiary, the right to opt for the conclusion of a contract whose essential elements are determined, and for the formation of which only the consent of the beneficiary is missing. The revocation of the promise during the time left to the beneficiary to opt does not prevent the formation of the promised contract. A contract concluded in violation of the unilateral promise with a third party who knew of its existence is void)**¹; and paragraph (II/2) of Article (311) of the German Civil Code (BGB) includes the following: **(An obligation with duties under Article 241/2 also arises by: 2. the initiation of a contract in which one party, with regard to a potential contractual relationship, grants the other party the possibility of influencing his rights, legal assets, and other interests, or entrusts them to the other party).**²

A unilateral promise to contract differs from a simple offer ("ijab"), just as it differs from the final contract; being a contract, it is more binding than an offer, but it remains unilateral, as it creates an obligation on the part of the promisor, yet this obligation remains revocable in principle if the promisee does not express his desire to contract within the specified period; in addition

¹ The original text of Article (1124) of the French Civil Code in the French language:

La promesse unilatérale est le contrat par lequel une partie, le promettant, accorde à l'autre, le bénéficiaire, le droit d'opter pour la conclusion d'un contrat dont les éléments essentiels sont déterminés, et pour la formation duquel ne manque que le consentement du bénéficiaire. La révocation de la promesse pendant le temps laissé au bénéficiaire pour opter n'empêche pas la formation du contrat promis. Le contrat conclu en violation de la promesse unilatérale avec un tiers qui en connaissait l'existence est nul.

² The original text of paragraphs one and two of Article (311) of the German Civil Code (BGB) in the German language:

Ein Schuldverhältnis mit Pflichten nach § 241 Abs. 2 entsteht auch durch: 2. die Anbahnung eines Vertrags, bei welcher der eine Teil im Hinblick **على etwaige rechtsgeschäftliche Beziehung dem anderen Teil die Möglichkeit zur Einwirkung auf seine Rechte, Rechtsgüter und Interessen gewährt oder ihm diese anvertraut, oder**

to that, the heirs or representative of the promisor, in the event of the promisor's incapacity, will have to perform this obligation if the beneficiary decides to exercise the option, which is not the case with respect to an offer, and the beneficiary is not obliged to exercise the option, and the failure to exercise it results in the expiration of the contract without being fulfilled, and we view that this is deemed in the nature of a discharge from the obligation arising from the contract¹; and the promise to contract must include, under penalty of nullity, a reference to all the essential elements of the final contract, in terms of the promised thing and the price, and if the final contract is formal, the promise to contract must also satisfy the same formality²; and it differs from the promise of preference, since the latter does not require for its formation the determination of all essential matters in the final contract and the satisfaction of the form if it is required by law for the final contract, and also because in the promise of preference, the promisor is not obliged to dispose of the item but rather he must give priority to the beneficiary if he wishes to dispose of the promised thing, whereas in the promise to contract, the promisor is obliged to contract throughout the period specified in the promise if the promisee expresses his desire to contract within this period.³

With regard to the effects and the penalty resulting from the breach of the promise, a distinction should be made between two periods: the first period is the one that extends until the option is exercised by the promisee, and after the latter expresses his desire to contract, so the period prior to the exercise of the option by the beneficiary, the latter is the holder of the personal right which is represented by the right of option, and this latter, and he has this personal right during the period granted, explicitly or implicitly, to exercise the option; as for the second period, it is when the promisee shows his desire to

contract, so the final contract is concluded, or if he does not show it, the promise expires without the conclusion of the final contract and the promisor is released from his obligation; therefore, if the promisor breaches his promise during the first period or does not conclude the contract during the second period if the promisee has expressed his desire for that, he bears his liability for his non-compliance with the substance of the promise, given that it is a binding contract and consequently subject to the rule (a contract is the law of the contracting parties), so it is not possible to dispose of the thing with any person other than the beneficiary of the promise until the option is exercised; in particular, the promisor must not perform any act that is likely to harm the beneficiary's right to choose, and after the exercise of the option, the preparatory contract gives way to the final contract, so if the promisor withdraws from his promise before the end of the option period and before the beneficiary uses his option, this withdrawal is considered as non-existent⁴; and the French legislator considered the contract concluded by the promisor with a third party and contrary to the promise to be void if the third party knew of the existence of the promise, as the second and third paragraphs of Article (1124) of the French Civil Code stated: **(A unilateral promise is the contract by which one party, the promisor, grants to the other, the beneficiary, the right to opt for the conclusion of a contract whose essential elements are determined, and for the formation of which only the consent of the beneficiary is missing. The revocation of the promise during the time left to the beneficiary to opt does not prevent the formation of the promised contract. A contract concluded in violation of the**

¹ See Articles (420 et seq.) of the Iraqi Civil Code.

² Abdullah Abdul Amir Taha Al-Shammari, *The Idea of the Negotiation Contract*, research published in the *Karbala University Journal*, Volume 7, Issue 1, 2009, pp. 24-25.

³ See: Article (102) of the Egyptian Civil Code; Article (73) of the Kuwaiti Civil Code.

⁴ See: Article (102) of the Egyptian Civil Code; Article (73) of the Kuwaiti Civil Code.

unilateral promise with a third party who knew of its existence is void).¹

Third: The Negotiation Contract:

The negotiation contract differs from negotiations in themselves, for negotiations precede preliminary contracts in the pre-contractual stage, and are not considered a contract but rather arrange some obligations on the shoulders of the two negotiating parties only; as for the negotiation contract, it is (a contract by virtue of which its two parties undertake to begin negotiation, continue it, or organize the course of negotiations for the purpose of reaching the conclusion of a contract in the future)², meaning that it is a preliminary contract like the promise of preference and the promise to contract, and consequently it is subject to the rule (a contract is the law of the contracting parties) and binds its two parties, however, it differs from them in that it is concluded prior to negotiations, so the two parties are, by virtue of this contract, obliged to negotiate, just as it is binding on both sides.

And despite the legislative absence regarding the negotiation contract, individuals often resort to it

when they wish to conclude final contracts related to huge financial deals such as the technology transfer contract³, so the two parties conclude this contract to undertake to negotiate about all matters related to the final contract in terms of the subject matter, and deadlines of execution, including delivery, payment of the price, and other matters, and it is subject to the general rules of the contract; and there are other forms close to the negotiation contract, such as the agreement on the date of signing and the agreement on the method of signing.

And these three preliminary contracts can be concluded via ordinary or electronic means, and among the texts that can be relied upon in this regard are Articles (1125-1126) of the French Civil Code, for Article (1125) states: (**Electronic means can be used to lay down contractual conditions or information about available goods or services**),⁴ and Article (1126) includes the following: (**The information requested with a view to the conclusion of a contract, or that which is sent during its execution, may**

¹ The original text of Article (1124) of the French Civil Code in the French language:

La promesse unilatérale est le contrat par lequel une partie, le promettant, accorde à l'autre, le bénéficiaire, le droit d'opter pour la conclusion d'un contrat dont les éléments essentiels sont déterminés, et pour la formation duquel ne manque que le consentement du bénéficiaire. La révocation de la promesse pendant le temps laissé au bénéficiaire pour opter n'empêche pas la formation du contrat promis. Le contrat conclu en violation de la promesse unilatérale avec un tiers qui en connaissait l'existence est nul.

² Dr. Mohammed Hussein Abdul Aal, The Contractual Regulation of Contractual Negotiations (A Comparative Analytical Study of Legal Means to Secure Negotiations in International Trade Operations), Dar Al-Nahda Al-Arabiya, Cairo - Egypt, 1998, p. 94.

³ A technology transfer contract is (every agreement by virtue of which the technology supplier undertakes to transfer, for a consideration, technical information to the technology importer, to use it in a special technical manner to produce or develop a specific commodity, or to install or operate machinery or devices, or to provide services), and

technology is: (everything that can be a subject matter of sale, purchase, or exchange, and in particular patents, trademarks, and technical know-how for which patents or marks have not been granted or which are eligible for such grant according to the laws regulating patents and trademarks, skills and expertise inseparable from the persons of the employees, and technological knowledge embodied in material things, particularly equipment and machinery). For more, see both: Jalal Ahmad Khalil Awadallah, The Legal System for Protecting Inventions and Technology Transfer in Developing Countries, 1st ed., That Al-Salasil Publications, Kuwait, 1983, p. 20 et seq.; Sultan bin Mohammed bin Al-Wissam Al-Hajri, Technology Transfer Contracts (A Comparative Study in Egyptian, Bahraini, and Qatari Law with Reference to French Law), Master's Thesis, College of Law – Applied Science University, Bahrain, 1434 AH - 2014 AD, p. 19 et seq.

⁴ The original text of Article (1125) of the amended French Civil Code in the French language: **La voie électronique peut être utilisée pour mettre à disposition des stipulations contractuelles ou des informations sur des biens ou services.**

be transmitted by electronic mail if the other party has accepted the use of this means).¹

And this emerges particularly with respect to the electronic negotiation contract, for the two contracting parties may agree in advance on using a specific electronic means to conduct negotiations via electronic means and the internet network, for example electronic mail (E-mail), texting (Texting), or visual communication (Videoconferencing)², through the use of one of the electronic platforms such as (Microsoft Teams)³ or (Google Meet)⁴ or (DocuSign)⁵ or (Zoom)⁶ or other electronic platforms.

And through what has preceded, the binding force of preliminary contracts and their subjection to the rule (a contract is the law of the contracting parties) becomes clear to us, and among these contracts are those that are binding on one side, such as the promise of preference and the promise to contract, and among them are those that are binding on both sides, such as the negotiation contract.

4. Conclusion

After addressing the topic of (The Application of the Rule "A Contract is the Law of the Contracting Parties" to Preliminary Contracts) through this research, we have reached a set of findings and recommendations, which we outline below:

4.1 Outcomes:

1. The rule (a contract is the law of the contracting parties) is considered the

fundamental principle of every legal system, and it must be respected by both the contracting parties and the judge alike.

2. Preliminary (preparatory) contracts enjoy binding force according to Article (146) of the Iraqi Civil Code, because they are legally valid contracts; however, their force is relatively "lighter" compared to the final contract.

3. There is a deficiency in the legislative regulation of preliminary contracts (such as the promise of preference and the negotiation contract) in many laws, as these contracts emerged through practical practice, and jurisprudence and the judiciary filled this vacuum.

4. The penalty resulting from a party's breach of their obligations in preliminary contracts varies between compensation, the nullity of the contract concluded with a third party, or substitution for the third party (as in French law regarding the promise of preference).

4.2 Recommendations:

1. Regulating preliminary contracts in general through the following proposed text: **"(1) Preliminary contracts may be concluded as a preparatory stage for the conclusion of the final contract. (2) Preliminary contracts shall include the promise to contract, the promise of preference, the preliminary agreement, the negotiation contract, and any other contract agreed upon by the contracting parties to regulate the mechanism of the course of negotiations or determine the method of concluding the contract or how to execute it,**

¹ The original text of Article (1126) of the French Civil Code in the French language: **Les informations qui sont demandées en vue de la conclusion d'un contrat ou celles qui sont adressées au cours de son exécution peuvent être transmises par courrier électronique si leur destinataire a accepté l'usage de ce moyen.**

² Dr. Abdullah Mohammed Said Rababa'ah, Electronic Contracting: A Jurisprudential Legal Study, research published in the Journal of Sharia Sciences - Qassim University, Kingdom of Saudi Arabia, Electronic Transactions Conference (E-Commerce - E-Government), Volume 5, Issue 2, 1432 AH - 2011 AD, pp. 277-280; Dr. Aqeel Fadhil

Hamad Al-Dahan and Munqidh Abdul Ridha Al-Fardan, The Legal Framework of the Electronic Negotiation Contract, research published in the Journal of Ahl al-Bayt University (peace be upon them), Issue 8, 2009, pp. 59-60.

³ The electronic link for the electronic platform: <https://www.microsoft.com/en-us/microsoft-teams>.

⁴ The electronic link for the electronic platform: <https://meet.google.com>.

⁵ The electronic link for the electronic platform: <https://www.docusign.com>.

⁶ The electronic link for the electronic platform: <https://www.zoom.us>.

provided that it does not violate the provision of the law or custom. (3) In terms of their binding force, preliminary contracts shall be subject to the first paragraph of Article 146 of this Law, provided that the nature of each, whether unilateral or bilateral, is taken into account."

2. We propose amending Article (91) to include both the promise to contract and the promise of preference together, to be formulated as follows: "(1) The contract by virtue of which one of the parties vanishes to conclude a contract in the future for the benefit of the other party shall not be valid unless all essential matters of the contract promised to be concluded and the period within which the promisee must express his desire to contract are specified. (2) The civil liability of the promisor arises in the event that he concludes the promised contract with a third party, and the concluded contract shall be void. (3) The undertaking may be limited to granting the promisee preference over others if the promisor decides to dispose of the promised thing; if the promisor breaches this by concluding a

contract with another person, the promisee may claim specific performance and substitution for the third party, along with the admissibility of claiming compensation for the damage suffered as a result thereof."

3. We propose regulating the preliminary contract under a special and independent text separate from the promise to contract, to be formulated as follows: "(1) The contracting parties may conclude a preliminary contract as a preparatory form of the final contract, and by virtue of this contract, the contracting parties undertake to conclude the final contract within the period specified in the preliminary contract. If the contracting parties do not specify this period, the final contract must be concluded within a reasonable period as required by the nature of the transaction and the circumstances of the case. (2) If either contracting party breaches their obligations arising from the preliminary contract, the other party may claim specific performance along with compensation for the damages suffered as a result of this breach."

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5.9 Websites:

The official website for French legislation Légifrance: <https://www.legifrance.gouv.fr>.

The official website of the German Federal Ministry of Justice / The page designated for German legislation in the German language: <https://www.gesetze-im-internet.de/bgb>.

The official website of the German Federal Ministry of Justice / The page designated for judicial precedents at the electronic link: <https://shorturl.at/XOBF6>.

The electronic link for the electronic platform: <https://www.microsoft.com/en-us/microsoft-teams>.

The electronic link for the electronic platform: <https://meet.google.com>.

The electronic link for the electronic platform: <https://www.docusign.com>.

The electronic link for the electronic platform: <https://www.zoom.us>.