AGORA International Journal of Juridical Sciences, http://univagora.ro/jour/index.php/aijjs
ISSN 1843-570X, E-ISSN 2067-7677
Vol. 18, No. 2 (2024), pp. 109-116

CONSIDERATIONS ON THE LIMITATIONS IN ROMANIAN LEGISLATION REGARDING THE ALIENATION AND EXECUTION OF LAND CONTRACTS

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Abstract: *The execution of agreements aimed at transferring ownership of real estate is hampered both by the behavior of the seller, who refuses to fulfill his obligations, and by legal regulations that make it difficult to transfer ownership of real estate by imposing important obligations on the seller. The legislation of the last ten years has made it much more difficult to carry out sales of land, especially outside the built-up areas of localities. A legal modification from 2020 implements a series of important legal changes related to the holders of pre-emption rights, but also concerning the specific ways of selling agricultural land located outside* built-*up areas, when the holder of pre-emption rights does not want to buy. Whenever the court is asked to give a decision which supersedes a selling contract, the petition is admissible only if the pre-contract is legally signed, in accordance with Civil code provisions, and all other legal requirements are fulfilled, meaning: obtaining all necessary authorizations, respecting pre-emption rights, respecting the fiscal and land registration requirements. Following the latest legislative changes imposed by Law No. 116 of 2024, failure to comply with these obligations is sanctioned, as the case may be, with absolute or relative nullity of the concluded contract. In finding solutions for the execution of these contracts, the High Court of Cassation and Justice of Romania has an important role, which has ruled through several decisions that are presented in this study.*

Keywords*: sale of real estate, limitations, right of pre-emption, enforcement*

1. Introduction

Romanian legislation before 1990 only allowed the transfer of building ownership, but the sale of land was prohibited. The transfer of property rights only became possible after 1991 when Law No. 18 of February 20, 1991 on tland resources was adopted. According to Article 45, “Privately owned land, regardless of its owner, is and remains in the civil circuit. It may be acquired and alienated by any of the methods established by civil legislation, in compliance with the provisions of this law”.

At first, only Romanian citizens could own land. Later, the Romanian Constitution of 2003 also recognized the right of foreign citizens to acquire land in Romania under the conditions of accession to the European Union. The concrete conditions for the acquisition of land by foreign citizens were laid down in 2005 by Law No 312 of November 10, 2005 on the acquisition of land private ownership by foreign and stateless citizens and foreign legal entities.

According to Article 3 of the same Law, a citizen of a Member State, a stateless person residing in a Member State or in Romania, as well as a legal person established in accordance with the legislation of a Member State may acquire the land property right under the same conditions as those provided by law for Romanian citizens and Romanian legal persons. Foreign citizens could acquire the property of land after 5 years or 7 years from the date of Romania's accession to the European Union, depending on whether or not they were resident in Romania (Art. 4 and 5 of the Law). Therefore, the conditions under which the property right of real estate in Romania that can be validly acquired are also of interest to foreign citizens, especially those of the European Union.

2. The real estate sale in Romanian Law

In Romanian Law, real estate sales contracts must be drawn up in authentic notarial form, this being a condition of their *ad validitatem*. The need to fulfill this form results in particular from art. 1244 of the Civil Code. The text of the law imposes the form of the authentic document under the penalty of absolute nullity in the case of conventions that transfer or constitute real rights to be entered in the land register. Currently, the transmission of the real estate property right or the establishment of real rights through legal acts can only be achieved by concluding the act in authentic form and registering the transfer or establishment of the right in the land register (Bârsan, 2013: 125).

However, the parties sometimes choose to conclude a sale-purchase promise. The sale-purchase promise, also known as the pre-sale contract, has been defined in the doctrine as a contractual agreement of will by which the parties mutually assume the obligation to conclude a certain sale-purchase contract between them in the future, establishing its essential content (Costin, Mureşan, Ursa, 1980 : 36). In Romanian doctrine, the notion of sale-purchase promise was also defined by the terms "precontract", "preliminary contract" or "provisional contract". It represents a promise to sell and/or buy, an agreement of will that precedes the conclusion of a sale and which is intended to give the parties the certainty that none of them will capitulate from the intention to carry out the envisaged contract (Cărpenaru, Stănciulescu, Nemeş, 2009:14). The promise whose object is the property right over the building can be recorded in the land register if the promisor is registered in the land register as the holder of the right that is the object of the promise, and the pre-contract, under the penalty of rejection of the request for recording, stipulates the term in which the contract is to be concluded (Stănciulescu, 2012 :105). The text did not provide the condition of the authentic form for the valid conclusion of the preliminary contract for the sale of real estate.

Likewise, sales-purchase contracts that do not comply with the requirement of authentic form because they are concluded in writing under private signature will be considered sales pre-contracts based on the principle of conversion of legal acts. They give rise to an obligation on both parties to make and improve (*facere*) the sale-purchase contract in an authentic form. The obligation to make (*facere*) is the one that compels the debtor to a positive act (or performance) other than giving (Flour, Aubert, Savaux, 2002: 26)**.** The party that has fulfilled its obligation to pay the price has the possibility of requesting the issuance of a decision that will take the place of an authentic sales contract..

The current Civil Code expressly provides, through the provisions of art. 1279 paragraph (3) of the Civil Code, and art. 1669 paragraph (1) of the Civil Code, for any

contractual party, in the event of refusal by the other party, to address the court to obtain a decision that will take the place of the contract. According to art. 1279 paragraph (3) of the Civil Code, "*if the promisor refuses to conclude the promised contract, the court, at the request of the party that has fulfilled its own obligations, may issue a decision that will take the place of the contract, when the nature of the contract allows it, and the requirements of the law for its validity are met. The provisions of this paragraph are not applicable in the case of a promise to conclude a real contract, unless otherwise provided by law."* Also, according to art. 1.669 paragraph (1) Civil Code: *"When one of the parties who have concluded a bilateral promise of sale unjustifiably refuses to conclude the promised contract, the other party may request the issuance of a judgment to replace the contract, if all other conditions of validity are met."*

The two cited legal texts represent particular applications of the enforcement remedy in kind to which the creditor may resort when the debtor fails to perform his assumed obligations. Since these texts represent procedural provisions laying down the conditions for exercising civil action, they are also applicable in the case of enforcement of obligations derived from preliminary sales-purchase contracts, concluded prior to the entry into force of the current Civil Code. In these cases, the acquisition of ownership of the real estate will be based on the court decision, which will replace the consent of the seller. The court decision is itself an authentic document (Sferdian,2021:598).

3. Limitations on the sale of land imposed by special legislation

The transition period in any society which encountered radical changes of the Government or the Political regime had multiple relativities and complications. In Romania, the transition period seems to have no end and on the contrary it seems more and more complicated (Rath-Boșca, 2015). All of this has imposed the need to adapt some traditional institutions of law (C.Miheș, 2019:103).

Significant restrictions on the sale of agricultural land outside built-up areas were imposed in Romanian legislation by Law no. 17/2014 on some measures regulating the sale of agricultural land located outside the built-up area and amending Law no. 268/2001 on the privatization of companies that manage public and private state-owned land for agricultural purposes and the establishment of the State Lands Agency. One of the declared purposes of the law, which has undergone numerous changes, was to ensure food security, protect national interests and exploit natural resources in accordance with the national interest. The law imposes special conditions for the agricultural land located outside built-up areas, within 30 km from the state border and the Black Sea coast inlands, as well as those alienated through sale-purchase only with the specific approval of the Ministry of National Defense (art. 3 paragraph 1 of the Law). Agricultural land located outside the built-up area can be alienated, by sale, before the completion of 8 years from the purchase, with the obligation to pay tax of 80% on the amount representing the difference between the sale price and the purchase price, based on the notary's grid for that period. According to the provisions of the Fiscal Procedure Code, the person who considers that his rights have been violated by a fiscal administrative act has the right to appeal. (Cîrmaciu, 2022; 59).

It also provides that the alienation, by sale, of agricultural land located outside built-up areas shall be carried out in compliance with the substantive and formal conditions provided

for by the Civil Code and rrespecting the pre-emptive right of certain categories of persons. . The legislative amendments of 2020 regulated seven categories of pre-emptors. Among those who make up these categories, we mention: co-owners, relatives, spouses, owners of agricultural investments, tenants, owners of neighboring land, young farmers, the Romanian State or the State Lands Agency (Art. 4 paragraph.1). The pre-emptive right is exercised in the order of the seven classes at a price and under conditions equal to those provided in the offer. We agree with the opinion expressed in the doctrine in the sense that the legislator surprisingly greatly, and even artificially, expands the scope of pre-emptions, by artificially dividing them into seven ranks of preferability, thus diluting the traditional meaning of the pre-emptive right and even tending towards a restriction of the principle of free movement of land (Marcusohn, 2021).

According to Article 16 of the Law no.17/2014, the alienation by sale of agricultural land located outside the built-up area without respecting the right of pre-emption, according to the provisions of law or without obtaining the approvals provided is prohibited and is punishable by absolute nullity. Also, following the amendments made to Law 17/2014 by Law no. 116/2024, the alienation by sale of agricultural land located outside the built-up area without respecting the provisions of Article 42 regarding the obligation to pay tax is prohibited and is punishable by relative nullity.

On the other hand, as regards the alienation, by sale, of agricultural land located in the outside built-up areas on which there are classified archaeological sites, this is done according with the provisions of Law no. 422/2001 on the protection of historical monuments, republished, with subsequent amendments (art. 4 paragraph 2). Last but not least, it is mandatory that the property that is the subject of the pre-contract be registered in the tax roll and in the land register.

Law no. 17/2014 requires compliance with these legal provisions also in the case of sale-purchase pre-contracts, regardless of whether they were concluded before or after its entry into force. Art. 5 paragraph 2 of the Law also provides that the application for registration in the land register of the ownership right shall be rejected if the conditions provided for by this law are not met.

Initially, art. 20 paragraph 1 of Law no. 17/2014 exempted from the obligation established by art. 5 paragraph 1 pre-contracts that were authenticated by a notary prior to its entry into force. However, the Constitutional Court of Romania, by decision no. 755 of 16th December 2014 (https://www.ccr.ro/wp-content/uploads/2020/07/Decizie_755_2014.pdf), admitted the exception of unconstitutionality of the provisions of art. 20 paragraph 1. The Constitutional Court considered that equal treatment should be established regardless of the form in which the pre-contract was concluded and made it mandatory to comply with the requirements of Law 17/2014 in all cases.

4. Important court decisions that interpreted the legal limitations

By decision no. 8 of June 10, 2013 of the High Court of Cassation and Justice (https://www.iccj.ro/2021/07/10/decizia-nr-8-din-10-iunie-2013/), it was decided that the legal action requesting the issuance of a court decision to replace an authentic act of sale and purchase of a real estate property has the character of a personal real estate action. The supreme court considered that the action is personal in nature, because the plaintiff asserts a

claim, namely the right to request the conclusion of the contract, correlative to the defendant's obligation to take the necessary steps to conclude it.

In another decision, no. 12 of June 8, 2015, rendered in an appeal in the interest of the law (https://www.iccj.ro/2015/06/08/decizia-nr-12-din-08-iunie-2015/), the High Court of Cassation and Justice ruled on the possibility of enforcing in kind of the promise of sale, in a situation where the promising seller has only an ideal share of the property right over it. The supreme court ruled that the promise of sale cannot be enforced in kind in the form of a judgment in lieu of a sale contract for the entire property without the consent of the other co-owners. The solution of partial admission of the action, within the limit of the co-owner's share in the property, can be envisaged only if the prospective purchaser opts to obtain a decision for an ideal share of the real estate property. Otherwise, the principle of availability would be terminated.

By issuing the decision, the court does not conclude the contract in place of the parties, but verifies the existence of the elements of the contract as agreed by the parties and, only to the extent that they are present, and the refusal of one of the parties was unjustified, then the court issues the decision that will replace this requirement. The court decision issued in this case ensures the enforcement of the obligation, legally assumed by the promise of sale, and does not assume the legal nature of the sale-purchase contract. The court decision enforces the right of the creditor (promiser-buyer) to obtain in kind the enforcement of the obligation to conclude the contract capable of transmitting the property right, assumed by the debtor (promiser-seller), the court decision cannot be confused with the sale contract itself, in the sense of *negotium*.

In the case of a pre-contract of sale and purchase concerning a real estate property, concluded by only one of the spouses, the prospective purchaser may not bring an action having as its object the issue of a decision that would take the place of the contract, provided that the pre- contract of sale and purchase did not give rise to an obligation to conclude a contract of sale and purchase and to transfer the ownership of the real estate property to the non-signatory spouse. The promising purchaser has the possibility to obtain only damages, without being able to successfully use the remedy of enforcement in kind of the obligation to dispose of the property assumed by one of the spouses.

In the Decision of the High Court of Cassation no. 24/2016 on the resolution of certain legal issues, the High Court of Cassation and Justice of Romania has established that the court may order the completion of the formalities in order to obtain the opinions provided for in art. 3 and art. 9 of Law no. 17/2014, as subsequently amended and supplemented, from the competent authorities and to follow the procedure regarding compliance with the right of pre-emption provided for in art. 4 of the same normative act, during the trial. It was also held that, given that by issuing a decision to replace a sale-purchase contract, the aim is to obtain a property transfer document, the conditions of validity of the contract must be verified by reference to the time of issuing the decision, and not to the time of formulating the action(https://www.iccj.ro/2016/09/26/decizia-nr-24-din-26-septembrie-2016/). The validity requirements provided for by Law 17/2014 can be fulfilled during the trial, with the assistance of the court, which will order the administration of evidence that may constitute proof of their fulfillment. If the court were not granted the possibility of actively acting in the sense of fulfilling certain legal requirements during the trial, by administering specific

evidence, the plaintiff's legal action would be completely devoid of purpose in the face of the defendant's refusal to carry out the procedures prior to the alienation of the property (The Decision no.235 of February 4,2021, https://www.scj.ro/1093/Detalii-).

In judicial practice, there have been controversies regarding the verifications of the formal or substantive requirements that the court must carry out when it is entrusted with the request to issue a decision allowing the registration in the land register of the arbitral award redered in a dispute related to the transfer of ownership and/or the establishment of another real right over a real estate property. By Decision No. 1/2022, the High Court of Cassation and Justice interpreted Article 603 of the Civil Procedure Code. According to Article 603 paragraph 3 of the Code of Civil Procedure, if the arbitral award concerns a dispute related to the transfer of ownership and/or the establishment of another real right over an immovable property, the arbitral award shall be submitted to the court or the notary public in order to obtain a court decision or, as the case may be, an authentic notarial deed. After the court or the public notary has verified compliance with the conditions and after the procedures imposed by law and after the parties have paid the tax on the transfer of ownership, the registration in the land register shall be carried out and the transfer of ownership and/or the establishment of another real right over the immovable property in question shall be carried out. By Decision no. 1/2022 rendered in an appeal in the interest of the law (https://www.iccj.ro/2022/03/25/decizia-nr-1-din-31-ianuarie-2022-2/), the High Court of Cassation and Justice ruled that the court will only analyze the formal conditions of the arbitral award, and not of the substantive ones. The Court reached this conclusion by interpreting the provisions of the Code of Civil Procedure, considering that the regulation of an appeal, subject to an imperative term for exercise (according to art. 611 of the Code of Civil Procedure) and a certain competence (of the court of appeal, according to art. 610 of the Code of Civil Procedure), cannot be circumvented, so that the formal aspects that could be exploited through the annulment action can be brought to the court in a non-contentious procedure (thus violating the legal regime of appeals).

5. Final conclusions.

Although there is a legal framework for acquiring property rights over real estate by Romanian citizens and foreigners, both through the regulations of recent years and through the interpretation of the relevant normative acts by the High Court of Cassation and Justice and the Constitutional Court, the situation of persons interested in seling or acquiring real estate and enforcement of sales pre-contracts has become significantly more difficult.

We consider that the beneficiary of a promise to sell real estate outside built-up areas, which falls under the incidence of Law no. 17/2014, is in a difficult situation as long as art. 5 paragraph 1 requires the fulfillment of the conditions provided for in art. 3, 4 and 9 in order to be able to issue a decision that will take the place of an authentic contract. The High Court of Cassation and Justice has stated that the special law does not authorize the court to issue a decision that will take the place of a sale-purchase contract in the absence of the cumulative fulfillment of the special validity conditions that this normative act imposes. Under Art. 1.669 of the Civil Code, the only condition of validity that can be replaced by the court, under the terms of law, is the consent of the promisor who unjustifiably refuses to conclude the promised contract, this being a general condition of validity.

One solution is to notify the court, either in the process regarding the issue of the decision that will take the place of an authentic contract, or separately, to oblige the promisor-seller to fulfill the formalities provided by law. However, the High Court of Cassation and Justice has established that the court may order the fulfillment of the formalities in order to obtain the opinions provided for in Art. 3 and Art. 9 of Law no. 17/2014, with subsequent amendments and completions, from the competent authorities and to follow the procedure regarding the observance of the right of pre-emption provided for in Art. 4 of the same normative act, during the court proceedings.

Regarding the limitations imposed especially after 2020, we consider that they excessively complicate the situation of owners seeking to alienate agricultural land outside the built-up areas of localities. We think that this restriction of the prerogative of the provision is likely to affect the very essence of the right to property.

REFERENCES

1. Bârsan C., *Drept civil. Drepturile reale principale în reglementarea noului Cod civil*, Editura Hamangiu, Bucureşti, 2013.
2. Cărpenaru S., Stănciulescu L., Nemeş V., *Contractele civile şi comerciale cu modificările aduse de Codul Civil 2009*, Editura Hamangiu, Bucureşti, 2009.
3. Cîrmaciu D., *Appeal procedure of fiscal administrative acts*. *The mandatory preliminary appeal procedure*, International Journal of Legal and Social Order, Vol. 1, No. 1/2022, https://ijlso.ccdsara.ro/international-journal-of-legal-a/issue/view/2/11
4. Costin M., Mureşan M., Ursa V., *Dicţionar de drept civil*, Editura Ştiinţifică şi Enciclopedică, Bucureşti, 1980.
5. Flour J., Aubert J. L., Savaux E., *Droit civil. Les obligations, 1. L"acte juridique civil*, Edition Dalloz, Paris, 2002.
6. Miheş C., *Consideraţii asupra necesităţii adaptării unor instituţii tradiţionale ale dreptului, penal în condiţiile societăţii dominate de tehnologia informaţiei*, in Ciopec F., Stănilă L.M., Pașca I.C., Previzibilitatea legislației și jurisprudenței în materie penală, Universul Juridic, Bucharest, 2019, p. 103–118.
7. Marcusohn V., *Noutăţi privind exercitarea dreptului de preempţiune în cazul vânzării terenurilor agricole situate în extravilan*, Revista Dreptul nr.6/2021.
8. Rath-Boșca L. D., *Considerations on the development of mediation in Romania*, Agora International Journal of Juridical Sciences, No. 4/2015, http://univagora.ro/jour/index.php/aijjs.
9. Sferdian I., *Drept civil. Drepturile reale principale*. *Studiu aprofundat*, Editura Hamangiu, București, 2021.
10. Stănciulescu L., *Curs de drept civil. Contracte*, Editura Hamangiu, Bucureşti, 2012.
11. The Decision of the High Court of Justice of Romania no. 8 of 10 June 2013 published in the Official Gazette of Romania no. 581 of 12 September 2013,
12. https://www.iccj.ro/2021/07/10/decizia-nr-8-din-10-iunie-2013/.
13. The Decision of Constitutional Court of Romania, no. 755 of December 16, 2014 published in the Official Gazette of Romania no.101 of 9 February 2015, https://www.ccr.ro/wp-content/uploads/2020/07/Decizie_755_2014.pdf

14. The Decision of the High Court of Justice of Romania no. 12 of June 8, 2015 published in the Official Gazette of Romania no. 678 of 7 September 2015, https://www.iccj.ro/2015/06/08/decizia-nr-12-din-08-iunie-2015/
15. The Decision of the High Court of Cassation no. 24 of September 26, 2016 published in the Official Gazette of Romania no. 936 of 22 November 2016,
16. https://www.iccj.ro/2016/09/26/decizia-nr-24-din-26-septembrie-2016/
17. The Decision of the High Court of Cassation no.235 of February 4, 2021, https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=182330#highlight=##
18. The Decision of the High Court of Cassation no. 1 of January 31, 2022 2016 published in the Official Gazette of Romania no. 284 of 24 March 2022, https://www.iccj.ro/2022/03/25/decizia-nr-1-din-31-ianuarie-2022-2/