

# ASPECTS CONCERNING THE PUBLICITY OF MOVABLES AND IMMOVABLES IN THE MARITIME FIELD

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## **Abstract**

*This document presents elements of publicity for a specific category of goods, namely, ships. It also analyzes the recording and registration of Romanian flag ships. Each of these items requires special procedures, depending on the operation recorded where the ship is registered.*

*The registration of ships under construction and especially of Romanian flag ships, the granting, suspension and withdrawal of the right to navigate under the Romanian flag, the registration and removal of ships from records, the acquisition, transmission, transcription and extinction of real rights and/or obligations regarding ships and the procedure for issuance, extension of validity and renewal of the nationality documents require compliance with certain procedures.*

*The present article may interest professionals concerned with these notions that are often met in maritime law and, to a lesser extent, in common law.*

**Keywords:** *ownership right, movable and immovable, publicity, ships, recording and registration of flag vessels*

## **Introduction**

The chosen topic is rather vast, since in the maritime field there is a wide category of goods that are being used and transported by water. In this article I will use the term “maritime” with a general meaning, referring both to the maritime and to the fluvial sphere.

My attention has focused on the publicity of goods, since I have observed that in the field of maritime law, the theory speaks little of the goods publicity operations, while legal practice faces different cases in this field.

My study has emerged based on discussions held with several persons working in the maritime field, not necessarily in the field of maritime law. I have thus come to the conclusion that, when talking about maritime law, we first think about the concept of “ship” and then about its utility. For this reason, I will begin my article with a definition of the “ship” and I will continue with some discussions regarding the ownership right, and the ownership right over a ship. I will end my article with notions in the field of the publicity of movable and immovable property, as well as aspects regarding the publicity of ships.

## **1. The concept of “ship”**

The “ship” is a good, an object which the Romanian legislation, especially the one before 1989, has not specifically defined, having only referred to it and having let it to the doctrine to find an appropriate definition for it. In this respect, we mention the provisions of article 490 of the Comm. Code (the former commercial code), which stated that the *ships are movable goods. The boats, tools, instruments, weapons, ammunition, supplies and, in general,*

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*all things intended for its permanent use are part of the vessel<sup>1</sup>, even when they are separated from the vessel for a certain period of time.*

The “ship” was given a definition among the provisions of the Government Ordinance [O.G.] no. 42/1997, which stipulate that there are ships, for the purpose of this ordinance, maritime and fluvial ships of any kind, propelled or unpropelled, sailing on the surface or submerged, designed for the transport of goods and/or persons, for fishing, towage or propelling, floating devices such as: dredgers, floating elevators, floating cranes, floating grips, floating grabs and the like, propelled or unpropelled, as well as floating facilities which are normally not intended to be moved or for performing special works, such as: floating docks, floating wharves, pontoons, floating hangars for ships, drilling platforms and the like, floating lighthouses, small crafts and crafts intended for leisure activities<sup>2</sup>.

The same legislative act, Government Ordinance [O.G.] no. 42/1997, also regulates the legal status of the installations, machines and engines which propel the ship or which produce another mechanical action, of the mechanisms and means necessary for the transmission of the mechanical action, as well as of all the equipment necessary for navigation, for the different manoeuvres, for the safety of the ship, for saving human lives, for the prevention of pollution, for hygiene and for the exploitation of the ship according to its intended use, including the legal nature of supplies.<sup>3</sup>

The legal classification of ships in the category of movable/immovable goods has raised issues regarding the identification of the category of goods the ships belong to. There are several instances in which ships are assimilated to immovable goods or they are governed by the rules regarding immovable goods. However, they cannot be classified with certainty as belonging to the category of immovable goods since that would be in violation of the explicit provision of the legislation in force, according to which ships are movable goods.

Each ship has to be registered administratively, in order to be distinguishable from the other ships, but also for the proper recording of the mentions and privileges of the respective ship. The doctrine has ruled that there are four elements necessary for the identification of a ship, namely: the name, the tonnage, the port of registration and its nationality. According to the current legislation, in order to correctly establish the elements of identification of the ship, it is necessary to consider the category of the respective ship.

We have to keep in mind that maritime ships, propelled inland waterway vessels, self-propelled floating devices and installations are distinguishable by a name proposed by the owner and approved by a competent authority, which is the Romanian Naval Authority [Autoritatea Navală Română] (A.N.R.). Unpropelled inland waterway vessels, leisure vessels, and unpropelled floating devices and installations are distinguished by a registration number issued by the A.N.R., and may carry a name, on request by the owner and with the approval of the harbour master of the registration harbour.

The first element of identification of the ship is, depending on the case, the name or the registration number, which has to be painted on the body of the ship and has to stand out. The records of the maritime ships under Romanian pavilion is kept in the Registry of maritime ships [Registrul matricol al navelor maritime] by the harbour masters established by the decision of the general manager of the A.N.R. Inland waterway vessels are registered in the Registry of inland waterway vessels [Registrul matricol al navelor de navigație interioară] by the harbour masters established by the decision of the general manager of the A.N.R. A.N.R. keeps record of these ships in the Central Registry [Registrul de evidență centralizată].

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<sup>1</sup> Meaning “ship”.

<sup>2</sup> Art. 23 of Government Ordinance [O.G.] no. 42/1997 republished.

<sup>3</sup> Art. 24 of the same legal document.

The ships under construction are inscribed in the Registry of ships under construction [Registrul de evidență al navelor în construcție], which is kept by the harbour master on whose territorial jurisdiction the shipyard is located.

The nationality of the ship is the second element of identification. And this element is important in terms of the advertisement of movable goods, for the same reasons as the first element.

Pursuant to Government Ordinance [O.G.] no. 42/1997, ships have the nationality of the state in which they are registered and whose flag they are authorized to fly. The nationality of the ship represents the feature of belonging to a state whose flag it flies, whose protection it enjoys and under whose jurisdiction it is. In order to achieve or to be granted Romanian nationality, two conditions have to be met cumulatively, namely the ships have to be registered in Romania and to have obtained the right to fly under the Romanian flag.

Regarding the use of the ships, it also regards the cargo of the ship, as well as the document showing the loading of the cargo on a ship (the loading policy), known as the *bill of lading*. There is the need to first establish what good is referred to before establishing the person in whose patrimony the respective good belongs.

Nevertheless, we will only analyze the ships in this research, as mentioned in the beginning of the material.

## 2. The ownership right and other real rights over the ship

**2.1.** When talking about the ownership right, we think about normative acts regulating property, as well as of a common definition for all the goods over which property s bore. Thus, the fundamental law regulates ownership in two articles, art. 44 and art. 136. These legal provisions do not define ownership; they only show its types and its place in the Romanian legal system.<sup>4</sup>

The old regulation provided for in the 1864 civil code, defined ownership as *the right someone has to enjoy and to command over a good exclusively and absolutely, but within the limits imposed by the law*<sup>5</sup>. The doctrine in the field has extended the definition, adding to it, in the sense that the ownership right has started to be considered the real right that entitles the holder to use the good according to its nature or purpose, to use and to command over the god absolutely, exclusively and perpetually, within the limits of the law and to the extent there is no prejudice to someone else's right.

From this definition have also been drawn the attributes of the ownership right, respectively the right to possess the good, the right to use the good, as well as the right to command over the same good. All these three attributes are recognized for the owner of the good.

The new civil code regulations delineate the types of ownership in art. 552 and subsequently, in art. 555 ownership is defined through its very attributes, namely the scope of the ownership right<sup>6</sup>. Starting from this definition, the new regulation of the ownership right

<sup>4</sup> Art. 136 of the Constitution of Romania

(1) Property is public or private.

(2) Public property is guaranteed and protected by the law and belongs to the state or to territorial administrative units. (...)

(5) Private property is inviolable, under the organic law.

Art. 44 of the Constitution of Romania.

(1) The ownership right, as well as state bonds, are guaranteed. The contents and the limits of these rights are established by law.

(2) Private property is equally guaranteed and protected by the law, regardless the owner. (...)

(7) The ownership right requires compliance with the duties regarding environmental protection and good neighbourliness, as well as of the other duties incumbent upon the owner by law or by custom.

<sup>5</sup> Art. 480 of the 1864 Civil Code.

<sup>6</sup> Art. 555 – The scope of the right to private property

brings into question the attributes of the right to property, respectively possession, use and control.

Nevertheless, according to some authors, the attributes are possession, use, the right to capitalization, as well as control. This enumeration does not substantially alter the composition of the attributes; it only prepares for the discussions which follow on the division of the ownership rights, thus on the other main real rights.

This approach is also useful to us in the study of ownership over ships, as well as of other real rights that can be encountered in this field.

It is also appropriate to mention here the existence of legal provisions regulating the publicity of movable and immovable property, since the adoption and come into force of the new civil code have brought together the commercial code, part of the legislation in the field of transports and in the maritime filed, the publicity of goods and part of the old civil code.

**2.2.** In what concerns the ownership of the ship or other real rights over it, the property deed and the owner have to be identified, after which the attributes of the ownership right and the movable publicity operations specific to the maritime filed can be discussed.

We keep in mind that before 01.10.2011, the Romanian legislation on maritime law and, implicitly, on the legal status of ships, consisted in the Commercial Code (Book I, Title 12, "On the transport contract", Book II, "On maritime commerce and on navigation", Book IV, "On carrying out commercial activities and their duration"), the Civil Code, the Code of Civil Procedure – all these represented the *common law* in the field of maritime law. Other special laws added to these, which completed the initial regulations.

Currently, it is still applicable the Government Ordinance [O.G.] no. 42/1997, which is the normative document regulating the registration of ships, the creation, transmission and extinction of real rights over ships<sup>7</sup>. In order to speak of these legal operations, a few specific elements for ships in the maritime field have to be considered.

In what concerns the ownership right over ships, there are two known ways of gaining property, namely: main means (such as: the construction of the ship and the sale and purchase of the ship) and derived means (such as, for example: the dissolution of the legal persons the ship belongs to, the seizure of the insured good by the insurer etc.)

Romanian legislation situates the building contract of the ship in the category of the leasing category, as it is regulated in the civil legislation. This legal relation may take the form of a contract for works. In relation to the complexity of the issues involved in the construction of a ship, this contact may be considered a contract for works and involves several particularities.

The contract for works is a mutually binding contract, by onerous title, commutative, of successive performance and consensual. In the common law, the law does not require a specific form for the validity of the contract for works. However, when talking about contracts for the construction of vessels, such agreements must be concluded in writing and cannot be enforced against third parties unless transcribed in the registries of the harbor masters or of the maritime authority where the construction takes place.

The contract for works is a *intuituu personae* type contract in what concerns the organization and management of the works. The contractor has to carry out the work itself, if there is a specific clause in the contract regarding this aspect or if this results from the circumstances.

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(1) Private property is the right of the owner to possess, use and control a good exclusively, absolutely and perpetually, within the limits established by the law.

(2) Under the conditions of the law, the right to private property is susceptible to arrangements and divisions, depending on the case.

<sup>7</sup> Section 3 of the Government Ordinance [O.G.] no. 42/1997, republished, in art. 30-43.

Under the legislation in force<sup>8</sup>, *the right to fly under the Romanian flag* is closely connected to the ownership of the ship. *This right is granted:*

a) to maritime ships and to inland waterway vessels either owned by or in the lease of Romanian legal or natural persons;

b) to maritime ships and to inland waterway vessels owned by natural persons having the citizenship of a member state of the European Union or belonging to the European Economic Area or to legal persons established in the European Union or in the European Economic Area;

c) to maritime ships and to inland waterway vessels owned by foreign natural persons domiciled in Romania or to the Romanian branches of the foreign legal persons, other than the ones mentioned at letter b);

d) to maritime ships and to inland waterway vessels owned by foreign legal or natural persons, hired through bareboat agreements or leasing, for periods over one year, by Romanian legal or natural persons.

Thus, we can find in the mentioned legal document references to ownership and to ship ownership, but to other real rights as well. We mention here the leasing, which is a form of loan, thus a contract through which the owner only transmits an attribute of ownership, namely the use of the good (the ship).

Both the legislation and the doctrine in the field mention persons in different capacities, other than the owner of the ship. Among these, we encounter the concept of “ship-owner”. The ship-owner is the person who equips the ship, appoints the commander and chooses the crew. We have to keep in mind that the capacity of ship-owner is not necessarily connected to the capacity of owner of ships.

Thus, the ship-owner can be the owner of the ship, namely, the legal or natural person who has gained the right of ownership over the ship, if this is the person who exploits the ship directly and immediately. But another legal or natural person can be the ship-owner, with the power of attorney of the owner of the ship to exploit the ship in its name, who falls under the obligation to equip the ship for the voyage.

The ship-owner is the one who provides the charterer with the full or partial transport capacity of the ship directly or through representatives such as: brokers or brokerage companies, shipping companies, forwarding companies etc. This is done under a shipping contract which may take a variety of forms.

### **3. Publicity of movable and immovable goods. Publicity in the maritime field**

From the legislation governing publicity in general, as well as from the doctrine, emerges the idea that publicity has not been organized for the transmission and encumbrance of all movable and immovable, tangible and intangible assets. The law generally distinguished between immovable and movable goods, since in this former case publicity is and remains a problem.

Regarding movable goods, there is the opinion that the attribute of possession, seen as a *status quo*, is the best mean of publicity, and the need to advertise movable operations has an exceptional character. The publicity of movable transfers must be limited to certain categories of movable goods, susceptible to individualization.

The real estate publicity represents a set of means provided by the law, ensuring the recording, security and enforceability against third parties of legal acts constituting, transmitting or extinguishing real immovable rights.

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<sup>8</sup> Art. 45, paragraph. 2 of Government Ordinance [O.G.] no. 42/1997, republished.

The norms of the civil law not only regulate the issuance, modification or termination of civil legal relations, but also the protection, preservation and guarantee of the subjective civil rights.

Over time, in our country, real estate publicity has been performed by several means, the two main systems being the one of the registries of transcriptions and registrations, on the one hand, and the one based on land registers, on the other hand. Aside from the two main systems, some intermediate systems have been regulated, such as: land book publicity, with a limited scope (for Bucharest and a few surrounding towns) and the land record book system, applicable in certain localities in Transylvania.

Regarding the publicity of movable items, the real security interest of the creditor is enforceable against third parties only by fulfilling publicity formalities. The publicity requirement is considered met upon the registration of the security interest notice in the Electronic Archive of Real Security Interests [Arhiva Electronică a Garanțiilor Reale Mobiliare], a computer tracking system of the priority of security interests structured on persons and goods. It is a public system and it can be accessed free of charge.

The archive is an electronic registry, accessible by all through an internet connection, which is managed only by authorized operators. The moment of the registration of the security interest confers its degree of priority over security interests registered subsequently, even on the same day.

Regarding publicity in the maritime/naval field, we note that for the transcription of the right of ownership there is a dedicated procedure, with certain specificities. Thus, for the transcription of the right of ownership over a ship the following documents are required: a request for the transcription of the ownership right in which three names will be listed, in the preferred order, if the change of the name of the ship is also in view; the property deed, in legalized copy; the registration certificate of the owner legal person in legalized copy or the normative act of establishment of the legal person in simple copy or the identity card or other official document showing citizenship in legalized copy, for natural persons.

For operations of registration, inscription, transfer of property, transcription of tasks or the change of the technical characteristics of the ship, such as: the type of ship, engine power, tonnage or load capacity of the ship, standard requests will be added.

The request for any operation will be made by the owner / operator of the ship or, depending on the case, by the interested parties. The related documents, in Romanian language, will be submitted in one copy, in original or legalized copy, except for the maritime ships that fall under the provisions of international conventions and which carry out international voyages, submitted in view of the granting, suspension or withdrawal of the right to fly the Romanian flag, which will be presented in two copies.

Legal documents concluded abroad are not enforceable against third persons unless transcribed in the registers of the Romanian diplomatic missions. The documents concluded in Romania in a different language than Romanian will be translated by an authorized translator whose signature will be certified by a notary public.

In the event in which it is requested to perform operations for a ship currently carrying out an international voyage, the mention in the document of nationality can be made diplomatically, through the consular office of the state on whose territory the ship is found.

### **Conclusions**

Analyzing the materials at hand in the study of the proposed topic, we have come to the conclusion that the study of this topic can be furthered and developed. The information itself is of interest for professionals, whether we are talking about lawyers, economists or other professionals.

I believe that the elements mentioned above have managed to open a gateway to the study of this field and to raise interest for a special activity, which can take place in full legality. Furthermore, the publicity operations regarding ships strengthen the stability of the civil circuit and help knowing the owner or the person in whose favour a privilege is constituted, including in the maritime field.

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