

THE SALE PURCHASE CONTRACT WITH REDEMPTION PACT NEW LEGAL INSTITUTION IN THE ROMANIAN LEGISLATIVE SYSTEM

Chebeleu Ioana Camelia, Chebeleu Mircea*

University of Oradea, Faculty of Environmental Protection, 26 Gen. Magheru St., Oradea
E-mail: chebeleuioanacamelia@yahoo.com

Abstract

Although a legal institution of absolute novelty, the sale-purchase contract with a redemption pact is one deprived of practical significance, the authors estimating a lack of interest of the buyers to enter into such a contractual relationship. Sale of this kind has utility exclusively for the seller either for the legitimate purpose of securing a financing or for the illegitimate purpose of eluding the interests of potential creditors. Thus, anticipating that a forced execution procedure could be initiated against him, a person might be tempted to alienate part of his assets, and then later if the forced execution hadn't started to opt for redemption. As far as the buyer is concerned, the disadvantages of entering in such a legal relationship are obvious, and consist in the practical impossibility to personalize / embellish the purchased goods, impossibility resulting from the seller's possibility to repay only the necessary and useful expenses, the latter the latter only within the limit of the value added to the good that formed the object of the contract.

Key words: contract, redemption option, buyer, seller, legal relationship, property right

INTRODUCTION

As a result of Romania's accession to the European Union, was initiated the drafting of a new Civil Code, with the declared aim of regulating the non-existent legal situations and ordinary realities on December 1 1865 (the date of coming into force of the former Civil Code also known as Civil Code of Alexandru Ioan Cuza).

Among the new legal institutions is also found the institution of the sale – purchase contract with a redemption option, regulated by Book V Title IX Section 4, art. 1758-1762.

¹From the oldest times, has been considered that selling with a redemption pactis only a principle of illicit gains for usurers and serves to

¹DimitrieAlexandresco - Theoretical and practical explanations of Roman Civil Law; Tome of the Eighth, Part II, Graphic Workshops Socec& Co, Soc. Anonymous, 1923, p. 448;
Traian R. Ionascu, Note to the decision of the Dorohoi Tribunal, 1929, in

disguise the pignorative contract, an act reputed as being an illicit one and even prohibited in time by law. The pignorative contract is a contract that hides a loan in the form of a sale with a pact of redemption. It has often served to disguise either a usufruct convention (established beyond the permissible limit), or to hide the commission pact prohibited by art. 1689 and 1710 of the old Civil Code (through the commission pact in mortgage matter, anticorruption and encumbrance, is understood the clause authorizing the creditor to approach his mortgage or immovable property given in without the legal formalities imposed by the law.

In such a case, since the property only appears as a guarantee and not as a reason for use by the lender, it is stipulated between the parties the clause through which to ensure that the property remains in the possession of the old owner, being about the so-called relocable clause of the sold property

²It was also considered that the sale with a redemption pact would impede the improvement of property right, being a danger for the public credit towards the uncertainty in which the property remains between the moment of the conclusion of the contract and the effective exercise of the redemption right or the fulfillment of its term.

This paper aims to discuss in a succinct way the considerations underlying the new regulation and the practical applicability of this type of contract.

MATERIAL AND METHOD

The materials used in the writing of this paper consist of normative acts, web pages, treatises and specialized courses. The methods used are legal, namely the formal method, the historical method, the comparative method, the logical and sociological method, the analytical method. The use of these methods has the role of performing a systematic analysis of the information from the studied sources in order to elaborate the points of view and the conclusions.

PandacteleRomane 1924; Art.1689, 1701 Civil Code of 1846;
<https://www.juridice.ro/174836/vanzarea-cu-optiune-de-rascumparare.html>

²Ernest Glasson - Elements de droit francais I, Paris,1884, 118, p. 586 ;<https://www.juridice.ro/174836/vanzarea-cu-optiune-de-rascumparare.html>

RESULTS AND DISCUSSION

According to art. 1758 *the sale- purchase with a redemption option is a sale affected by a resolving condition by which the seller reserves the right to redeem the asset or the right passed to the buyer.*³

⁴The redemption option is an express resolute condition, purely potestative from the seller's side, a condition which consists in the seller's ability to return the price and expenditure within a specified term and which, by virtue of a ban regarding the protection of public order interests in the transmission ownership of property or rights may not exceed five years from the date of the sale. Also, this term cannot be extended either by convention or by court.

A first observation is that fulfilling the resolving condition is left by the legislator to the discretionary appreciation of the seller, which in the old civil law constituted a purely potestative condition, thus being hit by nullity.

The subject of this paper is the attempt to identify the reasons and considerations underlying the new regulation, namely its practical applicability.

In order to achieve the above-mentioned desideratum, we will start from analyzing the considerations for which the purely potestative resolving conditions were forbidden in the old regulation, and then we will analyze the measures that have been resolved in the new regulation.

According to art. 1010 the old Civil Code, the obligation was null when was contracted under a potestative condition from the part of the one who binds. As far as we are concerned, we judge the sanction of nullity as being justified by the following considerations:

1. violation of art. 969 of the old Civil Code, according to which the legally established conventions have the power of law between the contracting parties, they can be revoked only by their mutual consent, or in cases authorized by law

2. the insertion of purely potestative clauses was able to create the possibility of simulating smarter loan usurious contracts

In order to avoid the aforementioned situations, the provisions of art.1758 para. 2-1759 of the Civil Code state that exercising the option of redemption by the seller can be done only within a maximum of 5 years and only if he repays the buyer the price received and the expenses for the

³Civil Code art. 1758 par. 1, Law no. 71/2011 for the implementation of Law no. 287/2009 on the Civil Code, published in the Official Gazette of Romania, Part I, no. 409 of 10 June 2011

⁴Matei B. Cantacuzino - Elements of Civil Law, Cartea Romaneasca SA, Bucharest, 1921, p.666; Dumitru Marcel Gavris et. all - The New Civil Code, Comments, doctrine and jurisprudence, Vol. III art. 1650-2664, Ed. Hamangiu, Bucharest, 2012, p. 103

conclusion of the sales contract and the completion of the advertising formalities.

As regards the 5-year term, it is a decadence and public order, and not being susceptible of being increased by the will of the parties.

With regard to the redemption option, this must be stipulated in the actual content of the contract, and not later because in such a situation we will be in the presence of two successive and distinct sales.

The effects of the sale with a redemption option are determined in accordance with the provisions on the resolving condition, which applies accordingly.

Consequently, up to a possible redemption, or until the 5-year term is met, the buyer doesn't have the certainty of keeping the ownership of the purchased asset, which is likely to bring him a whole series of damage or inconvenience.

An eloquent example would be that of a buyer of a car to which is changed the engine power and sizing the exhaust drum. In the conditions in which these costs are beautician / voluptary, and not necessary or useful, if the seller opts for redemption, the buyer will not be able to claim their consideration.

According to the provisions of art. 1759 paragraph 2, the seller is obliged to reimburse the necessary expenses, as well as the useful ones, but in the latter case only within the limit of the value increase. If the difference between the redemption price and the price paid for the sale exceeds the maximum established by the law for interest, the redemption price will be reduced to the price paid for the sale.

As long as the legislator didn't understand to make any distinction concerning the subject of such a contract, it can be concluded that in the essence of any kind of goods of any nature may be the object of this type of contract (obviously with the exception of goods whose alienation is usually prohibited).

The conclusion is valid even in the case of non-classified goods, with the mention that in this situation, according to the provisions of art. 761, sharing must be required also in the relation with the seller if he has not yet exercised his option.

The seller who hasn't exercised the redemption option within the split, lapses from the option right even when the asset is wholly or partly attributable to the buyer.

In the absence of additional provisions, it is necessary to interpret the above rule as mandatory in both the notarial partition and the one and made through the courts variant.

At a first analysis, it appears that the regulation of sale with redemption pact is of particular utility with regard to the seller. The

assumptions in which this type of contract can be used are extremely varied, a concrete example would be that of an entrepreneur who needs a certain amount of money to finance the activity (and who for various reasons can't or is not eligible to accessing a bank credit) remises an asset he doesn't need at the moment.

With the money thus obtained, he could finance his activity, and in the event that he exceeds the financial impoverishment to redeem his alienated property.

Therefore, from the point of view of the seller, the sale with a redemption option can be used, among others, as a financing mechanism.

Not the same thing can be said about the buyer, not having too many reasons to enter into such a contractual relationship, perhaps just the desire to help the seller.

In this last situation, if the seller so helped manages to redeem the good, it can be appreciated that from the point of view of the buyer the contract had the nature of a disinterested act.

CONCLUSIONS

Referring to the above-mentioned considerations, we appreciate the regulation of the sale with a pact of redemption as being devoid of legal and economic importance and usefulness, the authors anticipating a relatively small number of such contracts. It mustn't be lost of sight the possibility of using such a contract for illegitimate purposes, for hiding possible assets and for circumventing legal provisions related to forced execution or to the institution of insurance measures specific to the penal procedure, fiscal or special insolvency proceedings.

In particular, anticipating that against him a forced execution procedure might be initiated, a person might be tempted to alienate some of his assets, and then later if the forced execution hadn't started to opt for redemption.

We also consider that there is no coincidence between the 5-year term provided by the Civil Code and the 5-year period set for prescribing tax receivables.

The conclusion is the same in the situation where forced execution, although started, ceased either as a result of the lack of property or as a result of the transfer of goods of no importance to the debtor's perspective.

REFERENCES

1. AlexandrescoDimitrie – *ExplicatiuniTeoretice si practice a Dreptului Civil Roman*; Tomul al Optulea, ParteaII-a, AtelierelegraficeSocec&Co, Soc. Anonima, 1923
2. CantacuzinoMatei B. – *Elementedreptului civil*, Ed. CarteaRomaneasca SA, Bucuresti, 1921
3. *Cod civil* art. 1758 alin. 1, Legea nr. 71/2011 pentrupunerea înaplicare a Legii nr. 287/2009 privindCodul civil, publicatăînMonitorulOficial al României, Partea I, nr. 409 din 10 iunie 2011
4. Gavis Dumitru Marcel et. all - *Noul Cod civil, Comentarii, doctrina si jurisprudenta*, Vol. III art. 1650-2664, Ed. Hamangiu, Bucuresti, 2012
5. Ernest Glasson - *Elements de droit francais I*, Paris,1884
6. IonascuTraian R., *Nota la deciziaTribunalului Dorohoi*, 1929, in Pandactele Romane 1924; Art.1689, 1701 Codul Civil din 1846
7. <https://www.juridice.ro/174836/vanzarea-cu-optiune-de-rascumparare.html>