

## **THE LEGAL CHARACTERS OF THE SALES CONTRACT**

**Sorin Fildan**

Faculty of Law of "Vasile Goldis" Western University, Arad, Romania

Ph. D. Associated Professor

E-mail: [sfildan@uvvg.ro](mailto:sfildan@uvvg.ro)

**Narcisa Mihaela Stoicu**

Faculty of Law of "Vasile Goldis" Western University, Arad, Romania

Ph. D. Associated Professor

E-mail: [nstoicu@uvvg.ro](mailto:nstoicu@uvvg.ro)

### **—Abstract —**

Although it is envisaged to be a classic and easy topic in its theoretical approach, the establishment and analysis of the legal characters of the sales contract is the starting point in the legal configuration of this contract.

The sales contract is regulated in articles 1650-1762 of the new Civil Code (which make up Chapter V "The Sales Contract" of Title IX "Various Special Contracts" in the Book V "On Obligations"). In addition to these texts - which are common law in matters of the sales contract - the law also includes, however, a number of special provisions governing either some private variants of this contract, or regular sales, but with a particular object, sales for which the lawmaker has established special rules, derogatory from the common law.

According to art. 1650 of the new Civil Code (NCC), sale is defined as "(...) a contract by which the seller conveys or, where appropriate, pledges to convey the property over an asset to the buyer, in exchange for a price which the buyer pledges to pay. The dismemberment of an ownership right, or any other right, can also be conveyed by sale."

The sales contract is a bilateral and mutually binding, non-gratuitous, commutative, consensual and rights-transferring contract.

**Key Words:** *The new Civil Code, sales contract, legal characters*

**JEL Classification:** K12

## 1. INTRODUCTION

The legal characters of the sales contract are as follows:

- it is a *bilateral contract and synallagmatical one*, giving rise to obligations on both sides of the parties, obligations that are both reciprocal and interdependent, so that the action of each party is actually taking place because of the legal obligation assumed by the other party;
- it is an *onerous contract*, as it is envisaged by each side, a patrimonial gain and interest, each of them assuming the specific obligations to obtain a counter prestation (do ut des);
- it is a *commutative contract*, because the existence and extent of obligations assumed by the parties have been known since the very moment in which the contract has been concluded; these are not dependent on any future and uncertain elements or events (alea); the mutual benefits are considered, by the parties, to be equivalents;
- it is a *consensual contract*, because - usually - it is validly concluded by simply reaching an agreement between the parties, regardless of the form in which the consent is expressed;
- it is a *rights-transferring contract*, due to the fact that the ownership right is transferred from the patrimony of the seller into the patrimony of the buyer - usually regarding individually determined assets- when it bears upon an individually determined asset. (D. Chirică, 2000:1:6-20).

## 2. THE BILATERAL, SYNALLAGMATICAL AND COMMUTATIVE CHARACTERS

In the *sale and purchase* field, both parties have the quality of creditor of some obligations and that of debtor of other obligations.

The mutually binding nature of the contract of sale and purchase gives birth to important practical consequences, regarding the breach of contract exception, the possibility to resile from the contract in case the other party has failed to comply with the obligations he has assumed and regarding the issue of risk assumption of

fortuitous impossibility of executing the obligations assumed (*C. Stătescu, C. Bârsan*, 1981:96, *L. Pop*, 1998:74; *S. Fildan, I. Mihnea*, 2011: 67-68.).

According to art. 1719 of the NCC, “The purchaser has the following obligations: a) to accept the sold item, b) to pay the sale price.” The buyer has to, in addition to those “main” obligations, bear the costs of sale – purchase, in case the parties have not agreed otherwise. The obligation to pay the sale price, is the essential part of a sale – purchase contract and is, therefore, mandatory by law. With regards to specific terms and conditions of payment, the New Civil Code makes provisions with suppletive character, leaving the parties the possibility to agree upon them, according to their common interests.

The purchaser’s obligation to accept the object sold has to be fulfilled at the time and place specified in the contract. In case this obligation is not fulfilled, and the asset is movable, “(...) the seller has the faculty to store the object sold in a storehouse at the expenses of the buyer, or he has the faculty to sell it.” (Art. 1726, paragraph 1, NCC).

According to the exact provisions of Art. 1672 NCC, the seller has three main obligations, namely: to transfer the ownership of the asset or, where appropriate, of the sold right, to deliver the goods foresighted in the contract and to offer warranty for them and to safeguard the buyer against any eviction of the asset. When the asset sold is not delivered at the time at which the contract is concluded, the obligation to deliver it raises, which involves the obligation to preserve and maintain it in good conditions until the delivery will take place.

The NCC contains a number of provisions regarding the delivery obligation, which, however, are provisions of suppletive nature, applied only where the parties have not determined, through the clauses of the contract, other solutions that are in conformity with their common interests.

According to the provisions of Art. 1695 par. 1 NCC, “The seller is obliged, by law, to safeguard the purchaser in cases of eviction that would obstruct the buyer, totally or partially, to exercise his possession upon the goods purchased.” The legal basis of this obligation stems from the very obligation the seller has to transfer the ownership to the purchaser (or another right) of the sold asset and to makes it available for the buyer; this can be regarded as a “prolongation” of these obligations.

Not all the disturbances of possession of the purchased asset have the aftermath of obliging the seller to warranty against eviction, only the disturbances that are relied upon some rights.

### **3. THE ONEROUS CHARACTER**

Each contracting party is pursuing a personal interest when concluding the contract, regardless if it is upon an asset that is going to enter into the personal property of him, or if it is upon the receipt of the sale price that is going to be paid.

The subject of the purchaser's obligation, which consists of a sum of money, called the price, is payable by the purchaser as an equivalent to the value of the asset bought. For the validity of the contract, the subject of the purchaser's obligation has to be a price, *expressed in money, determined* or determinable, *honest* and *serious*.

Where these conditions are not met cumulatively, the sale-purchase contract is going to be the subject of absolute nullity because there is going to be a structural element missing: the subject of the obligation of the purchaser and the cause of the seller's obligation.

### **4. THE CONSENSUAL CHARACTER**

The principle of mutual consent is usually dominant with regards to the form of the legal documents. According to it, civil contracts are valid and shall produce effects by the mere consent of the parties, regardless of the form in which these were expressed and externalized. Only by exception, in certain cases, provided by law, or where the parties, by their own will, have agreed to, does the validity and effectiveness of the legal document depend upon the expression of their consent in a solemn form, or, in case they decide, to have it accompanied by the effective delivery of the sold asset that is the subject of obligations.

As in the case of the other contracts, in the case of the sales contract, the consent is made up, in most cases, of the offer made by one party and the acceptance of the offer by the other party; the contract is going to be concluded when the two manifestations of will are going to meet.

As an exception to the mutual consent rule, the law requires that certain contracts of sale must take a particular solemn form in order to be valid, which is an *ad validitatem* condition; these can be for example, conventions that transfer or give birth to real estate rights that are to be included in the land book, contracts

concluded by electronic means, etc.; another exception is when the parties agree, by means of express provision, that the sale concluded between them is not perfect until after signing the contract or after the effective delivery of the assets sold, etc..

The freedom to consent to a contract of sale-purchase is limited by legal restrictions and can also be restricted by conventional restrictions too. Some of the legal restrictions of the freedom of contracting are related to the quality or capacity of the person who is in the role of the purchaser or of the seller, others are related to the nature of the goods that are the subject of the contract, some are related to the need of protecting public interests and others to the need of protecting personal interests. In turn, the parties may, through their agreement, can set certain restrictions, such as those established by the preference pact or by the preemption right, through unilateral or bilateral promises to sale and/or purchase (*D. Chirica*, 1997:18-35, *Fr. Deak*, 2006:19-29).

The law prohibits the sale of some goods in the interest of protecting public morality, in cases involving pornography, for example; in the interest of protecting the public health by removing, from the civil circuit, the illegal drugs or by strictly implementing laws that regulate their release; or for protecting the public security with regards to arms and ammunition and other social values considered of public order, such as the cases of agricultural lands obtained through land allotment or through establishing ownership under the Land Law no. 18/1991, republished, or the goods that are part of the national cultural heritage, etc..

Similarly, the law sometimes requires the sale, against the property's owner's will (for example, in the case of enforced execution, in cases of judicial separation of the properties, by means of public auction, etc.) or requires the sale of certain goods only to a particular purchaser, for example, the houses built with state funds may be sold under Decree-Law no. 61/1990 and Law no. 85/1992, republished, only to those who legally occupy them as tenants.

## **5. THE RIGHTS-TRANSFERRING CHARACTER**

For this translative effect of the contract of sale-purchase to occur instantaneously, by the meeting of the wills, three conditions must be met, namely:

- At the time of conclusion of the contract, the seller must be the owner of the property or the holder of the right to sell it, otherwise the transfer cannot occur (*nemo dat quod non habet*); in case of the present sale of future goods, as in the selling of others property, the ownership of the sold

asset will be transmitted to the purchaser only when the future goods will exist or when the third parties property will belong to the seller;

- The parties should not have agreed to postpone the transfer of the ownership to a later date; indeed, the rule set out in Art. 1674 NCC is not compulsory, but suppletive, therefor the parties may derogate from it, establishing through the terms of the contract, that the transfer of the ownership will take place at a later date, or at the end of a certain suspension term, or at the fulfillment of certain conditions;
- The sold object must be individually determined, for only thus can the ownership be transferred to the purchaser.

The practical importance of the accurate determination of the moment of the ownership's transfer of the assets sold from the seller's patrimony to the purchaser's one arises from the fact that, under general rule, the owner or right holder bears the risk of accidental destruction of the sold goods or of the respective rights (*res perit domini*).

Conventional postponing of the transmission time of the ownership, from the seller to the purchaser, seeks, often, to ensure that the full price will be paid to the seller. This practice is most common in movable assets, where the privilege of the seller can be easily dismantled by the buyer through a subsequent alienation of that asset and the delivery of it to a third party (subacquirer) with good faith (*bona fides*) that will be safe from seller's prosecution, invoking Art. 935 of the NCC.

Sometimes the seller provides himself an additional warranty for charging the price for which a suspensive period has been agreed, by combining the sale-purchase contract with a rental contract; in these conditions the parties may agree that, until the payment of the final installment of the price, the buyer is going to possess and to use the asset as a tenant, and only by the date of the full payment of the price the transfer of the ownership will take place (*R. Savatier*, 1944: 335-336; *C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu*, 1929: 896-897; *D. Clocotici și Gh. Gheorghiu*, 1, 2, 3, 5, 7-8, 9, 10 și 11/1997, *I. Cernăianu*, 1993:3:109-112; *V.M. Ionescu*, 1996:9:49-73; *D. Andrașoni*, 1997:11:68-70).

In trade relationships, such an agreement is called a lease. The drawback of such a contract is that the seller keeps having the risk of accidental destruction until the ownership is transferred.

In any case, the parties' agreement to defer the transfer of the ownership of the asset sold must be explicit, that is "formally and clearly expressed" (C. *Hamangiu*, N. *Georgean*, 1932:563).

Such an agreement "allows the seller to reclaim the sold and unpaid asset if the buyer is declared bankrupt" even before the due date, because the seller remains the owner of the asset, even if sold, until when, according to the contract, the delayed transfer of the ownership from the seller to the buyer will take place. (C. *Hamangiu*, N. *Georgean*, D. *Alexandresco*, 18).

The French legal literature has found that inserting in the sale-purchase contract a clause to delay the transferring moment of the ownership would not make a sale contract a conditional one, because the parties, from the beginning on, are definitively and firmly bound to fulfill the obligations assumed, whose legal fate does not depend upon any future and uncertain events; due to these postponing does not affect the very existence of the obligations assumed through the contract, but merely the production of the translative effect of the sale and its direct consequence of incurring the risk of accidental destruction of the asset, but under no circumstances does it affect the sale itself. (*M. Planiol et G. Ripert*, 1932:9).

## **6. CONCLUSION**

The contract of sale-purchase is one of the most important contracts that are concluded in the present society; it is the most common legal instrument by which the civil circulation of goods and values takes place. Its legal and economic role is in a natural and continuous growth in the transition period towards a functioning market economy.

Knowing the legal characteristics of this contract leads to a clear outline of some aspects regarding the conditions of validity of its conclusion, the form required by law and the effects it will produce.

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