THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

The Analysis of the Pre-Emption Right under the Contract of Sale in the Regulation of New Civil Code

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Abstract: In this paper we will keep under review the specificity of the reported preemption right to the sale contract, according to the article 1730-1740 of the New Civil Code. With the entry into force of the new future regulation, the preemption right will acquire a separate status, being currently known that the legal status of the right under the review is diverse; there are many legal provisions which provide this right in various areas, being excedentary to the sale contract, such as culture, privatization, franchising, intellectual property. According to the analysis of the future legal deposition, it shows that preemption right may have as a source both the law and the contract; in this case it is referred to the legal and conventional right of preemption. We note also that, in light of the new regulations, the mechanism for exercising the right of preemption is similar to the one applicable to the right of preference. **Objectives**: The purpose of this paper is to focus on the usefulness of this new legislative measure designed to establish a proper legal support specific to the holder of this right in the conclusion of a contract in relation to third parties. **Approach**: This topic emphasizes the use of the following methods: observation, comparison and interpretation of laws.

Keywords: preemption; right to preference; consent; New Civil Code

1. Introduction

The application of the new Civil Code will have a great influence in all civil and commercial law, especially in monistic terms that this code requires: the regulation of private law relation incorporates all provisions relating to individuals, family and commercial relations, taking into consideration even the private international law provisions. So the effects of this new regulation[1] will be felt on various levels.

The principle of will autonomy of the parties will allow their ability to choose, within the limits set by law,[2] the manner in which it will conclude or give up the closure of a legal civil act, to establish the content, the way to terminate, modify it within the law and morality (Popa, 2008, p. 14-18). Such legal limits have as juridical reason the protection of some economic and social rights. In this regard, in the case of the contract for purchase and sale, the legislator understood that the interests that should be protected belong particularly to the buyer, recalling here the guarantee against eviction, against hidden

[1] The new Civil Code adopted by Law 287/2009 was published in Official Monitor no. 511 of July 24, 2009, and republished in the Official Monitor, Part I no. 505 of July 15, 2011.

[2] Article 5 of the Civil code states: "It is not permissible by convention or special provisions, the laws that are interested in public order and morals".

defects, questionable clauses that are interpreted in favor of the buyer etc. To these it is also added the right of preemption which we will analyze in terms of the stipulations that are established by the new Code within the article 1730-1740.

2. The Notion of Pre-Emption Rights and the Legal Status in the Light of the New Civil Code

The new rule in matters of the contract for purchase and sale has expanded in scope, presenting aspects of the promise of sale and the promise of purchase, for the sale of another's property, sale with the pact of redemption, selling with the installment payment, the sale at a public auction, sale of rights, but also the right of preemption.[1]

Thus it was expressly dedicated the notion of preemption, the legislator proposed an analysis of the legal nature, of the mechanism of operation, conditions and effects of the exertion of this right, paying also attention to certain conflict issues such as: violations of this right, the contest between the preemptors, the multiplicity of sold goods, the exertion of the right of preemption within a repossession. But it was not given a conclusive legal definition, which would have eliminated the doctrinal controversies, especially in connection with its legal nature. Article 1730 New Civil Code provides: "(1) *As provided by **law or contract**, the owner of the preemption right, called preemptor*[2]*, may purchase prevalently goods. (2) The provisions of this current code concerning the right of preemption are applicable, unless by law or contract it is established otherwise.*"

The legislator mentioned the source of this right, either of **legal nature**,[3] as established by a peremptory norm (Deak, 2006, p. 40) or of **contractual nature**, which brings back the pact of preference, in which case the priority right to purchase is relied on the consent of the parties.

In connection with this double form of manifestation, we appreciate that the legislator was inspired by the French law, specifically from the definition of preemption right, "*aptitude recognized to a person or an administrative entity, under a contract or a legal deposition, to acquire the property of goods, in case of its alienation, with preference to another buyer.*" (Jean, 1991, p. 398) We must mention that Professor Eugen Chelaru (1997, p. 15), starting from the same definition, showed that "*the right to preemption is contractual or legal. The preemption right is contractual when it arises from the will of the parties concluding a pact to that purpose, a pact of preference... the preemption right is may arise from the law*" in anticipation of the future orientation established in article 1730.

Depending on the source of this right, it was associated with a new name, either the right of preemption,[4] when the source is the law, or the conventional right of preemption [art. 1734 (1), a. and b.]. As for the doctrinal approach, according to which the preemption right may only be of legal

[1] Right of preemption is a limitation of the legal provision attribute of ownership, which usually follows a public interest. The existence of this right would not transform the sale into a forced one, it does not oblige the seller to undertake or to dispose of the property, or forcibly impose a price limit, but it is limited the freedom of the seller to choose the buyer (Chirică, 2008, p. 100).

[2] The legislator paid attention also to the legal terminology, establishing for the owner of the preemption right the term of preemptor.

[3] The Legal nature of the right of preemption which is based on a peremptory norm is the rule in this matter. The Doctrine considers that this right is a legal mechanism that is based on a legal will, which cannot be overridden by the agreement between the parties.

[4] We find even the name of legal right of preemption [article 1734 (1), letter a) and b)].

origin, the doctrine intervenes in a critical manner, abandoning this assumption, as that on that purchase priority established by contract giving the holder a right to preference. [1]

For the section reserved to the right in question, subsequent to purchaser's obligations, we may say that the New Civil Code limited the preemption only for the contract for purchase and sale, without making a distinction between the goods that may be the subject to this contract. Only when there are presented the terms of exercising this right, then we may reference to sell of real or mobile estate. It was considered that the right of preemption may be exercised not only as a priority to the sell, this right can generate priority to the holder to other categories of contracts: lease, franchise, etc. (Negru & Corneanu, 2004, p. 30) The notion of priority right would includes all the rights that grant the holder the priority to close a contract in relation to third parties, whether the priority is conferred by law or contract and regardless of the nature of the contract on which this priority is given.[2] A similar view can be deduced and analyzed following the definition of the right "subjective civil right conferred by law to certain categories of persons to purchase with priority an asset, when its owner decided to dispose it or exploit it by other contracts established by law, at a price and on equal terms with the third parties". (Neagu, 2010)

We note that when the priority is granted when concluding a contract, other than the one for purchase and sale, the New Civil Code uses the terminology of preference. According to article 1828 of the New Civil Code: "*(1) At the conclusion of a new lease of the dwelling, the tenant has, on equal conditions, the preference right. But he has this right, when he has executed the obligations arising under the previous lease. (2) The provisions concerning the exertion of the right of preemption in sale matters are applied properly."*

The article 1730 (3) provides the mechanism of operation and of acceptance of the offer when purchasing an asset. Thus, in order to exercise the right of preemption by the preemptor, the owner of the asset, he must give notice of its intention to dispose of the asset and also the price.

In light of the new regulations, the term allowed by the preemptor to decide is different, depending on the nature of the asset: 10 days from the notification of the offer in the case of sale of goods or of maximum 30 days, in case of sale of immovable property. According to the final paragraph of article 1730, the term flows in both cases, since the communication of the offer by the preemptor. We note that compared to other provisions of special law governing the right of preemption, the proposed terms of the future code are more limited. For example, according to Law no. 10/2001, the deadline for exercising the right of preemption is of 90 days for movable heritage and historical monuments according to article 36 paragraph 3 of Law no. 182/2000 and article 4, line 7 of Law no. 422/2001, the deadline is of 30 days, a similar deadline for alienation of forest covered by Law no. 46/2008.

Furthermore, the legislator intervenes expressly, stating that only after the end of that period, the asset may be alienated to a third party, otherwise, applying the sanction of relative nullity of the contract, whether there is a preemptive legal or conventional right (article NCC 1731). We must mention that in addition to this civil penalty, in the case of another piece of legislation governing the right of preemption, namely GEO no. 40/1999 on the protection and establishment of the rent for the spaces leased for housing purposes, the holder of that right may choose the subrogation in the rights of the

[1] For further details about the distinction between legal and conventional rights of preemption see the doctoral thesis of Adina Iulia Foltiş entitled *Regimul juridic al dreptului de preempţiune /The legal regime of the right of preemption,* presented in 2010 but not yet published. The author proposes a repositioning of this right in the sense that it should be included in the category of the priority rights, defined as preemptive right as being that right which gives the holder priority preference / priority in order to conclude a contract of sale in relation to third parties.

[2] *Idem.*

buyer, compensating the latter by paying the price. Other laws expressly provide absolute nullity sanction of the contract concluded by disregarding the right of preemption.

But what does the future regulation propose in this situation in matters of contract for purchase and sale? If however the sale was made by a third party, article 1732 provides that the options of the preemptor and the conditions for exercising its right of preemption: the seller (or the third party) will be required to notify at once the preemptor the content of the contract concluded with the third party. This notification will include the full name of the seller, description of the asset, the tasks that burden him, the terms and conditions of sale and the place where the asset is situated. Following this notification, the preemptor may exercise his right by communicating to the seller his consent to buy. In this case also, according to the nature of the property, the terms remain the same, 10 days and 30 days from the notification. But in the present instance, the new regulation is firm: the seller will be liable to the third party in good faith for the eviction which results from the exercise of the preemptive right. Also, any clause by which the seller and the third party sought to eliminate the application of law becomes null and void (article 1733).

A special situation, which finds its explanation in the duality of concepts, the *preemption right* and *preference right*, concerns the preemptors competition. Here the legislator distinguishes between **holders of the legal right of preemption** and **holders of the conventional preemption right**. Thus, under the rule of law, the proposed solution by the future code may be straightforward, all depending on the fundamental difference between the right of preemption of a legal nature and of conventional nature: in case of the contest between the two, the valid concluded contract will be the one with the holder the legal right of preemption. Other situations determined by the competition between the preemptors prevailed ether the holder of the legal right of preemption **chosen by the seller** (if there were more than one) or the holder of the conventional preemption right that was first registered in the real estate register[1] or the holder of the conventional preemption right that presents as a certain date the oldest sale (in the case of a movable asset).

Article 1739 NCC presents concise and summative the legal character of this right, recalling only the indivisible and the intransferable one. However, the list is not exhaustive, it can add the character of public order of this right, in the sense that it cannot be waived in advance, and the parties cannot derogate by agreement or unilateral legal acts of the provisions governing the right of preemption. (Chirică, 2008, p. 104). The doctrine added also the temporary character, under double aspect: the quality of the person holding this right and in terms of its exhaustion, after the right has been exercised (Popa, 2008, p. 260). It persists and argues the *erga certa personam*, not being mentioned in the future rule, according to which the holders may not require to any person to grant the right of preemption.

3. Conclusions

According to the analysis, we notice that the intention of the legislator is to protect and provide an additional guarantee to the holders of this right, giving them the opportunity to exercise it on a more stable legal ground, concrete and marked by the 10 articles. In addition, Law no. 71/2011 for implementing Law no. 287/2009 on the civil code solves the problem of possible overlapping of some rules on the same issue.

[1] Situation applies when the contract of sale is an immovable.

Thus, the provisions concerning the right of preemption contained in the special laws in force will be filled with the depositions of article 1730 -1740 of the Civil Code. In case of the right of preemption is of contractual nature, the provisions of article 1730-1740 of the Civil Code become applicable only to the agreements concluded after 1 October, the date of entry into force of the New Civil Code.

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***The new Civil Code adopted by Law no 287/2009 was published in Official Monitor no. 511 of July 24, 2009, and then republished in the Official Monitor, Part I no. 505 of July 15, 2011.

***Law no 71/2011 for implementing Law no. 287/2009 on the Civil Code, published in the Official Monitor, Part I no. 409 of June 10, 2011.