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**The Relocation of Real Estate under the
Terms of Constituent Legal Advertising**

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Abstract: With the new Civil Code coming into force, in the Romanian law system, an effect associated with land books which has often given rise to disputes in the case law and doctrine is reintroduced. This effect of particular significance in the area of real estate rights shall be called the articles of association or rights of entries in the land register. Advertising is the way in which certain information is brought to the attention of the interested persons. Similarly, real estate advertising is “all the legal means by which the material and legal situation of buildings is publicly disclosed in order to protect their civil circuit” (Ungureanu & Munteanu, 2008, p. 662). One way of making real estate advertising is the land book system. This method is also intended to be the only one in the sense of the new civil code, as a single, uniform system ensures that people concerned can become more easily aware of the material and legal situations. However, the application of this system throughout the country is a long-term process, involving the opening of land books for all buildings and the completion of land land-use operations throughout the country. From the perspective of tabulation rights, the completion of land registry works at the level of each administrative and territorial unit will be the moment at which the legal constitutive effect of the land is to occur, currently postponed by the provisions of Article 56(1) of L 71/2001 for the implementation of the Civil Code. Thus, in this Article, we intend to look at the mechanism of the transfer of the right to property under the conditions of the legal articles of association, with the sales contract, a pattern of translational documents of property, as a reference.

Keywords: Land book; real estate advertising; real estate; cadastre; tabulation

1. The Rights of Incorporation of the Land Book Entries, as Regulated in the Current Civil Code

Among the many functions that an advertising system can perform, such as information, opposability, proof, etc., the constituent or translative function can also be identified, which is also performed by the property advertising system through land books. Thus, under that function, the creation or transmission of rights in rem is subject to the fulfilment of certain appropriate formalities (Stoica, 2009, p. 416). In our system of law, the above-mentioned formalities are to be completed in the land book.

In the current rules, Article 885 paragraphs (1) and (2) explicitly enshrines the articles of association of land books in respect of the acquisition and extinction of real estate rights. This legal text States that: “*save as otherwise provided by law, rights in rem in the property entered in the land register shall be acquired, both between the parties and vis-à-vis third parties, only by entering them in the land register, on the basis of the act or fact justifying the entry. Rights in rem shall be lost or extinguished only by their removal from the land card, with the consent of the holder, given by a notarial authentic*”

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instrument. Such consent shall not be required if the right is extinguished by the expiry of the period shown in the entry or by the death or, where appropriate, the termination of the legal existence of the consultant, if he was a legal person.”

This effect is also reiterated in Article 886, which aims to amend a right in rem in immovable property: *‘the amendment of a right in rem in immovable property shall be made in accordance with the rules laid down for the acquisition or extinction of rights in rem, unless otherwise specified by law’.*

At the same time, we also stress that it is not in all cases necessary to include in the land book real rights in buildings, and there are also exceptions provided for in Article 887 Civil Code. However, paragraph 3 of the same Article makes the acts of provision subsequent to the acquisition of rights in rem conditional upon entry in the land register. (12). Therefore, even if the holder has acquired certain rights in rem in immovable property in a way that does not require registration, in order to be able to dispose of them subsequently, he must be subject to the law of the land registry (13).

Otherwise, the principle of full advertising would no longer be respected. Moreover, the holder of the right not recorded in the land book has an interest in including him for the protection afforded by the land book. For example, if a person appearing as the holder in the land book, although not the beneficial owner, has this right, the bona fide third party acquiring for consideration shall be treated as the “holder of the right registered for his benefit” in accordance with Article 901 paragraph (1) Civil Code (14).

The transfer of the right to real estate in the current Civil Code regulation is one of many exceptions to the principle of consensus.

Thus, according to Article 1674 Civil Code, “except in cases provided for by law or where the parties’ intention is not to do so, property shall be transferred from right to the buyer from the time the contract is concluded, even if the property has not been handed over or the price has not yet been paid”. Furthermore, Article 1273 Civil code enshrines the right to transfer rights in rem by agreement of the parties’ will, “even if the goods have not been handed over, if this agreement carries on specific goods, or by individualization of the goods, if the agreement carries on certain goods of a gender.”

As regards the transfer of the right to immovable property, it follows from the read-across interpretation of Article 1676 Civil code with Articles 885, 888 and 881 Civil code that the tabulation of the right in the land register is necessary, which is possible only on the basis of the notarial authentic instrument, of the final judgment of the court, of the certificate of succession or under another instrument issued by the administrative authorities, where the law so provides. On the other hand, the form of the authentic instrument is not only a requirement for the right to be entered in the land register, but also a condition for the validity of the property sale contract.

We can say that in order to carry out the valid transfer of the real estate right from the seller’s estate to the buyer’s estate, double formalism is needed, which is the exception to the consensual transfer of law: the authentic material of the sale and the tabulation of the right in the land book of the building in question.

Under these circumstances, the way **in which the obligation to give** the seller manifests itself and what its actual content is.

The definition of sale provided for in Article 1650 paragraph (1) Civil Code: “sale is the contract whereby the seller sends or, where appropriate, undertakes to transfer ownership of a good to the buyer in return for a price which the buyer undertakes to pay.”- The obligation on the seller to pass on

ownership of a good to the buyer is clear. The assumption that the seller does not submit, but undertakes to submit, takes into account situations where ownership is not transferred at the time of the agreement of will but at a later date, the date by which the facts or material which will complete the transfer will be produced or committed. However, this does not mean that the obligation *to give* into a must, since several operations must be carried out in order to carry out it, which fall within the legal nature of the obligation *to do so*.

We appreciate that the displacement of the property right is the best example of proving that there is an obligation *to give* the seller, and the complex content of the seller, the fact that it will be executed by means of benefits characteristic of obligations *to do*, does not distort the content of the obligation *to give*.

To support this idea, we refer to the existence of valid consent expressed on the transfer of ownership. In the absence of such consent, the mere handover of a good or the handover of documents for the purposes of the breach, without the intention of transferring the right, would be irrelevant and could not be interpreted as obligations the enforcement of which is itself manifested in the performance of the obligation *to give*.

All these obligations are subsumed and ancillary to the transfer, as it is essential to express consent to the transfer. The debtor's benefits follow all the same intent of transferring ownership and are intended to extinguish by enforcement not obligations *to do* but the obligation *to give*, on the basis of the consent originally expressed.

For this reason, Article 1650 Civil Code cannot be interpreted as applicable to a promise of sale, since a new consent is required to operate the transfer, but it can be considered to be a sale of the good to another, a sale with reserve ownership or a sale of immovable property by land book system in which the entry has legal effect.

Therefore, all the benefits specific to the obligations *to do* are component elements of a whole, which is the obligation *to give* and are executed by the seller to complete the transfer of ownership, and therefore, until the transfer of the ownership to the buyer's assets is completed, the buyer can only be the holder of a claim.

It is only by performing all the benefits necessary for the transfer of ownership and taking account of this transfer that the translational effect will occur.

2. The Role of the Material Act of Tabulation in the Obligation *to Give*

The completion of the transfer of the right to immovable property in the legal formation of the infringement involves the commission of the material act of the right registration, which can be obtained following the application for an infringement which is often requested by the buyer.

With regard to the tabulated action, the purpose of the action is only considered to be the handover of the documents necessary for the registration (other than the one by which the right in rem is transferred) because of the disapproval of the person against whom the entry is made. On the other hand, if a right in rem is removed from the land register, the express consent of the holder is required, which must be in genuine form in accordance with Article 885 paragraph (2).

Therefore, the legislator has no longer provided for the need for a separate agreement of the holder of the right to the transmission, constitution, or modification of a right in rem in immovable property, but such consent is necessary to put an end to the right by removing it from the land register.

From the above, we are to see what principles characterize the housing advertising system in the new Civil Code. First, the legislator has opted for the principle of tradition to be applied to immovable property, the transfer of property being postponed until the actual right is entered in the land register. Since the transfer is no longer split between two legal acts, but between a legal act and a legal fact, the principle applicable is this time that of unity.

When the seller shows his willingness to conclude the contract for the sale of a building, he creates the necessary prerequisite for the transfer of ownership to operate automatically on the date of entry of this right in the land book. The obligation *to give* the seller shall be the consent to the sale and the delivery to the buyer of the documents necessary for the tabulation. Consent to the tabulation shall be implicitly considered and be objective by providing the purchaser with the documents necessary to carry out the tabulation.

We do not believe that we can talk about a buyer's obligation to register his acquired right by sale (but rather a right of the buyer linked to the obligation *to give* the seller), but questions arise as to whether the seller's obligation to submit the right is considered as a matter of law once he has handed over the documents necessary for the breach. We consider that we cannot talk about full and final enforcement of the right to transfer property until the time when the property is transferred to the land register. The fact that this entry is requested by the buyer is justified by the fact that the seller, by consenting to the transfer of ownership, implicitly consents to the possession of the right in the land book.

At the same time, the vendor can request this entry himself, because it is the last stage of his obligation *to give*. The seller may not be refused an application for entry in the land book of the buyer's right on the grounds that it would not prove the existence of an interest. It is not only in the interest of the buyer to see the acquired valid right, but also in the seller's interest to fully enforce its obligation to transfer ownership, because until the date of the transfer, its property is in an uncertain situation, in the process of transmission and will not be able to dispose of it in any way, nor can it require the buyer to pay the price unless they have agreed otherwise.

According to Article 28 paragraph (5) of L7/1996: Entries in the land register shall be made at the request of the interested parties, except in cases where the law provides for registration by default; the application for registration shall be sent to the territorial office in which the property is situated." In addition, the following paragraph stipulates that "*the entry or provisional registration may be requested by any person who, according to the original document, the court ruling or the administrative authority decision, is to remove, constitute, modify, acquire or extinguish a tabular right*". Therefore, both the displaced and the acquirer of a right in rem are entitled to execute the substantive act of the registration.

The buyer, interested in completing the translational act, acquires by law the possibility to carry out the material act to which the seller would be obliged. At the same time, the notary public, as the instrument agent of the authentication of the sale contract, has the duty to ask for the buyer's right in the land book to be covered, thus avoiding the first's dependence on the last one in completing the execution of the obligation *to give*. However, this is possible precisely because the seller agrees to the tabulation.

There is no need for express and separate consent to the tabulation of the seller because the seller is intimately related to the obligation to transfer the property and is included in the consent to sale expressed in authentic form. The buyer's right, which is correlated to this obligation, is affected by an

uncertain period of time of a legal nature, which does not have its effect in the agreement of the parties but which the parties assume.

3. Uncertain Legal Term Affecting the Sale of Property in the Constituent System the Law of the Land Registration

The particular feature of this term is that the event determining the date of transfer of the property, i.e. the completion of the obligation to give, i.e. the time of entry, is not only carried out by the action of the seller but also by the buyer, personally or by means of the notary public, which by law, he is obliged to carry out the formalities relating to the advertising of property.

Thus, the obligation to transfer the property, which derives from the property sale contract in current Civil code is a genuine obligation affected by the form of the standstill period, so that any sales contract aimed at transferring the ownership of a building, given the legal effect of the sale in the land book, it will be a real legal act affected by the arrangements. We consider that this term is set in favour of the buyer, since until it is realized, the risk of forgiven loss of the good is not transferred to him. At the same time, the same term is a time-consuming one in favour of the seller, because the obligation *to give* is extinguished simultaneously with the transfer of the property.

We cannot consider the transfer of property until the time of the land book entry to be affected by an event with a suspensive status, as its production is anticipated and desired by the parties, and not unpredictable and independent of the will of either party.

If we considered the future event to be a suspensive condition, we would not be able to determine the date from which the condition would be deemed not to be fulfilled, when it would be certain that the event would not occur, whereas registration may continue to be required by either party or by the notary public, which would lead to a civil insecurity and would be contrary to the provisions of Article 1404 Civil Code. On the other hand, even if we accept that there is a possibility that the future event may no longer occur, we should accept that the act of disposal would be considered never to have been concluded, which would be contrary to the valid binding act that the parties have concluded.

As regards the nature of the buyer's right from the time the contract was concluded to the time of the infringement, as I mentioned, we believe that this can only be a right to claim, which only goes out at the time of the infringement in the land register and not at the time when the documents required for the infringement are handed over.

The failure to give the necessary documents for the infringement, gives the buyer the right to bring an action for tabulation in accordance with Article 896 Civil Code and to obtain the enforcement of the obligation to transfer property by entering the property right in the land book.

With regard to the order of performance of obligations by the seller and the buyer, we consider that in case there is no standstill period within which the price must be paid or the parties do not agree that the price should be paid at the same time as the contract of sale is concluded, the buyer will not be liable for payment of the price until the good is handed over to the buyer and the obligation to hand over the good cannot be due until the ownership is given to the buyer, i.e. entered in the name of the buyer in the land register.

Last but not least, the question of *bearing the risk of forcible loss* of the property until the time the right is entered in the land book, in accordance with the provisions of Article 1274 Civil Code placing this risk on the debtor of the obligation to surrender the property.

Bearing the risk of forced fouling of the immovable property presents some particularities caused by the steps taken to produce the translational effect.

If the seller gave his consent to the transfer of ownership at the time of the conclusion of the contract but did not hand over the property or the documents necessary for the sale, the provisions of Article 1274 Civil Code apply, the seller being still the debtor of the obligation *to give* and implicitly of the obligation to surrender, so that he will bear the risk of forcibly discarding the property.

When the property is handed over before the property is entered in the land book, the question arises as to whether the seller has to bear the risk of fortuitous loss of the property, since the seller has made available to the buyer all the instruments necessary for the transfer of the property. In this situation, we consider that if the parties agree that the acquirer should request the recording of the right in the land book, the failure of this material act by the buyer should not be interpreted against the seller who performed the benefits to which he was obliged to consider the transfer of ownership.

Therefore, in this particular situation, the risk of forced sale of the good is to be borne by the buyer. Only if the seller assumes toward the buyer that this last material act will be carried out, thus preventing the buyer from applying for an infringement, the seller shall bear the loss of the property until the right is entered in the land book.

In the event that the seller gave his consent to the sale (and implicitly to the tabulation), and the documents necessary for the sale were handed over but the property was not handed over, the *res per it debtors rule* will apply and the risk of the sale of the property will be borne by the seller.

Also, if the good is forgiven after the buyer's right of ownership has been entered in the land book but the good has not been handed over because the price has not been paid, we believe that the risk of forgiven loss of the good will have to be borne by the buyer, since the non-performance of the obligation to discharge was due to the non-performance of its own contractual obligations, with the indication that it must have been delayed or become legally late, in accordance with Article 1525 Civil Code.

Conclusions

We can conclude that, in the current Regulation of Civil Code, the transfer of real estate is a real obligational act affected by the modality of the uncertain standstill period, which implies the application of the principle of unity in the transmission of real estate in a land book system. It is not the question of a second real act by which the parties' consent to an infringement, but of a single act, which obliges to execute, that is to complete the transfer of property by entering the right in the land register.

The obligation to transfer ownership consists of the authentic consent for sale, the obligation to hand over the documents necessary for the recording and the material document of the entry in the land register. Of these, the first two are performed exclusively by the seller, while the last act is no longer the exclusive attribute of the seller, because the law allows the buyer to complete the sale, and the public notary is obliged to do so.

Thus, ensuring the dynamic security of the civil circuit requires that the transfer obligation be enforced by any interested party, or by the notary public, *ex officio*. The notary does not replace an absent consent to the registration, but ensures that the transfer of property is completed, precisely on the basis of the agreement of the parties to the transfer, postponed until the completion of this formality.

The material act of the entry in the land book is, on the one hand, intended to mark the date on which the property of the alienator's estate is transferred to that of the acquirer and, on the other, to mark the time when the enforcement of the obligation *to give up* has been fully completed.

However, as long as we do not have a unitary cadastre throughout the country, it is impossible to apply the rights-based effect of the land book entries. We are therefore in a transitional situation, but it has not been overlooked by the legislator.

Thus, by the provisions of Article 56 of Law No 71/2011 for the implementation of Law No 287/2009 on the Civil Code, the rights-constitutive effect provided for by Articles 885 paragraph (1) and 886 Civil Code is extended until the land register works are completed and land books are opened for those buildings. Until then, the land registration is to have only an effect of opposability to third parties. But despite the heavy work of the cadastral works, it seems to see a happy end as well.

References

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