

The sale of another's property. Under the terms of the Romanian Civil Code, can the seller be a non-owner?

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Abstract

According to Article 1683(1) of the Civil Code, "If, at the time of conclusion of the contract for a specific individual asset, that asset is owned by a third party, the contract is valid and the seller is obliged to ensure the transfer of ownership from the owner to the buyer." The text of the law shows that "the sale of another's property" (specifically identified, our note - o..n.) is a valid transaction (in all cases, o.n.). Since, in doctrine, the transfer of ownership through sale has already been established, questions arise such as: can the seller be the owner of the property or not? Under the current legislative conditions, has the sale become (only, o.n.) a contract that creates obligations? The study aims to re-examine the regulation of the transfer of ownership, the sale of another's property, risk bearing, etc. (in accordance with European doctrine and legislation). The paper is structured in four sections: "The transfer of ownership through sale"; "The subject matter of the contract: present and future goods"; "Transfer of ownership: automatic, abstract, and instantaneous"; "Sale of another's property: valid, void, or voidable."

Keywords: seller-buyer; transfer of ownership, sale of another's property, present and future goods, legal and personal effects.

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1. The translativity nature of ownership of the sale

According to Article 1650(1) of the Civil Code, "A sale is a contract whereby the seller transfers or, as the case may be, undertakes to transfer to the buyer the ownership of an item in exchange for a price that the buyer undertakes to pay."

Traditionally, the contract of sale is defined by its legal characteristics. These are briefly listed below.

a) The sale is consensual in nature. According to Article 1178 of the Civil Code, the contract is concluded by the simple agreement of the parties, unless the law requires a specific formality for its valid conclusion.

It should be noted, however, that the sale is only consensual in principle³.

Sometimes, however, the sale becomes a solemn contract. For example, the sale of real estate (whether it is a building or land) must be concluded in authentic form under penalty of absolute nullity (Article 1244 of the Civil Code).

The authentic deed is drawn up in a single original copy and the parties each

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³ See Francisc Deak, *Treatise on Civil Law. Special Contracts*, Ed. Actami, Bucharest, 1999, p. 11; Florin Moțiu, *Special Contracts*. University Course, Ed. Universul Juridic, Bucharest, 2023, p. 13.

receive a duplicate of the original deed⁴.

It should be noted that the sale is not a real contract (because the goods sold may be delivered after the contract is concluded) nor is it *intuitu personae* (because, as a rule, the contract is not concluded in consideration of specific persons).

Ad probationem, when the goods have a value greater than 250 lei, the sale must be concluded in writing (Art. 309 para. 2 of the Civil Procedure Code).

Consequently, for sales that must be concluded in writing, proof cannot be provided by witnesses (Art. 309 para. 3 of the Civil Procedure Code)⁵.

b) The sale is a synallagmatic contract. A contract is synallagmatic when "the obligations arising from it are reciprocal and interdependent" (Art. 1171 of the Civil Code). Thus, the seller has the primary obligation to deliver the goods, and the buyer must pay the price.

The synallagmatic nature also implies the interdependence of obligations.

As a rule, the interdependence of obligations derives from the interdependence of the wills of the seller and the buyer.

Consequently, the reciprocity and interdependence of obligations create the premises for a presumption of economic balance between the performances of the parties to the contract of sale⁶.

c) A sale is a contract for consideration. The contract is for consideration because "each party seeks to obtain an advantage in exchange for the obligations assumed" (Art. 1172(1) of the Civil Code).

It follows that both the seller and the buyer seek to obtain a material equivalent in exchange for their own commitment.

The onerous nature is closely related to the synallagmatic nature of the sale.

d) The sale is a commutative contract because "at the time of its conclusion, the existence of the rights and obligations of the parties is certain, and their extent is determined or determinable" (Art. 1173 para. 1 of the Civil Code).

The commutative nature of the sale distinguishes the contract from any aleatory contract and is relative.

As an exception, the sale of litigious rights, a variety of common law sale, is aleatory in nature.

e) The sale is transferable of ownership. Thus, the contract of sale transfers the right of ownership of the property from the seller to the buyer.

According to Article 1674 of the Civil Code, "ownership is transferred by operation of law to the buyer upon conclusion of the contract, even if the goods have not been delivered or the price has not yet been paid."

Although it transfers ownership, the sale is, at the same time, "a source of

⁴ According to Article 885 of the Civil Code, "real rights over immovable property included in the land register are acquired, both between the parties and in relation to third parties," only from the moment of registration in the land register. According to Article 56(1) and (2) of Law No. 71/2011, until the completion of cadastral works, the registration of ownership rights and other real rights over immovable property in the land register shall be made only for the purpose of enforceability against third parties.

⁵ In the same context, *prima facie* evidence may only serve as proof between the parties if it is supplemented by other means of evidence, including witness testimony or presumptions (Article 310(3) of the Code of Civil Procedure).

⁶ See Vasile Nemeş, Gabriela Fierbinţeanu, *Civil and Commercial Contract Law. Theory, Jurisprudence, Models*, Ed. Hamangiu, Bucharest, 2022, p. 3 et seq.

personal obligations for both the seller and the buyer.⁷

The transfer of ownership takes effect immediately if certain conditions are met, such as: the seller is the owner of the item, the item exists and is individually identifiable⁸, and the transfer of ownership has not been postponed⁹.

The moment of transfer of ownership (o.n.) may be immediate or may be postponed (by the parties or by law).

2. Subject of the sale agreement: present and future goods

Legislatively, the subject matter of the contract is the legal transaction, such as sale, lease, loan, and the like, agreed upon by the parties, as evidenced by the set of contractual rights and obligations (Art. 1225 of the Civil Code).

Doctrinally, it has been argued that the goods are the derivative (material, o.n.) object of the civil legal act¹⁰.

To introduce the context, we briefly analyze the object of the parties' performances in the sales contract, namely the goods and the price.

a) The goods sold must meet the following requirements. The goods sold must be possible. As a rule, *ad impossibilium, nulla obligatio*.

The impossibility of the goods sold may be material or legal and is assessed at the conclusion of the contract¹¹.

The situation is different if, at the conclusion of the contract, the object was possible, but subsequently its execution becomes impossible due to unforeseeable circumstances or force majeure.

In the above case, the issue of contract risk arises.

However, "if, at the time of its conclusion, one of the parties is unable to perform its obligation," the contract is still valid (Art. 1227 of the Civil Code).

The goods sold must exist (or be capable of existing).

When the goods negotiated by the parties have been completely destroyed at the time of conclusion of the contract, the sale "has no effect" (Art. 1659 para. 1 of the Civil Code).

However, if the goods have been partially destroyed, the buyer who was unaware of this fact at the time of sale may request either the cancellation of the sale or a corresponding reduction in price (Art. 1659 of the Civil Code).

It should be noted that the goods contracted for may also be future goods (*res futura*).

In the above case, if the goods do not exist at the time of conclusion of the contract but may exist in the future, the sale is valid (Art. 1228 of the Civil Code)¹².

⁷ See Dan Chirică, *Treatise on Civil Law. Special Contracts*, vol. 1. *Sale and Exchange*, ed. Hamangiu, Bucharest, 2023, p. 326.

⁸ Thus, according to Article 1678 of the Civil Code, when the sale concerns goods of a certain type, including goods of a limited type, ownership is transferred to the buyer on the date of their individualisation by delivery, counting, weighing, measuring or by any other means agreed or imposed by the nature of the goods.

⁹ See Manuela Tăbăraș, *Special Contracts*, Ed. CH Beck, Bucharest, 2013, p. 5.

¹⁰ See Gabriel Boroi, Carla Alexandra Anghelescu, *Course on Civil Law. General Part*, Ed. Hamangiu, Bucharest, 2021, p. 180.

¹¹ See Titus Prescure, *Course on Civil Contracts*, Ed. Hamangiu, Bucharest, 2012, p. 57 et seq.

¹² The good is considered to be delivered on the date when it becomes fit for use according to the purpose

The goods sold must be in civil circulation. "Only goods that are in civil circulation may be the subject of a contractual service" (Art. 1229 of the Civil Code). It is presumed that all goods are "in civil circulation."

Goods that are not in commerce (*extra commercium*) cannot be the subject of a sales contract.

The following are exclusively subject to public ownership: public resources of the subsoil, communication routes, airspace, waters with exploitable energy potential and those that can be used in the public interest, beaches, territorial waters, natural resources of the continental shelf economic zone, as well as other goods established by law (Art. 859 of the Civil Code).

The goods sold must be determined or determinable. Goods are determined by their individuality.

Goods may be certain or generically determined.

Certain goods are determined by their individual characteristics, i.e., their nature, position, size, etc., while generically determined goods (*res genera*) are determined by quantity, quality, value, etc.

When the price or any other element of the contract is to be determined by a third party, this must be done "fairly, diligently, and impartially" (Art. 1232(1) of the Civil Code).

The penalty for non-compliance with this requirement is, in all cases, the absolute nullity of the contract (Art. 1225(2) of the Civil Code).

The goods sold must be lawful and moral. According to Art. 1225 para. 2 of the Civil Code, the subject matter of the contract must be in accordance with both the law and the rules of social coexistence (morality).

The object is unlawful when it is prohibited by law or contravenes public order or morality.

The penalty for a contract with an unlawful or immoral object is absolute nullity¹³.

b) The sale price is the amount of money representing the equivalent owed by the buyer in exchange for the goods transferred by the seller. *Ad validatem*, the price must meet the following requirements.

The price must be set in money. The requirement of a price in money is essential to the contract of sale (Art. 1660 para. 1 of the Civil Code).

It should be noted that it is not necessary for the sale price to be set entirely in cash, but only that the amount of money constitutes the buyer's main consideration.

As a rule, the price of sales made on national territory must be paid in lei (but reporting it in euros does not affect the validity of the contract).

for which the contract was concluded (Art. 1658 para. 5 of the Civil Code). Otherwise, the contract has no effect.

¹³ A special regulation on the sale of goods was introduced by Government Emergency Ordinance No. 140/2021 on certain aspects relating to contracts for the sale of goods (in force since January 1, 2022). The ordinance established the legal framework for sales contracts concluded between sellers and consumers, in particular rules on the conformity of goods, corrective measures in the event of non-conformity, the methods of implementing those corrective measures, and commercial guarantees with a view to ensuring a high level of consumer protection and the proper functioning of the internal market. For details, see Camelia Spasici, „Considerations on the conformity of goods and guarantees under the conditions of Government Emergency Ordinance No. 140/2021”, in *Universul Juridic* No. 10/2022, p. 20 et seq.

The price must be determined or determinable. As a rule, the amount of the price is determined by the parties upon conclusion of the contract.

The sale price is "sufficiently determined" if it can be established according to the circumstances (1664 para. 1 of the Civil Code).

As a rule, the amount of the price is determined by the parties upon conclusion of the contract (but may be determined subsequently by a third party).

In commercial relations, when the contract concerns goods that the seller usually sells, it is presumed that the parties had in mind the price usually charged by the seller.

The sale is also valid when "the parties have agreed on a method by which the price can be determined at a later date, but no later than the date of payment, and which does not require a new agreement between the parties" (Art. 1661 of the Civil Code). In this case, the price is determinable.

When the price has not been determined within one year of the conclusion of the contract, the contract is sanctioned with absolute nullity.

The price must be fair and serious (but not prejudicial).

The fair (real) price is a true price (set, agreed upon by the parties) for the purpose of actually paying it.

When the price is fictitious (simulated), the sales contract is voidable (if the price was "set without the intention of being paid")¹⁴.

The price is serious when it reflects the value of the goods, so it is not derisory (negligible). Thus, a serious price excludes the existence of a disproportion that is not (susceptible to natural justification, o.n.).

The price is derisory when it is "so disproportionate to the value of the goods that it is obvious that the parties did not intend to consent to a sale" (Art. 1665 para. 2 of the Civil Code).

When the price is real and serious, the sales contract is, in principle, valid, even if the price is much lower or higher than the real value of the thing sold, since the parties are free to determine the price below the value of the thing, the equivalence being relative, as it is related both to the value of the thing and to the subjectivity of the parties.

The price is detrimental when there is a clear disproportion between the market value of the item and the actual price paid by the buyer.

According to Article 1222(1) of the Civil Code, the party "whose consent was vitiated by lesion may, at its discretion, request the annulment of the contract or the reduction of its obligations by the amount of damages to which it would be entitled."

An action for annulment is admissible only if the lesion exceeds half of the value that the service promised or performed by the injured party had at the time of conclusion of the contract.

The right to bring an action for annulment due to lesion is time-barred one year after the date of conclusion of the contract¹⁵.

¹⁴ See Florin Motiu, *op. cit.*, p. 51.

¹⁵ Instead, the penalty for not having a price is absolute nullity (because the buyer's obligation has no purpose, and the seller's obligation has no cause). For details, see Camelia Spasici, *Special Contracts*, Ed. Hamangiu, Bucharest, 2025, pp. 92-93.

3. Transfer of ownership: automatic, abstract and instant

A validly concluded sales contract produces legal effects¹⁶.

The main effect of the sales contract is the transfer of ownership from the seller to the buyer (in relation to the other personal effects of the contract)¹⁷.

Legislatively, according to Article 1650(1) of the Civil Code, "the seller transfers or, as the case may be, undertakes to transfer ownership of an item to the buyer."

Similarly, the transfer of ownership is carried out at the intervention of the transferor in two ways: "the seller transfers" or the seller "undertakes to transfer" (ownership of an item). Thus, the seller "is obliged: to ensure the transfer of ownership" (Article 1683(1) of the Civil Code).

On the other hand, according to the contradictory provisions of Article 1674 of the Civil Code, "ownership is transferred by operation of law to the buyer upon conclusion of the contract" (our emphasis).

Similarly, "ownership is transferred by operation of law to the buyer from the moment the seller acquires the goods" (Article 1683(3) of the Civil Code).

From the texts presented above, it follows that the transfer of ownership in the sales contract operates either by law or as an obligation (personal, o.n.) of the seller?

Given the debatable nature of the above texts, we present a few considerations.

In the Civil Code of 1864 (now repealed), the transfer of ownership was not expressly included as an effect of the sales contract. However, Article 1294 of the Civil Code provided that "Sale is an agreement whereby two parties undertake between themselves, one to transfer to the other the ownership of a thing, and the other to pay the former its price."

Similarly, "The sale is perfect between the parties and ownership is legally transferred to the buyer, with regard to the seller, as soon as the parties agree on the item and the price, even if the item has not yet been delivered and the price has not yet been paid."

In the context of the times, it was generally considered that the transfer of ownership of the thing sold was only "the nature of the sale and purchase agreement" and not its essence¹⁸.

Currently, the issue of the method of transfer of ownership has been settled in French legislation and doctrine.

a) Legal effects and personal effects! Since the 1980s, French doctrine has drawn attention to the important role that the transfer of ownership plays in the formation and execution of the most important civil contract: sale.

The main elements of a sale are the goods and the price, but the main interest

¹⁶ It should be noted that, in terms of their nature, the effects of legal acts (including contracts, etc.) are legal means intended to achieve the interests of the parties: the seller and the buyer.

¹⁷ The main effect of the sale "is a real one, that of transferring ownership and risks from the seller to the buyer" (our emphasis); see Dan Chirică, *op. cit.*, p. 326.

¹⁸ See Francisc Deak, *op. cit.*, p. 9; Eugeniu Safta-Romano, *Civil Contracts, Conclusion. Enforcement. Termination*, Ed. Polirom, Iași, 1999, p. 18; Ion Dogaru, Edmond Gabriel Olteanu, Lucian Bernd Săuleanu, *Fundamentals of Civil Law*. Volume IV. Special Contracts, Ed. C.H. Beck, Bucharest, 2009, p. 94.

pursued by the parties when concluding the contract is the transfer of ownership¹⁹. Thus, the transfer of ownership has a special significance in a sales contract.

The transfer of ownership is the "essential effect" of the contract, and the sale has become the model for contracts transferring ownership²⁰.

Consequently, in European doctrine, the effects of the sales contract have been divided into two categories: "legal effects" (derived directly from the contract - the "law" of the parties) and "personal effects" (obligations of the seller and buyer)²¹. Thus, a distinction was made between the transfer of ownership (legal effect) and the obligations of the parties (personal effects); in other words, the difference between the obligation to give and the obligation to do.

In France, the issue was settled by Ordinance No. 2016-131 of February 10, 2016, on the reform of contract law (in force since October 1, 2018).

According to Article 2 of the ordinance, the section entitled "Translative effect," Article 1196, paragraphs 1-3 of the French Civil Code, was amended as follows:

- in contracts transferring ownership or assigning another right, the transfer of the right takes place at the time of conclusion of the contract" (Article 1196(1) of the ordinance);

- the transfer of the right may be postponed by the will of the parties, by the nature of things or by law (Article 1196(2) of the ordinance);

- the transfer of ownership also includes the transfer of the risk of fortuitous loss of the thing (Article 1196(3) of the ordinance).

According to French law, the transfer of ownership operates under the term "*effet translationnel*" (transfer effect), which suggests that it is not a contractual obligation, but a legal effect of the contract.

Consequently, the transfer of the seller's right of ownership has its basis (mechanism, o.n.²²) in the agreement of the contracting parties (the distinction, in terms of effects, between the transfer of rights and the transfer of goods).

b) In the national literature on the subject, representative reactions have been favorable to the **distinction between the transfer of ownership and the obligations of the parties**. Even when ownership is not transferred to the buyer at the time of conclusion of the contract, but at a later date, "the transfer is a direct effect of the contract, and not of the performance of any obligation on the part of the seller."²³

In another opinion, it was stated that the introduction of this obligation, as well as the inclusion, through the definition in Article 1650, of the contract whereby "the

¹⁹ See Georges Decocq, Cyril Grimaldi, Jérôme Huet, Hervé Lécuyer, *Les principaux contrats spéciaux*, Librairie générale de droit et de jurisprudence, Paris, 2012, p. 54.

²⁰ On the transfer of ownership as being, in fact, the "sole effect" of the contract (the obligations of the parties being merely derivative, o.n.); see Jérôme Huet, *Traité de droit civil. Les principaux contrats spéciaux*, Librairie générale de droit et de jurisprudence, Paris, 2001, p. 179.

²¹ Consequently, European doctrine maintains that the transfer of ownership is not "an obligation incumbent upon the seller, since it is achieved by the mere effect of the contract, i.e., in an abstract manner, without any formality and, in principle, instantaneously" (emphasis added); see Philippe Malaurie, Laurent Aynès, Pierre-Yves Gautier, *Droit des contrats spéciaux*, Librairie générale de droit et de jurisprudence, 2022, pp. 183-185; Alain Benabent, *Droit des contrats spéciaux civils et commerciaux*, Librairie générale de droit et de jurisprudence, 2021, pp. 183 et seq.

²² See Daniel Mainguy, *Contrats spéciaux*, Dalloz, 2022, p. 145.

²³ See Dan Chirică, *op. cit.*, p. 327.

seller (...) undertakes to transfer (...) ownership of an asset" within the scope of the sale, does not add anything to the regulation of this contract and does not solve any problem that has not already been solved either in the area of promises of sale or in the regulation of real estate advertising²⁴.

It can also be interpreted that, at the time of its creation, the sale is both transferable of ownership and generates obligations for the parties. Thus, "the aforementioned obligation is in reality a mirage, a mere illusion, and not an obligation with a concrete, detectable existence."²⁵

In another opinion, it was stated that the obligatory act in this case has a concrete existence and therefore is not "a mere illusion," and only conditions the transfer of ownership for the future in relation to the fulfillment or non-fulfillment of the seller's obligation to transfer ownership. Or it can be understood that "the only way to conceive of the existence of the obligation to give is to define it as a legal fiction"²⁶.

Consequently, upon sale, the transfer of ownership occurs by operation of law, through the agreement of the parties (the seller and the buyer). This is achieved by the simple effect of the contract, i.e., automatically, abstractly, and instantaneously.

The "transfer" of ownership is a legal effect of the contract.

c) Postponement of the transfer of ownership. As a rule, the transfer of ownership, the goods sold, and the price paid by the buyer take place on the date of conclusion of the contract.

As an exception, by the will of the parties or by law, both the transfer of ownership and the obligations of the parties may be postponed to a later date. For example, the sale of future goods, the sale of generic goods, sale in installments, etc.

In the case of the sale of generic goods, ownership is transferred to the buyer on the date of their individualization by delivery, counting, weighing, measuring, or by any other means agreed upon or imposed by the nature of the goods (Art. 1678 of the Civil Code).

This may also be the case with sales under "Reservation of title," when "the buyer acquires ownership on the date of payment of the last installment of the price," even if the item was delivered upon conclusion of the contract (Art. 1684 and Art. 1755 of the Civil Code).

In the case of a sale under a suspensive condition, the effectiveness of the contract is conditional upon the future occurrence of an event (which also determines the moment of transfer of ownership)²⁷.

The best-known sales under a suspensive condition are: sale on approval, sale on trial, but also sale affected by the suspensive condition "of non-exercise of the right of preemption by the preemptor" (Art. 1731 of the Civil Code).

Consequently, the method of transferring ownership and its postponement are two distinct elements of the sales contract (which cannot be confused, o.n.).

Currently, the sale of real property rights has inter partes effects from the

²⁴ See Vasile Nemes, Gabriela Fierbinteanu, *op. cit.*, p. 56; Florin Moțiu, *op. cit.*, p. 57.

²⁵ See Gheorghe Comăniță, „Once again, on several aspects regarding the sale of another's property”, in Teodor Bodoasca, Calina Jugastru, Eugen Huruba, Verginel Lozneau (coord.), *Liber Amicorum Ioan Leș. Contributions to the study of private law*, Ed. Universul Juridic, Bucharest, 2017, p. 326.

²⁶ See Șerban Mircioiu, *Transfer of Ownership by Sale*, Ed. Universul Juridic, Bucharest, 2014, p. 361.

²⁷ See Jérôme Huet, Georges Decocq, Cyril Grimaldi, Hervé Lécuyer, *Les principaux contrats spéciaux*, Librairie générale de droit et de jurisprudence, 2012, pp. 164–165.

moment the contract is concluded, at which point the right of ownership is transferred from the seller to the buyer (despite the provisions of Article 885 of the Civil Code, according to which "real rights over immovable property included in the land register are acquired, both between the parties and in relation to third parties" only from the moment of registration in the land register)²⁸.

We note that in the above cases, the transfer of ownership operates on the basis of the consent of the parties expressed in the contract.

It follows that the postponement of the transfer of ownership, regardless of its cause, does not change its source (automatic, abstract, and instantaneous effect (our note)).

3.1. Risk in the sales contract: subject to special rules

Directly related to the transfer of ownership is the issue of the risk of loss of the property being sold.

As a general rule, the owner bears the risk of loss of the property, "unless this risk has been assumed by another person or unless otherwise provided by law" (Art. 558 of the Civil Code).

The general rule of risk has been enshrined in the adage *res perit domino*.

However, the principle of *res perit domino* is not mandatory²⁹.

Consequently, the law or the parties may modify the rule (for example, that the seller bears the risks even after the transfer of ownership or that the buyer assumes the risks before the transfer of ownership)³⁰.

According to the special rule (also applicable to sales, o.n.), as long as "the goods are not delivered, the risk of the contract remains with the debtor of the obligation to deliver, even if ownership has been transferred to the purchaser" (Art. 1274(1) of the Civil Code).

Therefore, in a sales contract, when the goods are still in the seller's possession, the seller bears the risk of the contract, in its capacity as debtor of the obligation that is impossible to perform (*res perit debitori*).

It follows that, in the above context, "in a sale with payment of the price in installments guaranteed by retention of title, the risk of the goods is transferred to the buyer at the time of delivery" (Art. 1755 of the Civil Code).

4. Sale of another's property: valid, null, or resolvable?

Legislatively, according to Article 1683(1) of the Civil Code, entitled "Sale of another's property," "If, at the time of conclusion of the contract for a specific individual property, it is owned by a third party, the contract is valid and the seller is obliged to ensure the transfer of ownership from its owner to the buyer".

Furthermore, the seller's obligation is considered to have been fulfilled either

²⁸ According to Article 56(1) and (2) of Law No. 71/2011, until the completion of cadastral works, the registration of ownership rights and other real property rights in the land register shall be made solely for the purpose of enforceability against third parties.

²⁹ See Vasile Nemeș, Gabriela Fierbințeanu, *op. cit.*, p. 65.

³⁰ See Camelia Spasici, *op. cit.*, pp. 81–83.

by the seller's acquisition of the property, or by the owner's ratification of the sale, or by any other means, direct or indirect, that procures the buyer's ownership of the property (Article 1683(2) of the Civil Code)³¹.

In the same context, when the seller fails to ensure the transfer of ownership to the buyer, the latter may request the termination of the contract, the refund of the price, and, where applicable, damages (Art. 1683 para. 4 of the Civil Code).

With regard to the above provisions, which are debatable, we make the following assessments.

4.1. Sale of another person's "property" under the provisions of the Civil Code of 1864

Since "sale and purchase" was considered a contract transferring ownership, the seller had to be the owner of the "property" being sold (*nemo dat quod non habet*).

In legal theory, this situation was known as "the sale of another's property."

The transaction was an abnormal legal operation, but it did occur in practice, either because both parties were unaware of the facts or because the seller and buyer knew that the property belonged to another person.

In practice, the sale of another's property manifested itself in: the sale by an apparent heir, the sale by one spouse of a joint property without the consent of the other spouse or of a property belonging to the other spouse, the sale by a co-owner of an undivided property, the sale of stolen property, etc.

Since the sale of another person's property was not prohibited by law, it was subject to the general principles governing agreements.

Consequently, a sale and purchase agreement concerning an item that is not owned by the seller was subject to nullity (relative or absolute).

The applicable penalty differed depending on whether the parties were mistaken or aware of the facts (regarding the seller's ownership, o.n.).

a) When the parties (or at least the buyer) were in error, believing that the goods sold belonged to the seller, the sale was deemed voidable due to error regarding the essential quality of the seller (in which case, the seller behaved as an apparent owner).

The penalty of nullity could only be requested by the buyer, by way of action (if the price had been paid) or by way of exception (if the price had not been paid).

The seller could not request the cancellation of the contract, even if he was acting in good faith, because "the error does not render the contract null and void when it falls on the person with whom the contract was concluded" (Art. 954(2) of the Civil Code of 1864).

The true owner cannot request cancellation either (being a third party to the contract), but could bring an action for recovery.

It should be noted that, if in the meantime the seller has become the owner of the item (after the conclusion of the sales contract), the buyer can no longer request its cancellation.

³¹ Unless otherwise provided by law or by the parties, ownership is transferred to the buyer from the moment the seller acquires the property, or the owner ratifies the sales contract (Article 1683(3) of the Civil Code).

However, the seller's warranty obligation for eviction subsists even if the buyer has not requested annulment or, before requesting annulment, is evicted by the true owner.

b) When the parties concluded the contract in full knowledge of the facts, knowing that the item sold was the property of another person (and therefore the issue of error no longer arose), the solution was controversial.

In an older argument, it was considered that the sale would be perfectly valid (since the agreement of will must be interpreted in the sense that the parties did not seek the immediate transfer of ownership of the item, but the seller only undertook to procure it later for the buyer, in the event of non-performance being liable to pay damages)³².

Instead, it was argued that the sale and purchase of another person's property with full knowledge of the facts constituted a speculative transaction, had an unlawful cause, and was therefore absolutely null and void (based on the provisions of Article 968 of the Civil Code).

Thus, a contract concluded by the seller in fraud of the owner's rights, with the complicity and, in any case, at the risk of the buyer, constitutes a typical case of absolute nullity (by virtue of the well-known classical adage: *fraus omnia corrumpit*)³³.

Since the absolute nullity of an agreement may be invoked by any person, the true owner had the right to invoke nullity, even if he did not participate in its conclusion.

4.2. Sale of another's property, under the provisions of the Civil Code 2009

As a rule, the seller must be the owner of the goods (at the time of conclusion of the contract).

Legislatively, this principle is also recognized by Article 17(1) of the Civil Code, according to which "No one may transfer or establish more rights than he himself has."

Notwithstanding the above, the Civil Code (in force) contains some controversial provisions. For example, according to Article 1230, "the property of a third party may be the subject of a service, the debtor being obliged to procure it and transfer it to his creditor or, where applicable, to obtain the consent of the third party" (our emphasis).

Similarly, Article 1683(1) provides that "if, at the time of conclusion of the contract for a specific individual asset, that asset is owned by a third party, the contract is valid..." (emphasis added).

Furthermore, as a penalty, when a co-owner has sold the jointly owned property and subsequently fails to ensure the transfer of ownership of the entire property to the buyer, the latter may request, in addition to damages, at his discretion, either a reduction in price proportional to the share he did not acquire, or the

³² See Eugeniu Safta-Romano, *op. cit.*, p. 41 et seq.; Valeriu Stoica, *Civil Law. Special Contracts*, ed. Universul Juridic, Bucharest, 2008, p. 5 et seq.

³³ The most common cases are those of fraudulent transactions (e.g., the sale of property to a third party in bad faith or the sale of the same property to several buyers), the sale of property to a third party in good faith, or the retroactive loss of rights, etc.; see Francisc Deak, *op. cit.*, p. 56 et seq.

termination of the contract if he would not have purchased it had he known that he would not acquire ownership of the entire property (Article 1683(5) of the Civil Code).

Given the contradictory provisions above, questions arise such as: can the sale of an asset (individually determined, o.n.) by a non-owner be valid? Has the seller's status as owner become irrelevant?

In attempting to answer the above questions, we note that national law recognizes the transfer of ownership character of the sales contract.

Consequently, "in legal systems where the sale is transferable of ownership, the sale of another's property is voidable, not resolvable" (see Art. 1599 of the French Civil Code, o.n.).

Similarly, Art. 1713 of the Civil Code of Quebec provides that the sale of property by a person who is not the owner or who is neither empowered nor authorized to sell may be null and void" (o.n.)³⁴.

Notwithstanding the above, "the provisions of Art. 1599 of the French Civil Code were not included in the drafting of the 2009 Civil Code, although "the solution for the sale of another's property should still be that of relative nullity pronounced at the request of the buyer, the principles of both regulations being undoubtedly identical in this regard" (o.n.)³⁵.

Furthermore, the Civil Code goes so far as to directly assert that the sale of another person's property is valid in all situations ("recklessly and without any justification," our emphasis).

In addition, even in the case of "ratification of the sales contract by the owner," the legislator's error "is obvious, because, as is well known, ratification³⁶ is nothing more than a confirmation of the sale by the true owner³⁷."

In view of the above, we propose that the legislator intervene to restore the provisions of the sales contract to legal reality.

5. Conclusions

Under national law, the sale is transferable by ownership.

As a general rule, ownership is transferred by law to the buyer upon conclusion of the contract, even if the goods have not yet been delivered or the price has not yet been paid.

The moment of transfer of ownership may be postponed (by the parties or by law).

The transfer of ownership takes effect immediately when: the seller is the owner of the item, the item exists and is individually determined, and the transfer of ownership has not been postponed by the will of the parties or by law.

The effects of the sales contract are divided into: "legal effects" (derived directly from the contract - the "law" of the parties) and "personal effects" (obligations

³⁴ The Italian Civil Code makes a distinction (according to which a buyer acting in good faith may, at the time of conclusion of the sale, request termination of the contract if the seller does not acquire ownership of the goods sold in the meantime (Art. 1479 of the Italian Civil Code).

³⁵ See Dan Chirică, *op. cit.*, p. 67 et seq.

³⁶ According to Article 1312 of the Civil Code, "Effects of ratification. Ratification has retroactive effect, without affecting the rights acquired by third parties in the meantime."

³⁷ See Dan Chirică, *op. cit.*, p. 77.

of the seller and buyer).

The difference between the transfer of ownership (legal effect) and the obligations of the parties (personal effects) is the difference between the obligation to give and the obligation to do.

Although abnormal, the sale of another's property is common in practice.

As a sanction, the sale of another's property is voidable (not void, o.n.).

In view of the above, the legislator must intervene to restore the respective provisions in legal reality.

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