

# **UNDER THE NEW CIVIL CODE: THE SALE CONTRACT IS TRANSLATED PROPERTY OR CREATOR ONLY OF OBLIGATIONS?**

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## **Abstract**

*According to art. 1650, paragraph. 1, of the Civil Code, "The sale is the contract that the seller transmits or, where appropriate, seek to transmit the property of an asset to the buyer, for a price which the buyer is obliged to pay" The dispositions of the 2011 civil code suggests that compared to the time of transfer of ownership, the contract may have different legal nature: creative translative property or obligations. Thus, transfer of ownership may be immediately and in this case, as occurs or may be postponed (conclusion of the contract) and in this case, is an obligation of the seller. For example, art. 1674 of Civil Code states that "the property is" shifting "by right to the buyer" and "General Provisions" of art. 1672. paragraph 1 and art. 1673. paragraph 1 of Civil Code provides that "The seller is obliged to transmit the buyer the ownership of the sold property ". Please note that until the appearance of the Civil Code 2011, the sale was widely known as "translational property" and a possible shift in the category of contracts creating obligations would produce important consequences for the concept (and related institutions). On the background issues above, we consider that the presentation of opinions and arguments in their support could be beneficial.*

**Keywords:** seller, property transfers, ownership, obligations, contract

## **a) Transfer of ownership: the right or the responsibility of the seller?**

The sale (that any legal act) legal effect, designed to enforce their interests. As derived directly from the contract (of law) or to the parties, the effects of the contract is divided into: effects of legal and personal effects. Thus, the sales contract has a double effect: the transfer of ownership from the seller to the buyer and the creation of obligations (to the parties).

Given the text of the law, that "the seller shall provide or, where appropriate, the buyer is obliged to send a good property" (Art. 1650 para. 1 Civil Code) would seem that the legislature in 2011 is only concerned with time transfer of ownership.

Without diminishing the role of time in which ownership is transferred from seller to buyer, at least as important to consider and determine the real spring that goes right to the buyer.

Clarification inconsistency is justified by the New Civil Code provisions. Thus, according to art. Paragraph 1650. A Civil Code, "the seller send" or seller "is obliged to submit property" (a transfer of ownership means that person is a seller's obligation), in turn, according to art. 1674 Civil Code, "property is shifting the right buyer at the time of conclusion" and art. Paragraph 1683. 3 Civil Code, "property is shifting the right buyer at the time of acquiring the property by the seller" (transfer of ownership is done right, the effect of the agreement will, even when the seller becomes the owner after the contract).

Next, we present briefly the transfer of ownership characteristics in the contract of sale, both in terms of mechanisms that produce it, but the implications when it is done.

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### b) Property transfers: legal (automatic, instant abstract)

Translative property contracts, representative doctrine is unanimous in assessing that the transfer of ownership takes the law (by agreement of wills, the contract itself, the source of the transfer).

Thus, in the opinion permitted national appreciated that, "In contracts which have as their object or another translation as real property, property or right is transmitted by operation of contract" (sn), thus the transmission of ownership is achieved "automatically and ex law."<sup>1</sup>

Likewise, "even if the parties by their will postpone the transfer of ownership to a date other than the conclusion of this transfer will be all automatic" (sn)<sup>2</sup>.

In the same context, but in another opinion stated that "the sale is in essence a contract translative of property so sold property transfer is done right, by contract<sup>3</sup>.

Consequently, the seller has an obligation to transfer the property because, once the property transfer contract law, without the intervention of the parties<sup>4</sup>.

Transfer of ownership occurs as, although it was agreed that when the transfer is delayed (Art. 1683 para. 3 Civil Code). In short the difference between the transfer of property and obligations of the parties is the difference between the obligations of giving and doing<sup>5</sup>.

Also indicated that the transfer of ownership is made instantly (totally healthy), that is inconceivable to understand a possible "transfer rate" of ownership<sup>6</sup>.

We appreciate that misunderstandings New Civil Code, reported the matter of ownership transfer mechanism should be attributed to different situations and without coordination of these laws.

Opinion that in any case, there is no question about a contract of sale otherwise (than already known) and therefore, according to the concept enshrined in national and European doctrine, the transfer of ownership in the contract of sale always operates of law (whether time coincides with the conclusion of the contract or transfer was postponed by the will of the parties or the law)<sup>7</sup>.

In conclusion, the "displacement" effect property is a legal contract and the seller has two obligations (personal) main teaching work and guarantee customer.

### c) When transferring ownership.

In terms of his conduct in time when transfer of ownership is important (to be defined and in no way confused with the source, spring transfer law).

Transfer of ownership at the time the contract.

<sup>1</sup> See L. Pop, Talk about some clarification of their obligations covered by the law no. 8 / 2005, p. 56-57.

<sup>2</sup> "The sale gives rise only to the requirements of teaching work sold, which is but one to make, and not one to give, subsequent transfer of ownership", see D. Chirica, special contracts. Civile and commercial Rosetti House, Bucharest, 2005, p. 74-75.

<sup>3</sup> See F.I. Motiu, Special Contracts, Legal Universe Publishing, Bucharest, 2011, p. 59.

<sup>4</sup> The European doctrine established, the value that transfer work widely sold is not "an obligation lies with the seller, because it is done by simple effect of the contract, that is, abstract manner, without any formality and, in principle, instantly" (sn), see Ph. Malaurie, L. Aynès, P.Y. Gautier, Droit civil. Les contrats spéciaux, Defrenois, Paris, 2007, p. 161, J. Huet, Traité de droit civil. Les principaux contrats spéciaux, LGDJ, Paris, 2001, p. 179; A. Benabent, Droit civil, civils et Les contrats spéciaux commerciaux, Montchrestien, Paris, 2008, p. 94.

<sup>5</sup> See G. Boroi, A.C. Anghelescu, civil law course. The general part. Hamangiu Publishing, Bucharest, 2011, p. 156.

<sup>6</sup> See D. Chirica, op. cit. (2005), p. 40.

<sup>7</sup> Given that ownership is an abstract, we ask the question: How should the legislature understand the actual transfer of ownership by the direct seller?

Usually, the transfer is done right at the time of conclusion of sale. It says so on the immediate transfer of ownership. According to art. 1674 Civil Code, "property is shifting the right buyer at the time of conclusion, even if the property was not delivered or was not yet paid the price."

Postponing the transfer of ownership after the contract end sale at a later date can be operated with the law.

Likewise, time delay and the parties may transfer agreement at a later date will. They have the right to postpone the moment of transfer of ownership because "time is not of public order"<sup>8</sup>.

If the sale of future goods, transfer of ownership operates only when they were executed (if things are to be made, the next crop, etc.).

Also, "when the sale is to such goods, including goods from a limited kind, the property is transferred by the buyer on their individualized teaching, counting, singing, printing, measurement or by otherwise agreed or required by the nature property "(Article 1678 Civil Code).

When concluding the contract the Seller is not working, own health is shifting the right buyer at the time of acquiring the property by the seller (Art. 1683 para. 3 Civil Code).

Likewise, the sale in installments, "the buyer acquires ownership of the final installment payment on the price," even if the thing was delivered terminates the contract (art. 1684 and art. 1755 Civil Code). In this case, the automatic transfer of ownership and abstract character remains<sup>9</sup>.

According to art. 119 of Law no. 71/2011 formalities necessary for enforceability reserve property advertising applies to contracts concluded before the entry into force of the New Civil Code, "if the subject property did not become enforceable against the previous law."

Finally, by the will of the law, "real rights on buildings included in the land is acquired, both between parties and against third parties" only upon entry in the land (Article 885 Civil Code). Thus, the sale agreement marks the only time of registration of transfer of immovable property (not the transfer itself, which takes place by agreement of wills).

In conclusion, according to the New Civil Code, the sale of property, transfer of ownership from the seller when the buyer is after the conclusion of the contract and the time overlaps effective against third parties.

#### d) Another thing selling is prohibited or valid?

By its nature, the sale is "translational property" because the work transferred ownership from seller to buyer. So to achieve the transfer of ownership, the seller must hold the right alienated<sup>10</sup>.

Per a contrario, if the seller does not own, cannot sell (on the principle that gave Quod nemo non habet). Thus, "Nothing seems more obvious and common sense than the fact that nobody can send more rights than he himself"<sup>11</sup> (sn).

Based on the foregoing, ownership of the seller is a requirement for the validity object. Although legal abnormal operation, sale by a non-proprietary work is common in practice is known as "selling another thing." The most common are cases of fraudulent operations (eg a third party sale or sales work the same good to multiple buyers), the work sold to a third party without bad faith (in the hope that it will acquire and transmit property later in time<sup>12</sup>) or retroactive loss of the right (following the cancellation or acquisition of property resolution act).

<sup>8</sup> In the French doctrine speaks of bringing forward the time of transfer of ownership of property to be purchased later, see A. Benabent, civil Drpoit. Les contrats speciaux civils et commerciaux, Montchrestien, Paris, 2008, p. 95-97.

<sup>9</sup> See D. Mainguy, Contrats speciaux, Dalloz, Paris 2008, p. 123.

<sup>10</sup> See Fr. Deak, civil law treaty. Special contracts, Actami Publishing, Bucharest, 1999, p 56.

<sup>11</sup> See D. Chrică, op. cit. (2005), p. 71 ff.

<sup>12</sup> For example, the sale by one spouse without the consent of a common good spouse or a spouse possessing, selling to a co-owner of an undivided ownership so good.

In our legislation, the sale is not expressly banned another work and therefore the situation is subject to general principles governing conventions (general theory of contract)<sup>13</sup>.

Please note that previous national doctrine, under the empire of the Civil Code of 1864 acknowledged that "the sale of another work" void contract (for non-requirement of validity of the object).

The new Civil Code challenged "sale of another work" by the provisions of art. paragraph 1683. One that "if the conclusion of the contract on an individual item determined, it is owned by a third party, the contract is valid" (sn).

In these new conditions, requiring a reconsideration of the institution "another sale work", for which thus arises a natural question: sale of another work or not valid?

From the outset we must stress that we appreciate the provisions of art. 1683 of the New Civil Code, at least for the fact that they have reopened the issue of sale of another work (properly unresolved previous regulations).

Please note that the doctrine of recent French ban on the sale is estimated that another work is fully justified in the case and immediately transfer the property. Otherwise, the parties postponed the transfer of ownership to a later conclusion of the sale, "prohibition loses its opportunity."<sup>14</sup>

In agreement with the current design, we consider that the seller should not always ownership at the time the contract. It is sufficient that the requirement of ownership to be fulfilled at the time of transfer to the buyer the right (which can be time the contract or a later time set by law or will of the parties - art. 1674 Civil Code). For this reason, the sale of future goods, the sale of such goods, the sale on time, etc., could not pronounce the nullity of contracts.

Trying to answer the question above, we must distinguish between two situations, as: the property buyer is shifting (right) with the contract or transfer of ownership is postponed. In the first case, the transfer of ownership takes place in time the contract if the seller has no ownership, contract of sale is sanctioned by nullity (for non sold work requirement).

Given the above, the sanction applicable to differ, as the parties were in error or have been informed (about the ownership of the seller).

When the parties (or at least the buyer) were in error, believing that the property belongs to the seller sold<sup>15</sup> it was accepted that the sale is canceled (relative void) for error on the essential quality of the seller (owner of the work considered sold). In this situation, we can say that the seller apparently acted as an owner.

Relative nullity of the sale may be made only by the purchaser, by the action (if the price was paid) or an exception (if the price was not paid).

The seller cannot rescind the contract under any circumstances, even if in good faith, because the error does not make void the falls on the person with whom contracted<sup>16</sup>.

No real owner can request cancellation, the third to the contract, but may bring an action to recover possession<sup>17</sup>. In this case, non-exercise claim action can be interpreted as "ratification of sale by owner" (Art. 1682 para. 2 Civil Code).

<sup>13</sup> Unlike French law, in that art. 1599 Civil Code provides that sales other work is zero.

<sup>14</sup> This is the reason why French law tends to limit the scope of nullity domeniu established by art. 1599 French Civil Code, see F. Collart Dutilleul, Ph. Delebeque, Contrats civils et commerciaux, Dalloz, Paris 2001, p. 117-119.

<sup>15</sup> See R. Sanilevici, I. Macovei consequences sale solutions work in the light of other legal practice in DRR no. 2 / 1975, p. 33 and practice: C.S.J., v. Civil Code, in December. no. 132/1994, the Law no. 5 / 1995, p. 77.

<sup>16</sup> According to art. 1212 Civil Code, "The victim of an error which is not otherwise entitled to the requirements of good faith."

<sup>17</sup> See T.S., v. Civil Code, in December. no. 2257/1967, in C.D. 1967, p. 83.

But if, meanwhile, became the owner seller work (after the sale), no buyer cannot rescind it. The obligation to guarantee the seller for eviction and remain in a situation where the buyer has not requested or required prior to cancellation, is the true owner crowded.

Note that, if the property is alienated in the public domain of the state or territorial administrative units, the contract is absolutely null in all cases, even if the buyer was in good faith (art. 136 of the Constitution).

When the parties knowingly entered into the contract (there was bad faith), knowing that the thing sold is the property of another person (and therefore the error is no longer an issue), it was considered that the sale transaction is a purchase of another speculative work, that is absolutely illegal and therefore null (under art. 1236 par. 2 and art. 1238 par. 2 Civil Code)<sup>18</sup>.

Note that, since the absolute nullity may be invoked by any person in this situation, the true owner may invoke the nullity, even if not attended the conclusion of the Convention. Over all the above, do not forget that according to the spirit of the Civil Code the legal act is presumed to be valid and the invalid is an extreme sanction, which operates only when the legal act cannot be preserved in any way.

In the second case, the transfer of ownership (and work) is postponed to a time after the conclusion of the contract if the seller has not become the owner of the work, the contract of sale is sanctioned by rescinded (for failure to obtain work and to "ensure" thus, transfer of ownership to the buyer - art. 1683 par. 4 Civil Code).

Appreciated that the new vision of the Civil Code in this field, enter the direction of European doctrine. For example, the recent French doctrine, selling work of another, is considered restrictive, appreciating that "there selling work to another, shall, be exposed to the crowded buyer made a true owner who exercises the claim" (sn). To do this, "should result in a sale of property right transfer, opening and a true owner's claim"<sup>19</sup>.

Moreover, all the French doctrine is admitted that the sale of another work "cannot be canceled when the seller, even if no owner of the work, is its apparent owner, as if the heir apparent" (sn). In this case, "the sale is valid on two conditions: good-faith purchaser (he ignores the fact that the seller was not the owner) and common error (everyone thought so): error facit jus communis (common error is the source of law)"<sup>20</sup>.

Consequently, under the new Civil Code requirement seller of property owner has suffered an attenuation conditional for delay transfer of the right (by the will of the parties or the law). In this case, it is accepted that, and can contract valid conclusion by a non-proprietary vendor.

Can be thus concluded by a non-proprietary valid sale and future assets, such sales, sales of individual assets determined (acquisition condition subsequent work), etc.

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<sup>18</sup> The contract vendor fraud law by owner, with the complicity and in any case, the risk of the purchaser, is a typical case and void, see Fr. Deak, op. cit., p. 42 and practice: Tribe. Constanta County, v. Civil Code, in December. no. 778/1987, in R.R.D. no. 2 / 1988, p. 69 70.

<sup>19</sup> To do this, "should result in a sale of property right transfer, opening and a true owner's claim" see Ph. Malaurie, L. Aynes, PY. Gautier, civil law. Special contracts, Wolters Kluwer, Bucharest, 2007, 124.

<sup>20</sup> See Ph. Malaurie, L. Aynes, PY. Gautier, op. cit., p. 126-127.

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