THE CONDITIONS FOR THE VALIDITY OF THE GOOD AS OBJECT OF THE SELLER'S OBLIGATION BASED ON THE NEW CIVIL CODE

Ana-Maria DIACONU
University Lecturer Ph.D., Juridical Sciences Department
Faculty of International Relations, Law and Administrative Sciences
University "Constantin Brâncuşi"of Târgu-Jiu, Romania

ABSTRACT: *NO DOUBT, THE CONTRACT OF SALE IS, CURRENTLY, THE MOST COMMON CONTRACT, STANDING OUT SALES EXPANSION WITH INCREASING LIVING STANDARDS, MOBILITY OF PERSONS, LACK OF SPACE.*

THE NEW CIVIL CODE DOES NOT RADICALLY ALTER THE CONTRACT OF SALE MATERIAL, BUT BRINGS SOME NEW ELEMENTS OVER WHICH WE WILL FOCUS IN TERMS OF THE CONTRACT SALE. NEW REGULATION SHOWS A MORE DETAILED PERSPECTIVE OF THE ESSENTIAL CONDITIONS THAT MUST BE FULFILLED BY THE GOODS AND THE PRICE, BY INCLUDING IN ITS PROVISIONS SOME SOLUTIONS FROM JUDICIAL PRACTICE AND DOCTRINE.

KEY-WORDS: *CONTRACT OF SALE, ESSENTIAL CONDITIONS, THE GOODS, SELLER'S OBJECT*

1. General considerations on the object of the selling contract

The selling contract is, certainly, the most spread contract nowadays, being noticed a growth of the social relationships that are the object of this legal act, with the growth of the personal movability phenomenon, the rising of the level of social development and of the lack of space.

The new Romanian Civil law, focused on updating the provisions contained by the Civil law in 1864, as well as on legalising some similar situations in application for which there were not legal particular provisions, summarise a global regulation of the selling contract in Chapter I of the Vth Book, "On Obligations", from Title IX, "Different Particular Contracts", realising, in fact, new re-organisations on the level of other particular institutions specific to civil law[1].

Taking into account that the object consists a fundamental, validation and general condition of the civil legal act[2], this article focuses on the object of the selling contract and on the essential conditions that the sold good and price must fulfil in order to be considered validly concluded the selling contract, with *the general conditions of the validity of the object* of a civil legal act (*to exist, to be in the civil course, to be determined or determinable, to be possible, to be legal and moral, to consist in a personal fact of the one which is obliged*).

If according to the doctrine of the previous regulation the object of the legal act coincided with the object of the legal relationship that begun, modified or terminated from this legal act (consisting in the conduct of the parties, respectively the actions or interactions to which they are entitled or to which the parties are obliged, and in the case when the conduct concerned as good[3], this formed the derived object of the civil legal act), *the new Civil law differentiates among the object of the contract and the object of the obligation*.

Starting from the definition of the selling contract sustained by the doctrine, reckoned by the new Civil law at art. 1650 par. 1 – where the selling is defined as being the contract by which the seller transmits or, is obliged to transmit to the buyer the property on a good in exchange of a price that the buyer is obliged to pay –, and analysing the provisions of art. 1125 par. 1 and art. 1226 par. 1 NCCC, we conclude that the object of the selling contract is the legal operation – the selling, and the object is the activity to which the debtor is obliged (in the selling contract both parties have the double quality of creditor and debtor).

In fact, the legal operation refers to the conduct of the parties, meaning the transmission of a patrimonial right or the obligation to transmit such a right by a contract party in exchange of the payment of a price by the other party, and the activities to which the parties are obliged are only the actions and inactions to which the parties are obliged (the seller assumes, among other, the obligation to give the thing to the buyer, and s/he has the obligation to pay the amount of money due to the buyer, as equivalent to the thing sold, as a price)[4].

Concerning *the object of the activity* of the parties, this is, for the seller, *the thing sold*, and for the buyer, *the price aid*.

2. The good sold

The sold good[5], as object of the activity of the seller, must fulfil, to validate the contract, the following conditions: to be in the civil course (in the commerce, according to art. 1229 and art. 1657 NCC), to exist at the conclusion of the contract or to be able to exist in future, to be determined or determinable, legal and possible, the seller to be the owner of the good sold individually determined.

2.1. The good to be in the civil course (in commerce[6]). In contrast to the Civil law of 1864, that repeated this provision, of art. 963, and in the regulation on the selling contract, at art. 1310, the new Civil law keeps this provision applicable to the contracts generally, not focussing, exceptionally, within the legal provisions applicable for the selling contract[7]. So, art. 1229 NCC provides that *only the goods that are in the civil course may be the object of a contract activity*, and art. 1657 NCC provides that *any good may be sold freely, if the selling is not forbidden or limited by law or by convention or will*.

So, establishing *the principle of the free circulation of things* possible to own, to become the object of the property right or of other legal relationships, it results an important derogation to this principle for the selling contract concerning the things that, according to law, are *extra commercium*.

The prohibition focuses either only the impossibility to give away some goods, that by their type or by a provision of the law are of public use or interest (absolute prohibition), or only the particular legal regulations, restrictive, of the circulation of some goods, that may be sold-bought only by certain persons, in particular conditions (relative prohibition), for reason of public or social-economic order[8].

So, are completely taken out of the civil course, are not able to consist the object of the selling contract, only the things that, by their type are not possible to consist the object of the property right and of the legal acts – as the human body and its parts –, that do not belong to anyone and of which use is common to all (*res communis* – the air, the sunrays, the sea water etc.). Also, according to art. 136 par. 3 of the Constitution, the resources of public interest of the underground, the air space, the water with energetic potential possible to be operated of national interest, the beaches, the territorial sea, the natural resources of the economic area and of the continental plateau, as well as other goods declared by common law consist the exclusive object of the public property right.

The law[9] declares the good within the public area of the country (of national interest) or of the administrative-territorial units (of local interest) impossible to be given away, unprescribable (both extinctively, and acquirably) and inseasible (may not be subjected to execution).

Within the legal provisions, the goods public property may be *given in order to be managed[10]* by public companies, mayories, authorities of the central and local administrations, to other public institutions of national, county or local interest, may be leased or loaned by public auction or may be given to be used for free, for a period, to persons without any working purpose, that conduct charity or public use activities or public services, but may not be sold-obtained for how long they belong to the public area[11].

According to the provisions of art. 868 NCC, the holder of the management right may use and dispose of the good managed within the legal conditions and by the constituting act.

Concerning the role of leaser, this may be granted to any natural or artificial person (art. 871 par. 2 NCC). In all cases, the exercise of the leasing right is subjected to the control from the leasing party, within the conditions of the law and of the leasing contract.

It is important that the fields and other goods from the private area of the country and of the administrative-territorial units – if they are not into the public area by changing the use, according to art. 7-8 of Law no. 213/1998 concerning the public property and the legal regulations on it - are subjected to the common legal law, if by law it is not provided something else, applying, in case of being given away, the provisions for the selling contract. In fact, one must take also into account, under sanction of absolute nullity, the provisions of Law of the local administration no. 215/2001, that are for public order[12].

Another case of *impossibility of being given away*, but only *temporary*, is mentioned at art. 32 of Law of the real estate fund no. 18/1991 concerning the fields that consisted the object of the private property right according to art. 19 par. 1, art. 21 and art. 43, and that may not be given away by legal acts among alive persons for 10 years, calculated from the beginning of the year following the registration of the property was made, under sanction of absolute nullity of the giving away act. In this category there is the situation of some buildings used for living given in the state property that may be bought by the tenants holding a loan contract (the impossibility to give away provided by art. 9 of Law no. 112/1995).

Concerning the *conventional impossibility to give away*, the new Civil law provides a novelty for the clause of the impossibility to give away (art. 626-629 NCC). This is the clause contained within a convention or will, by which it is forbidden the giving away of a good sold, donated, inherited etc. and that, in order to be recognised as valid and opposable, must fulfil the following conditions: to be within a convention or will, to be

justified by a serious and legal interest, to not have a longer period than 49 years, the period starting from the acquisition of the good.

The clause of the impossibility to give away may be terminated by the agreement of the parties, by court decision or by noticing its nullity, leading to the nullity[13] of the whole contract if it was important for the conclusion of the contract.

2.2. The good must exist when the contract is concluded or possible to exist in future (the actual or future existence).

Concerning the actual existence of the good that consists the object of the seller's activity, there are two situations that must be taken into account:

a) if at the moment of the selling of an individual good determined it *was destroyed as a whole*, the contract does not have any effect, the selling being null absolutely, because the seller's obligation is lacking the object;
b) if the good *was partly destroyed*, the buyer that did not know this fact may request either the annulment of the selling, or the reduction in accordance of the price (art. 1659 NCC).

Because it is before the conclusion of the contract and accordingly the transfer of the property right, the risk of the **destruction** in whole or in part of the good is supported by the seller (*res perit domino*). The exception is when the operation has arbitrary character, so, at the conclusion of the contract, the buyer is aware of the risk of the total or partial destruction, but buys, hoping that it did not appeared (*emptio spei*)[14].

If concerning the selling of the good destroyed the provisions are kept, a more global provision is granted to selling a future good, that in the previous Civil law was mentioned briefly oat art. 295. So, the future goods may consist the object of the selling contract (*res future*), that, even if do not exist on the conclusion of the contract, may exist in future, unless the transfer of the property right operates only at the moment of the realisation[15] of the good, so the risk of the contract is supported by the seller.

By principle, the consequence of the non-realisation of the good is the lack of effects of the selling contract. All in all, if the non-realisation is determined by the seller's fault, s/he is obliged to pay prejudice. How long the good is not realised, the seller may not be obliged to pay the price, and if it was fully or partially paid, in advance, the buyer is entitled to the restitution of the advanced amounts. However, based on the principle of disposability, art. 1658 par. 4 provides the possibility for the buyer to take the risk of non-realising the good, s/he is obliged to pay the price[16].

When the good is realised only in part, the buyer has the possibility to choose either the termination of the selling, or to ask for the reduction in accordance of the price.

2.3. The good is determined or determinable, legal and possible.

In order to operate the transfer of the property and of the risks it is necessary the individualisation, for the same types of goods, so we will define individually determined (*res certa*) those goods that, according to their type or to the will expressed in the contract, are individualised by their specific features.

It is generally determined (*res genera*) the good that individualises by the features of the species or of the category to which it belongs (the individualisation is made by weight, size, number etc.). The condition is fulfilled also when the thing is *determinable*, respectively if the contract concluded establishes the criteria by which the object may be determined (by example, on term)[17].

The condition that the good be legal is not fulfilled when the object of the legal act is prohibited by law or contradicts the good manners, the contract being absolutely null

(for instance, the buyer of a good come from smuggling, knowing its provenance, will not be able to request, on its confiscation, the restitution of the paid price).

The condition that the good be possible is imposed by the legal rule according to which no one is obliged to the impossible (*ad impossibilum nulla obligatio*), operating only for the absolute impossibility. If, in exchange, the impossibility is relative, only concerning a certain debtor, then the object of the act is valid, and in case of non-realisation of the debtor's fault, is engaged his/her civil responsibility.

The impossibility may by legal or material and must be appreciated dynamically, depending on the level of civilisation and of the technique and on the technico-scientific progress (which is not possible today, may become tomorrow possible)[18].

Regulating the initial impossibility of the object of the obligation, art. 1227 NCC provides that *the contract is valid even if, on its conclusion, one of the parties is in the impossibility of exercise its obligation, unless the law provides something else*

2.4. The seller is the owner of the good sold individually determined. Actually, this condition does not affect any more the validity of the selling contract.

According to the provisions of art. 1230 NCC, if the law does not provide something else, the goods of another party may be the object of an activity, the debtor being obliged to acquire and transmit to his/her creditor or to obtain the agreement of the other party. If the obligation is not exercised, the debtor is responsible for the prejudice caused. So, the buyer will be able to request the resolution of the contract, the restitution of the price and prejudice[19].

In addition, art. 1683, par. 1 NCC provides that, if on the conclusion of the contract on an individually determined good it is owned by another party, the contract is valid, and the seller is obliged to assure the transmission of the property right from its holder to the buyer.

It does not constitute a cause of annulment the situation when *the owner sells the good concerning to which there is a pre-emption right to another party, and* the notified pre-emptor exercises his/her right[20].

REFERENCES

[1]. L.M. Trocan, Some considerations concerning the field of application of the provisions of VIIth Book of the new Civil Law and of the new Civil Procedure Law, Volume of the Annual session of scientific communications of the Institute for Legal Research of the Romanian Academy "Romanian Legal Doctrine: between Tradition and Reform". Universul Judiciar Publishing House, Bucharest, 2014.

[2]. See in addition L.M. Trocan, The legal institution specific to the Anglo-Saxon right – the thrust – in light of the provisions of the Hague Convention of 1985 concerning the law applicable to thrust and on its recognition, Volume of the Annual session of scientific communications of the Institute for Legal Research of the Romanian Academy "Justice, Legal State and Legal Culture" Universul Juridic Publishing House. Bucharest, 2011, p. 597-605.

[3]. For the definition of the good see L.M. Trocan, Conflict rules for goods within the new Civil law, Annals of the University "Constantin Brancusi" of Targu Jiu, Series Law Sciences, No. 2/2011, p. 90.

[4]. The difference between the object of the legal act and the object of the obligation is interested for two of the validity conditions of the selling contract as civil legal act, that the civil legal act must have a determined object, while for the obligation it would be sufficient only a determinable object on the conclusion of the legal act. In addition, it would be possible that the legal operation, globally,

be illegal, even if the object of each obligation, each activity, have this character, as there is the possibility that the legal operation be legal, but the activities or some of them be illegal. See G. Boroi, *Civil Right Course. General Part*, Edition 2 revised and completed, Hamangiu Publishing House, Bucharest, 2012, p. 165.

[5]. When contractual obligation refers to a good that is regarded as a derived object of civil legal relationship - see, for details, R. Peptan, Civil Law. General Theory of Civil Law, "Academica Brancusi" Publishing, Targu-Jiu, 2009, p 85.

[6]. For the definition of the commerce see L.M. Trocan, United Nations Organization Preoccupations, the Hague Conference on the private international law and the European Union on the regulations of the electronic commerce, Annals of the University "Constantin Brancusi" of Targu Jiu, Series Legal Sciences, No. 4/2011, p. 107.

[7]. See Al. Hopulele, *Selling Contract in Light of the New Civil Law*, in *Civil Law Noted by the Experts of the Top Lawyer Firms in Romania*, Vol. II, Collection Lex Dex, Saptamana Financiara, Bucharest, 2011, p. 158.

[8]. In the category of the restrictively circulating goods we mention: goods of a state monopoly (may be sold, respectively bought only by natural/artificial persons authorized based on a license): weapons, ammo and explosives, narcotic products and substances, tobacco, toxic residues, metals and precious stones etc.

[9]. According to art. 136, par. (4) of the Constitution, republished, art. 861 and art. 874, par. (1) NCC.

[10]. The managing right consists by a Government decision, of the County Council or of the Local Council (art. 867 NCC).

[11]. See Fr. Deak, *Civil Law Treaty. Special Contracts*, vol. I, Universul Juridic Publishing House, Bucharest, 2006, p. 62.

[12]. *Idem*, p. 63.

[13]. About the action for annulment of the act, see R. Peptan, *Valorificarea nulităţii actului juridic civil. Modalităţi de validare sau valorificare a actului juridic civil nul*, Annals of the „Constantin Brâncuşi" University of Târgu Jiu, Juridical Sciences Series, Issue 4/2011, p 135-136.

[14]. Sea F. Deak, *op. cit.*, p. 70.

[15]. The good is considered realized when it exists and it is able to be used accordingly to its use, *per a contrario* we understand that the mere material existence of the good, without being able to be used accordingly to its purpose, will not lead to the fulfillment of the condition of the operation of the transfer of the property right.

[16]. See Al. Hopulele, *op. cit.*, p. 158.

[17]. C. Turianu, *Civil Right Course. Special Contracts*, Universitara Publishing House, Bucharest, 2008, p. 44-45.

[18]. Gh. Beleiu, *Romanian Civil Right*, Sansa Press and Publishing House Ltd., Bucharest, 1999, p. 155, apud Florin Motiu, *Special Contracts in the New Civil Law*, Edition III revised and completed, Universul Juridic Publishing House, Bucharest, 2011, p. 50.

[19]. Prior to the new Civil Code, under the influence of the theory that the contract is void if the property sold is owned by someone other than the seller, it was considered that the acquisition of ownership by the seller after the sale of its lead to consolidation (validation) that sale. In this regard, see R. Peptan, *Valorificarea nulităţii actului juridic civil. Modalităţi de validare sau valorificare a actului juridic civil nul*, Annals of the „Constantin Brâncuşi" University of Târgu Jiu, Juridical Sciences Series, Issue 4/2011, p 143.

[20]. By exercising the pre-emption right the selling contract is a posteriori terminated, in its exchange being concluded within the same conditions a selling contract between the pre-emptor and the seller. The Parliament presumes that this selling is realized under the suspension condition of the pre-emption right. For details concerning the exercising of the pre-emption right, see R. Peptan, G. Cimpu, *Aspects regarding the Pre-emption Right in the New Civil Law*, Annals of the University "Constantin Brancusi" of Targu Jiu, Series Legal Sciences, No. 3/2013, p. 178-180.