

BRIEF CONSIDERATIONS REGARDING THE PROPERTY TRANSFERRING OR ENGENDERING OF OBLIGATIONS CHARACTER OF THE SALES CONTRACT

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Abstract

I herein want to emphasize the main aspects regarding the property/real estate transferring or engendering of obligations character of the sales contract governed by the Romanian Civil Code of 2009.

Keywords: Sales contract, Real estate, Property, Real Estate Register.

1. Introduction

Art. 1650 par. 1 of the Romanian Civil Code (hereinafter referred to as the Civil Code) defines the sale contract as being *the contract whereby the Seller conveys or, as the case may be, undertakes to convey to the Buyer the property of a good in exchange of a price which the buyer undertakes to pay*. The definition provided by the Legislator may generate confusion in connection to the property transferring or, on the contrary, engendering of obligations character of the sales contract. The correlation of this legal text with other legal provision, as well as the observation of some novelty aspects in the sales matter are likely to clarify the perspective of Legislator as far as the definition of the Sales Contract goes.

2. Content

Apart from art. 1650 par. 1 of the Civil Code, we must also consider art. 1672 which, unlike the previous art. 1313 of the 1864 Civil Code from, includes, among the Seller's obligations, the obligation to convey the property of a good or, as the case may be, the sold right. Article 1674 of the Civil Code apparently comes in contradiction to Art. 1672 of the Civil Code which, similar to art. 1295 par. 1 of the 1864 Civil Code, provides that, *except of the cases expressly provided by law or if from the Parties' will does not result the contrary, the property transmits to the Buyer at the time of conclusion of the contract, even if the good was not given or the price was not paid yet*. The Seller's obligation of transmitting the property of the good or, as the case may be, of the sold right arises only in certain cases, explicitly or implicitly determined by law or by the Parties' agreement, namely in some cases when the property does not transmit de jure, and the Sales Contract is an engendering of obligation contract. In all other cases, the Sales

contract characteristic as being a property transferring contract prevails. Such a conclusion is also entitled by the provisions of art. 1273 of the Civil Code which, in the first paragraph, provides that *the real estate rights are established and transmitted by the Parties' agreement, even if the goods were not given, if the Parties agreed on some specific goods or, if the goods were individualized, on some gender goods*. According to par. 3 of the above-mentioned article, *the legal provisions in the real estate matter and also the special provisions regarding the transfer of some categories of movable goods remain applicable*.

Art. 1650 par. 1 second thesis of the Civil Code – *the Seller (...) undertakes to convey to the Buyer (...)* – must be linked with art. 1674 first thesis which clearly shows that, in some cases, provided by law or agreed upon by the Parties, the property is not a direct effect of the Sales contract, but an obligation undertaken by the Seller which follows, even if for a moment, the moment of the conclusion of the contract.

Art. 1650 par. 1 second thesis of the Civil Code does not comprise the Option Agreement and the Promise to Sell or the Promise to Buy. The Option Agreement provided by art. 1278 and 1668 of the Civil Code, turns into a genuine Sales Agreement at the time of exercising the option by the Beneficiary (the future Buyer), the latter being the owner of a potestative right. Once the option is exercised, the beneficiary's will meets the Promissory's will – which is an irrevocable offer – and thus the Sales Contract is concluded and it has a transferring of property character.

The Promise to Sell determines in the Beneficiary's patrimony a right of claim (personal right) as an equivalent of the Promissory's obligation (Seller) to conclude the contract, as an assortment of the compliance obligation (*facere*). Once this obligation is performed, the Sales Contract will be concluded which, in principle, has a transferring of property or constitutive of rights character.

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The Seller's obligation of transferring the property of the good or, as the case may be, of the sold right has the nature of a *dare* obligation, which is performed via the performance of a compliance obligation (*facere* obligation). The existence of *dare* obligation cannot be denied, being remembered both by the Legislator from 1864 and the Legislator from 2009. Some legal texts highlighted in the Fifth Book — About Obligations, Fifth Title — The Performance of Obligations, Chapter I — The Payment, Third Section — The Conditions of Payment and also the circumstances provided by the Civil Code in which the property/real estate right or any other right does not convey from the Seller to the Buyer at the exact time of concluding the contract outline the substance and the manner of the performance of *dare* obligation. The goal of the performance of *dare* obligation is the transfer of the property/real estate right. This is not a Roman legacy, but originated in the Glossators Era. In the Roman law system, *dare* obligation was not included in the scheme of consensual sale. Its recognition as a different concept from *dare* obligation was made through its goal, namely to convey the property of a good. In essence, the transferring of the property was made through *mancipatio*, *in jure cessio* or *traditio*, those representing the manifestation of *dare* obligation, which became effective through some compliance obligations (*facere* obligations).

The obligation is a bond by virtue of which the debtor is obligated to procure a benefit to the creditor, and the creditor has the right to obtain the due benefit (art. 1164 of the Civil Code). The object of the contract is the legal operation, such as selling, renting, lending and others alike, agreed by the parties, as results from the contractual rights and obligations (art. 1225 par. 1). The object of the obligation is the benefit to which the debtor undertakes. The above-mentioned legal provisions do not offer a clue regarding on which elements could be phrased a definition of *dare* obligation. Art. 1483 and 1488 of the Civil Code illustrate the object of *dare* obligation. Thus, the obligation to convey the property implies both the obligation to deliver the good and the obligation to preserve it until delivery, and the obligation to pay an amount of money is performed by handing over the nominal amount to the creditor. The payment has also the nature of a *dare* obligation, since the obligation to pay an amount of money is nothing but the transfer of the property on some fungible goods.

As we previously stated, the obligation to convey the property — *dare* obligation — is performed via a compliance obligation (*facere* obligation). In case of failure to perform by the Seller, the buyer may ask for the enforcement of the obligation, on the grounds of art. 1528 of the Civil Code, dedicated to the enforcement of the compliance obligation (*facere* obligation). The Civil Code is considering

just the enforcement of compliance and non-compliance obligations (*facere* and *non facere*). I believe that the explanation of this lays in the performance mechanism of *dare* obligation, which finds its purpose only through another instrument, namely the compliance obligation (*facere*). There is another version according to which there is no *dare* obligation but, according to their object, there are two types of obligations: compliance and non-compliance (*facere* and *non facere*), and the obligation of transferring the property is only an assortment of *dare* obligation, which can be subject to the enforcement procedure, as it does not violate debtor's liberty. Taking into consideration the legal provisions that govern the Sales Contract, as well as some legal provisions which outline the general legal regime of obligations, previously-quoted, this version seems difficult to accept.

Further, I will exhibit those cases in which the sales contract is a contract which engenders obligations, emphasizing how the transferring of the property operates.

1. The sale of immovable goods (Real Estate)

After the completion of cadastre for each administrative unit and opening on request or ex officio the land books, there will become applicable, among others, the provisions of art. 885 of the Civil Code, which establish the constitutive or transferring of rights effect of the registration in the Real Estate Register: under the reserve of some contrary legal provisions, real estate rights registered in the Real Estate Register are gained, both between the parties and to the third parties, only through the registration in the Real Estate Register, on the basis of the fact or the act which entitles the registration. The main legal provision in this matter is represented by art. 877 of the Civil Code, according to which the real estate rights registered in the Real Estate Register are rights subject to the registration in the Real Estate Register. They are acquired, modified and extinguished only with the compliance of the rules of the Real Estate Register.

Art. 876 par. 3 of the Civil Code defines the real estate as being one or more joined pieces of land, whatever category of use, with or without constructions, owned by the same person, placed on the territory of an administrative unit and which are identified through a unique cadastral number.

From the correlation of both art. 885 and 1676 of the Civil Code, according to which in the sales of real estate, the transferring of property from the Seller to the Buyer is subject to the Real Estate Register legal provisions, it follows that the transfer of real estate does not automatically operate at the time of the conclusion of the contract, but subsequently, through the registration of the gained right by the Buyer in the Real Estate. Thus, the Sales Contract becomes an engendering of obligations one and the Seller has the obligation provided by art.

1672 par. 1 of the Civil Code, namely to transfer the property of the good or, as the case may be, the sold right. This is *dare* obligation which is performed through a compliance obligation (*facere*). After art. 1673 par. 1 of the Civil Code provides that the Seller is obliged to transfer to the Buyer the property of the sold good, art. 1677 provides that the Seller is obliged to erase from the Real Estate Register, at his expenses, the registered rights on the sold good, if those rights are extinguished. Art. 1483 establishes that the obligation of transferring the property also implies the obligation to deliver the good and to preserve it until its delivery. As far as real estate rights registered in the Real Estate go, the obligation of transferring the property implies the obligation to deliver all the necessary inscriptions and documents in order to perform the registration. The Seller's obligation, provided by art. 1677 of the Civil Code is a first step towards achieving the goal of transferring the property, as only after the fulfilment of this obligation the Buyer can register his right. The fulfilment of the Real Estate Register formalities are a compliance obligation (*facere*).

The law provides to the Buyer the right to sue the Seller, if the latter does not perform his obligation of delivering all the necessary inscriptions and documents in order to perform the registration. Thus, according to art. 896 par. 1 of the Civil Code, when the person obliged to transfer, establish or modify in the benefit of another person a real estate right does not fulfill the necessary obligation in order to perform the Real Estate registration, the court can be asked to order the registration; this right is subject to a statute of limitation by law. In this respect, the request of the registration will be submitted to the district office in whose jurisdiction is situated the Real Estate.

Art. 888 of the Civil Code provides as a condition for registration an authenticated document by a public notary which proves the Seller's will to conclude the Sales Contract and also to transfer the Real Estate to the Buyer.

Until the time of registration with the Real Estate Register, the buyer has a *jus ad rem*, which further becomes *jus in re* – the Real Estate right. Although this metamorphosis seems curious, it represents the goal of the *dare* obligation, which is a legal fiction. From the conclusion of the contract until the time of registration with Real Estate Register, the Buyer's right is temporarily under protection, because, after the registration certificate is issued, the Real Estate Register is "frozen" for 10 days.

The correlative right of *dare* obligation is *jus ad rem*. According to the famous French jurist of the XVIII century Robert Joseph Pothier, *le jus in re, dont le droit de dominium est une des principales*

espèces, est un droit que nous avons dans une chose; le jus ad rem est un droit de créance personnelle que nous avons contre une personne qui s'est obligée à nous donner une chose, pour la contraindre à nous donner cette chose, dans laquelle nous n'avons encore aucun droit jusqu'à ce qu'il nous l'ait donnée. Le jus in re suit la chose, en quelques mains qu'elle passe, et il donne à celui qui a ce droit, lorsque la chose n'est pas par-devers lui, une action pour réclamer la chose, ou le droit qu'il a dans la chose, contre tous ceux qui se trouvent la posséder. Au contraire, le jus ad rem, qui e un droit de créance personnelle, suit la personne qui a contracté l'obligation de donner la chose. Il ne donne d'action que contre la personne qui a contracté l'obligation de la donner, et contre ses héritiers ou autres successeurs universels qui on succédé à son obligation: il n'en donne aucune contre des tiers qui posséderaient la chose qu'on s'est obligé de nous donner¹.

Given that the transfer of real estate is not achieved through *traditio*, the content of *dare* and, accordingly, of *jus ad rem*, is different compared to the one portrayed by Pothier. As noted above, the Seller is obliged to hand over the documents necessary for the registration in Real Estate Register.

The observations that I have previously made are subject to *condicio a qua*, namely the ending of the cadastre works in each administrative unit and opening, on request or ex officio, of land books. For the time being, the registration with the Real Estate Register is the same as the previous regulation, having the purpose of enforceability against the third parties, according to art. 56 par. 2 of the Law no. 71/2011 for the implementation of the Law no. 287/2009 regarding the Civil Code. However, this does not necessarily mean that the Sales Contract of immovable property does not have an engendering of obligations character. The characteristic of the Sales Contract as being a transferring of property contract or, on the contrary, an engendering of obligations contract, requires a broader interpretation. Although, between the Parties, as an effect of the conclusion of the contract, the right enters into the Buyer's patrimony, however the Buyer does not have a genuine Real Estate right yet. The striking feature of the Real Estate right is to be a right opposable erga omnes. In the eyes of third parties, until the registration with the Real Estate, there is not an utter right, inasmuch as the right cannot be opposed to third parties. Only upon the registration will the Buyer acquires a *jus in re*. Until then, the Buyer has a *jus ad rem* in relation to third parties and a Real Estate right in relation to the Seller.

¹ Șerban Mircioiu, Transferul dreptului de proprietate prin vânzare. Studiu de drept comparat (Bucharest: Universul Juridic, 2014), 168-169 apud Robert Joseph Pothier, Oeuvres complètes de Pothier, Tome 8, nouvelle édition (Paris: Thomine et Fortic Libraires, 1821) 89-90.

2. *Dies a quo* sales contract. *Conditio a qua* sales contract

The sales contract preserves its real estate/property transferring character, even if the parties have postponed the transfer of real estate/property by agreeing upon a *dies a quo* or a *conditio a qua*. This shall apply only if the sold good is not real estate or the sales contract does not engender the obligation to transfer real estate or property. A type of *dies a quo* sales contract is that which contains a title retentions clause, regulated by art. 1684 and 1755-1757 of the Civil Code. A type of *conditio a qua* sales contract is the trial sales contract, regulated by art. 1681 of the Civil Code.

3. Alternate sales contract

Art. 1461 par. (1) of the Civil Code provides that an obligation is alternative when its object consists of two main services and the performance of one releases the debtor of the whole obligation. If the seller undertakes the obligation to transfer the real or, as the case may be, the personal property of one of the two goods that constitute the object of the obligation, the contract has an engendering of obligations character, because the transfer of the real or, as the case may be, the personal property shall occur when the seller makes his choice between the two goods [art. 1462 par. (2)].

4. Sale of future goods

Art. 1658 of the Civil Code provides that, if the object of the sale consists of a future good, the buyer shall acquire the real or, as the case may be, the personal property when the good has been manufactured. With respect to buildings, real estate register provisions shall apply. In case of sale of goods belonging to a limited gender that does not exist at the date on which the contract is concluded, the buyer shall acquire the personal property when the seller will individualise the goods. When the good or, as the case may be, the limited gender is not manufactured, the contract is null due to the lack of its object. However, if it's the seller's fault that the good or, as the case may be, the limited gender is not manufactured, he shall be obliged to pay damages. In the meaning of this article, the good is considered to be manufactured when it can be used according to the destination in respect to which the contract was concluded.

The transfer of real or, as the case may be, the personal property is postponed until the good is manufactured. Thus, this type of sales contract has an engendering of obligations character.

In order to register the real property in building, the buyer has to exhibit the certificate of completion which proves that the manufacturing of the good is complete.

The transfer of real or, as the case may be, the personal property is postponed until the good is

manufactured. Thus, this type of sales contract has an engendering of obligations character.

5. Sale of another person real estate or, as the case may be, property

One of the novelties brought about by the Civil Code is the regulation of the sale of another person real estate or, as the case may be, property. Although subject to controversy under the former Civil Code, I am of the opinion that such a contract could be concluded prior to the entry into force of the New Civil Code on October, 1st, 2011.

According to art. 1230 of the Civil Code, if the law does not provide otherwise, goods belonging to a third party can constitute the object of the performance of a contract and the debtor is obliged to procure it and to transfer it to the creditor or, as the case may be, to obtain the permission from the third party. In case of non-performance of this obligation, the debtor shall be held liable for the damages thus caused.

According to art. 1683 of the Civil Code, if, on the date of conclusion of a contract regarding an individualised good, this good belongs to a third party, the contract is valid and the seller is obliged to ensure that the transfer of real or, as the case may be, personal property, from the third party to the buyer is made. The obligation of the seller shall be performed either by the acquisition of the good, or by the ratification of the sales contract by the third party, or by any other direct or indirect means which transfer to the buyer the real or, as the case may be, personal property in the good. The real or, as the case may be, personal property transfer shall operate *de jure*, if the law does not provide or the parties do not agree otherwise. If the seller does not ensure that the transfer of real or, as the case may be, personal property is made, the buyer is entitled to claim the avoidance of the contract and, as the case may be, damages.

If the seller would be the owner of the personal property which consists of a individualised good, the personal property would be transferred upon the conclusion of the contract. The sale of another person real or, as the case may be, personal property engenders for the seller the obligation to transfer the real/personal property. The seller is the debtor of a *dare* obligation and he shall perform it via a *facere* obligation. His performance could consist either in entering into a contract with the third party who is the owner of the good, or in convincing the third party to ratify the contract entered into by him and the buyer. There is a connection between the sale of another person property and the promise of another person deed. The expression used in art. 1683 par. (3) of the Civil Code "the real or, as the case may be, personal property transfer shall operate *de jure*" does not lead to the conclusion that the sale of another person real or, as the case may be, personal property is not an engendering of obligations contract.

6. Sale of gender goods

According to art. 1678 of the Civil Code, when the object of the sales contract consists of goods from a limited gender, the personal property shall be transferred to the buyer upon the date of the individualisation of those goods by delivering, counting, weighing, measuring them or by any other means agreed upon or imposed by the nature of the good.

If the individualisation is done by delivering the goods, the personal property shall be transferred by *traditio*, like in Roman Law. The performance of the obligation to deliver the goods is the vehicle that transports the personal property from the patrimony of the seller to that of the buyer. In other cases, the obligations to transfer the personal property and to deliver the goods are separate, but the former is performed through the same *facere* obligation which takes the form of counting, weighing, measuring them or by any other means agreed upon or imposed by the nature of the good. The choice of the goods that will be delivered to the buyer belongs to the seller, but the obligation to transfer the personal property will be performed only when and if at least medium quality goods are delivered. (art. 1486 of the Civil Code).

3. Conclusions

Having as main inspiration source the French Civil Code, the Legislator from 1864 assumed the characteristic of transferring the property of the Sales Contract, with some exceptions defined by the nature of the sold goods.

According to art. 644 of the 1864 Civil Code *property is achieved and transferred by means of inheritance, bequest, contract and traditio*. According to art. 557 par. 1 and 4 of the Civil Code, *the property may be achieved, according to the law, by means of contract, inheritance, bequest, accession, acquisitive prescription, the effect of possession in good faith in movable goods and fruit, by occupation, traditio and by court decision, when it is characterized by the transferring of property effect by itself*. With the exception of the cases expressly provided by law, as respects the immovable goods, the property achieves by means of the registration in the land book, in compliance with the legal provision provided by art. 888. The current regulation establishes, with the value of principle, the character of transferring of property of the contracts while preserving *traditio* as a manner

of achieving property, with special application in the gender goods matter.

The Real Estate alternated in the Romanian law system, as a consequence of the genesis of the Romanian state, with the exception of the Decree no.115/1938, aimed only at the opposability against third parties of the transferring of property achieved at the time of the conclusion of the contract. Thus, in the Old Kingdom was applied the personal publicity system of Real Estate, with French origins, whilst in Banat, Crişana, Maramureş and Bucovina was applied, even after War World I, the real publicity system of Real Estate Register, with Austrian origins.

Noting the shortcomings of the system established by Law no. 7/1996 regarding the cadastre and the land book publicity and taking into consideration the significance of the immovable goods in the civil circuit, the Legislator from 2009 stated the transferring of property or constitutive of right effect of the Real Estate registration, which will influence the Sales Contract, as it will become an engendering of obligations one.

With respect to movable goods, with the exception of gender goods, the Buyer acquires the right over the good once the contract has been concluded, which means that, in relation to this category of goods, the Legislator considered that possession is the most suitable form of publicity.

The transfer of Real Estate by means of the Sales Contract resembles with the Austrian legal system, follower of the *titulus and modus* theory, by the virtue of which the transfer of the Real Estate is split, similar to the ancient Roman consensual Sales Contract, in two acts: a personal act and a real act, meant to achieve the transfer of the Real Estate (the contract and the delivery).

The legal provisions analysed herein are not an absolute novelty as they are not completely unknown to the Romanian legal system, the Sales Contract characterized by the engendering of obligation character being, as many other legal concepts, a Roman legacy, even if the peculiarities of the legal mechanism and reasons why the sale had and has, in some cases, engendering of obligation effect, differ.

In spite of the difference between the movable and immovable goods, I salute the option of the Legislator, declaring myself a supporter of the engendering of obligations character of the Sales Contract and I hope that the effects of the registration in the Real Estate Register will be fully effective as soon as possible.

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