THE LACK OF REGULATION IN THE ROMANIAN CIVIL CODE OF THE LEGAL SOLUTIONS OF PRINCIPLE IN THE FIELD OF REAL RIGHTS

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Abstract

Romanian Civil code – Law no. 287/2009, entered into force at 1st of October 2011 – thoroughly regulates the matter of real estate rights. Unfortunately, the legislator had chosen that in some situations not to regulate a certain principle solution, useful for the determinate purposes of the subjects in their civil relations. In these cases, the Romania Civil code sends to the Court, which has to decide from case to case.

In the present study, we identified all the situations where the Romanian Civil code mentions such references and we proposed – de lege feredenda – some landmarks which the legislator could take into account in order to fix this lack of regulation.

Keywords: *Romanian Civil code, real estate rights, lack of regulation*

1. Introduction

As any other regulation included in a code, the regulation introduced by Law no. 287/2009 – the Romanian Civil Code[1] (hereinafter abbreviated RCC) – aims to legislatively cover all civil legal relations. As outlined in doctrine, codification 'implies intensive activity performed by the legislator, which means thoroughly revising the entire legislative material in order to remove obsolete and outdated rules (including customs), to fill in the gaps, to innovate legislatively (by introducing new rules, required by the evolution of social relations), to logically order the legislative material and to use modern means of legislative technique (by choosing the regulation manner and the external form of regulation; by using appropriate means of conceptualization)[2].

These important features characterizing the codification process of the rules governing civil legal relations were largely respected by the legislator when drafting Law no. 287/2009. Overall, the operative part of this statute – considering the specific meaning of the term as established by art. 44 of Law no. 24/2000 on the rules referring to the legislative technique for drafting new legislation[3] – meets the needs which led to the replacement of the previous regulation (which had been applied continuously since December 1865).

Nevertheless, on a detailed analysis of the solutions in the legal subject area of overall regulation of real rights (Book III – 'On property', art. 535-952 RCC), one notices that the legislator chose a debatable solution: in many cases, the rules which are provided for simply make reference to the courts for them to concretely determine how to resolve the dispute, in which, hypothetically, subjects of civil legal relations are involved.

Such an option is, in principle, open to criticism for at least two reasons:

a) By regulating such cross-referred rules, the legislator does not usually set indicative criteria for courts, so that the delivery of justice could be facilitated. Naturally, such criteria should have existed even in the substantive regulation of the issues specific to RCC and thus to be considered by the subjects of the civil legal relations in order to prevent the approach of taking recourse to the courts.

b) The legislator disregarded the particular situation existing in Romania involving the workload of the courts (especially those which deal with civil lawsuits). Excessively overloading the role of courts – a permanent reality after 1989 – should have constituted for the legislator a signal which should have led its activity towards finding appropriate solutions, in that taking recourse to the courts should have represented an extraordinary measure (without thus laying down obstacles that might unlawfully restrict free access to justice, enshrined in art. 21 of the Romanian Constitution).

In this study, we attempt to present the rules of the legal subject area governing real rights which comprise solutions of (necessary) recourse to the activity of courts. In addition to this, we put forward our own proposals to amend the texts in RCC in order to establish indicative legal benchmarks, so that the civil law subjects involved the respective legal mechanisms would be able to consider them in order to avoid going through a civil lawsuit.

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[1] Republished in the *Official Gazette of Romania*, Part I, no. 505 of July 15, 2011, as amended and supplemented.

[2] See N. Popa, *Teoria generală a dreptului* (The General Theory of Law), Ediția 5, Editura C.H. Beck, Bucharest, 2014, p. 188.

[3] Republished in the *Official Gazette of Romania*, Part I, no. 260 of April 21, 2010, as amended and supplemented.

2. Identifying the situations in which the legislator refers to court without laying down indicative rules which may be considered by the subjects of the employment agreements

2.1. Regarding accession

a) According to art. 587 para. (2) and (3) RCC, if the work was done by a third party in bad faith, the neighboring land owner can decide whether to request removing the work off the ground, by obliging the contractor to pay damages, if any, or to request registration of the neighbors' right of co-ownership in the land book. In determining the shares, the value of the land owned by the neighbor, as well as the value of half the contribution of the contractor shall be taken into account. In case of disagreement between the parties, *the court shall determine the contribution of each party to the resulting immovable property, and the shares in the right of ownership, respectively.*

Such a rule of reference could have been easily avoided if the legislator had laid down the obligation for the people involved in the legal situation hereto to recourse to a certified court expert specialized in civil and industrial engineering, mutually agreed, to determine each party's contribution to the resulting immovable property. Depending on this value, the shares in the right of ownership could have been properly established.

Even in the current regulation, in the process envisaged by the application of art. 587 para. (3) RCC, a certified court expert is to establish the value of the respective contribution, whereas the court shall only confirm the result of the evaluation.

b) According to art. 592 para. (1) RCC, whenever the owner chooses to force the contractor to buy the immovable property, in the absence of the parties' agreement, *the owner may request the court to establish a price and to issue a judgment which shall substitute the sales contract.*

Similarly with the situation referred to in subparagraph a) the recourse to court could have been avoided by laying down the obligation for the persons involved in this legal situation to use the services provided by an expert evaluator and, subsequently, to sign the sales contract (which, in such circumstances, would have become a forced agreement).

c) Art. 595 provides for the following: 'Whenever, under a provision of this section, the court is vested to determine the extent of indemnity or compensation, it will take into account the property price estimate calculated at the date of the judgment hereof.'

The property price estimate calculated at the date of the judgment is a landmark that is established by the expert evaluator, as court mediation might be missing.

2.2. Regarding the inviolability clause

Art. 672 para. (2) CCR provides that *the buyer of an asset may be authorized by the court to dispose of the respective asset if the interest that justified the inviolability clause has disappeared or if a higher interest requires it.*

Recourse to court could have been avoided if the obligation for the buyer-vendor to explicitly justify the conveyancing document had been laid down, if the interest which justified the inviolability clause had been eliminated or if a higher interest that would have required the selling operation had been manifest.

2.3. Regarding the manifestation of the legal limits of the right of ownership

Art. 630 RCC provides for the following:

'(1) If, by exercising his/her right, the owner causes inconvenience higher than normal in neighborly relations, the court may, on grounds of fairness, require of him/her to pay damages to the aggrieved party, as well as to re-establish the earlier situation when possible.

(2) If the damage caused were minor in relation to the necessity or usefulness of carrying harmful activity by the owner, the court may approve the conduct of that activity. But the aggrieved party will be entitled to damages.

(3) If the damage is imminent or very likely, the court may approve, by way of presiding judge's order, the measures necessary to prevent damage.'

Exceeding the limits specific to manifesting the normal neighborhood inconveniences between two immovable properties involves court intervention, in all the three cases regulated by the three paragraphs of art. 630. Except for the regulation hypothesis in para. (3), which is justified (but which is legislatively covered by art. 997 et seq. of the Code of Civil Procedure, referring to the special procedure of presiding judge's order), the other two situations might have been regulated especially by considering the manifestation of obligation of the respective subjects to reach agreement on settling the dispute between them; we believe that it is such a solution that would be consistent with the requirements expressed by the principle of equity.

2.4. Regarding the status of co-ownership

a) Upon co-owners' signing the administration contract or the deeds of disposition for the property being owned in shares, according to art. 641 para. (3) RCC, the co-owner or the interested co-owners '*can ask the court to substitute the agreement of the co-owner who was unable to express his/her will or who is abusively opposing to draft a administration contract essential to maintain the usefulness or the value of the asset.'*

This solution is excessive, completely unjustified. The law could provide that, in such a situation, the co-owner or the interested co-owners could nevertheless sign the administration contract, even if the co-owner

who is (objectively) unable to express his/her will or who abusively opposes to draft such a contract does not agree, on condition that the drafter(s) of the contract mention(s) the occasion which has given rise to its conclusion without the participation of all co-owners.

b) Given the situation of forced co-ownership, with reference to the common parts of the buildings with several floors or apartments, art. 657 para. (2) RCC provides that, in case the extent of damage caused to a part of the common property amounts to less than half the value of the property, *'co-owners shall contribute to rebuilding the common parts, proportionally to their shares. If one or more co-owners refuse or are unable to participate in rebuilding, they are obliged to waive their shares in their right of ownership to the other co-owners. The price is determined by the parties or, in case of disagreement, by the court.'*

The price might have been established – if the law had laid down this obligation for co-owners – by an expert evaluator, without the need for court intervention.

2.5. Regarding the usufruct

Art. 747 RCC provided for the following on the extinction of usufruct in case of abuse of use:

'(1) The usufruct may be terminated at the request of the bare owner when the beneficial owner abuses the use of property, causes damage to it or lets it deteriorate.

(2) The creditors of the beneficial owner may start a lawsuit to preserve their rights; they may commit to repair the damage and provide guarantees for the future.

(3) According to circumstances, the court may decide either the extinction of the usufruct or the takeover of the use of property by the bare owner, who is obliged to pay the beneficial owner an annuity during the duration of the usufruct. When the property is immovable, in order to guarantee the annuity, the court may order the registration of a mortgage in the land book.'

The intervention of the court, corresponding to the situations highlighted in para. (3) of art. 747 RCC might be legally replaced by the bare owner's conduct, which should be expressed in an appropriate and direct manner. The bare owner – justifying in advance the abuse of use ascribable to the beneficial user and being authorized by law – could directly take over the use of property. Similarly, if in such a situation, the beneficial owner could – without the need for court intervention – to require registration of a mortgage in the land book.

2.6. Regarding easements

Art. 772 RCC provides for the following on redeeming the right of way:

'(1) The right of way shall be redeemed by the owner of the servient tenement if there is a manifest disproportion between the usefulness assigned to the dominant tenement and the inconveniency or the depreciation caused to the servient tenement.

(2) In case of disagreement between the parties, the court may substitute the consent of the dominant tenement's owner. When determining the redemption price, the court shall take into account the age of easement and the change in value of the two tenements.'

The law could establish the right of the servient tenement's owner to directly benefit from the right of way, given the hypothesis regulated in para. (1) of art. 772 RCC. In such a situation, a hypothesis on the manifestation of a forced contract should also be regulated, the price being set by an expert evaluator.

2.7. Regarding the institution of managing somebody else's assets

a) To ensure the maintenance of the destination of the assets under administration, according to art. 797 RCC, the trustee 'is obliged to continue the manner of use or operation of the fruit bearing assess without changing their destination, unless he/she is authorized by the recipient or, in case of preventing it, by court.'

If the necessity to change the manner of use or operation of the fruit bearing assets and their destination is objectively justified, the trustee could benefit from the legal permission to make the required changes, emphasizing the fact that the recipient is objectively unable to authorize this change.

The same situation occurs when authorizing deeds of disposition. In this respect, art. 799 para. (1) RCC provides for the following:

'When administration concentrates on a determined individual asset, the trustee shall be able to onerously dispose of the asset or to encumber it with a collateral, when deemed necessary to preserve the value of the asset, to pay off debts or to maintain manner of use appropriate for the intended destination of the asset, only with the recipient's authorization or in case the latter is hindered or has not yet been determined, with the court's authorization.'

Para. (3) thereof provides for the following: '*When the administration concentrates on all the assets, the trustee can dispose of a determined individual asset or to encumber it with collateral whenever deemed necessary for the proper administration of the universality. In other cases, prior permission of the recipient or, where appropriate, of the court, is necessary*.'

The solution we propose is the same as the one for maintaining the destination of the administered assets.

b) The legal regime of full administration assumes in reference to the prohibition of acquiring rights in respect of the administered assets, the manifestation of an exception, in that the trustee shall be able to sign the documents concerning the administered assets

or to acquire, otherwise than by inheritance, any type of rights on the respective assets or against the recipient, *'on the recipient's express mandate or, in case the latter is hindered or has not yet been determined, on the court's mandate.'*

At least when the trustee justifies the manifestation of an objective impediment that hinders the recipient to give him/her the mandate, the law might establish the possibility of drafting the documents deemed necessary in the case, without the need for court intervention.

c) With respect to full administration regime, art. 812 RCC, which focuses on mitigating the trustee's liability, provides for the following: *'In determining the trustee's liability limits, as well as the damages that he/she owes, the court shall be able to reduce the amount, given the circumstances related to assuming administration or the free nature of the trustee's service.'*

This regulation is unnecessary because it is a sovereign attribute of the court, regardless of any express legal permission given in a particular situation, to determine the extent of liability of a person proportional to the damage, which may be evidenced by the person entitled to repair it.

d) Regarding the obligation of the trustee to perform inventory and to provide securities, art. 818 and art. 819 RCC provide for the following:

- art. 818:

'(1) The trustee is not required to perform the inventory, to underwrite an insurance policy or provide other security for proper performance of his duties, in the absence of a provision in the articles of incorporation, of a subsequent agreement of the parties, of a legal order to the contrary or of a court order passed on demand of the recipient or any other interested person.

(2) If such an obligation was established as the trustee's duty by law or by court order, the trustee shall be able to request the court, for good reasons, to be dispensed with its fulfillment.'

- art. 819:

'(1) In dealing with the requests under art. 818, the court shall take into account the value of the goods, the situation of the parties, as well as other circumstances.

(2) The court shall not accept the request for establishing that it is the trustee's duty to deal with the inventory, the securities or the insurance, if, in this manner, a provision to the contrary included in the articles of incorporation or a subsequent agreement of the parties were violated.'

If the trustee could come up with good reasons to be exempted from fulfilling the obligation to perform the inventory, to underwrite an insurance policy or to provide other security for proper performance of his duties, legally, one might establish that carrying out administration without assuming such obligations might be done on the trustee's own initiative.

In this context of analysis, we underline the fact that art. 819 para. (2) RCC is meaningless.

e) In the case of adopting decisions in special circumstances, the regulation on collective administration and delegation lays down that trustees shall be able to individually draft preservation deeds [art. 826 para. (1) RCC]. By exception, according to para. (2) and (3) of the same article:

'(2) If decisions cannot be validly taken because of constant opposition of some trustees, the other documents related to managing other person's assets shall be drafted in case of emergency, by court authorization.

(3) To the extent that misunderstandings between trustees persist and administration is seriously affected, the court may order, at the request of any interested person, one or more of the following measures:

a) to establish a simplified mechanism for the adoption of decisions;

b) to distribute the tasks among the trustees;

c) to impart a casting vote, in case of a tie, to one of the trustees;

d) to replace the trustee or, where appropriate, the trustees to whom it is ascribable the given situation.'

The authorization provided for by art. 826 para. (2) for the court to determine is not necessary. As for the measures provided for by para. (3), they should be initiated and established by the recipient.

f) With regard to blue chip investments art. 833 RCC provides for the following:

(1) The trustee may deposit the sums of money entrusted to a credit or insurance institution or to an undertaking for collective investment, to the extent that the deposit is redeemable on demand or at notice within 30 days.

(2) The trustee shall be also able to make deposits for longer periods to the extent that they are fully guaranteed by the Romanian Bank Deposit Guarantee Fund or, where appropriate, by the Romanian Policyholders Guarantee Fund.

(3) If the guarantee provided for by para. (2) is unavailable, the trustee shall not be able to make deposits for longer periods, unless the court authorizes it and in accordance with the rules laid down by the court.'

In such a situation, authorization should also be first expressed by the recipient, excluding – in principle – the intervention of the court.

g) The annual trustees' report includes the right of the recipient to conduct an audit of the administration. According to art. 843 para. (4) RCC, *'If the trustee opposes auditing, the interested party may request the court to appoint an independent expert to check the report.'*

The appointment of the expert should be done – at least initially – directly by the recipient.

h) Regarding administration, RCC provides for the hypothesis of legal discharge of administration. In this respect, art. 851 provides for the following:

'(1) If any of the recipients does not accept the report, the trustee can ask the court to approve it.'

(2) Whenever deemed necessary, the court shall order for a specialized expertise to be performed.'

The expertise provided for by para. (2) art. 851 RCC could be carried out without it being manifest in resolving a lawsuit.

i) At the end of this paragraph, we left the references in art. 844 and 846 RCC, respectively, from which one could infer that the law may also give the court both the opportunity to establish the distribution of powers between the trustees (when the administration is carried out by two or more trustees) and the opportunity to order the replacement of the trustee.

2.8. Regarding the regulation of the land book

a) Changing the immovable property registered in the land book – art. 879 para. (3) RCC provides for the following: 'Annexation or detachment of encumbered immovable property shall only be done with the consent of the holders of those encumbrances. The refusal of the encumbrance holders should not be abusive, as it may be censored by the court.'

Going to court in this situation might be avoided if the law provided for the right of the owner to perform the operation of changing the immovable property – annexation or detachment – without the consent of the encumbrance holder, who, abusively, refuses to give his/her consent, on condition that the conduct of the encumbrance holder is put in writing.

b) The date of taking effect of the registration in the land book – art. 890 para. (3) RCC provides for the following: 'If more applications were received on the same day by post or courier, the mortgage rights shall have the same rank, and other rights shall gain equal rank only temporarily, followed by the court's decision, at the request of any interested person, on the rank and, if necessary, on the deletion of invalid registration.'

We believe it is imperative that the legislator would establish one or more criteria for delineating the ranks for the guarantee rights (other than mortgage).

c) Rectifying the registrations in the land book – according to art. 908 para. (3) RCC, 'When the right registered in the land book is to be rectified, its holder is obliged to hand over the entitled party, together with the consent engrossed in duly certified notarial form, enabling the performance of the rectification, and the necessary documents, as, otherwise, the interested person shall be able to request the court to order registration in the land book. In the latter case, the decision of the court shall substitute the registration consent of the party, who is obliged to submit the documents necessary for the rectification.'

In such circumstances, the law could lay down that the operation necessary to register the rectification might not need court intervention.

3. Conclusions

In all the aforementioned cases, we believe it is both possible and necessary for the legislator to intervene in order to establish legislative solutions which should not make reference to court. Only in this way the role and purpose of the regulations contained in the Romanian Civil Code would be fully manifest.

This approach would not involve depriving of or limiting the possibility of the subjects of civil legal relations to take recourse to court whenever substantive rights or legitimate interests would require this.

References:

- N. Popa, *Teoria generală a dreptului* (The General Theory of Law), Ediţia 5, Editura C.H. Beck, Bucharest, 2014.