ASPECTS CONCERNING THE PRIVATE OWNERSHIP RIGHT WITHIN THE CONTEXT OF THE NEW CIVIL CODE

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Abstract

The new Civil Code introduces several important changes and clarifications regarding the ownership right in general, and the private ownership right, in particular, so that it becomes necessary, for both the analyst in law and the practitioner, to make a comparison between the old regulation contained in the Civil Code of 1864 and the current regulation provided by the new Civil Code. At least in theory, the new legal framework in this area shows greater consistency and legal precision, although it is not entirely safe from any criticism.

Key words: *private ownership right, restoration of property, juridical limits, legal limits, conventional limits, judicial limits*

JEL Classification: *K11*

1. Preliminary considerations

The new Civil Code[2] introduces several important changes and clarifications regarding the ownership right in general, and the private ownership right, in particular, therefore requiring a comparative research between the old regulation contained in the Civil Code of 1864 and the current regulation provided by the new Civil Code.

In this respect, taking into account the critical comments referring to the legal definition of the ownership right contained in art. 480 of the 1864 Civil Code[3], the legislator has completed it as emphasized by the juridical doctrine, so that in the new regulation (article 555 of the new Civil Code), this definition contains all the attributes that compose the legal content of the ownership right, namely possession, use and disposition[4].

At the same time, concerning the juridical characters of the private ownership right, the legal definition provided by art. 555 of the new Civil Code is more comprehensive since it refers to all characters of the property right arising from its specific legal nature, namely the exclusive, absolute and perpetual characters[5].

By the legal regulation of private ownership right contained in the new Civil Code, the Romanian legislator has intended to eliminate other critics or confusions caused by the prior regulation, such as for example in relation to the ways of acquiring private ownership. Thus, the legal enumeration of the general ways of acquiring private property right contained in art. 644

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[2] Law no. 287/2009, republished in the Official Journal of Romania, Part I, no. 505/15.07.2011.

[3] See, in this respect, L. Pop, *Dreptul de proprietate şi dezmembrămintele sale*, Lumina Lex Publishing House, Bucharest, 2001, p. 41-42.

[4] In the old regulation, art. 480 of the Civil Code of 1864 provided: "The property is the right one has to enjoy and dispose of a thing ....". Some authors have argued that the legal definition of the ownership right was incomplete because it did not include the use of the thing, as an attribute of this right. We consider, among other authors - for example, P.C. Vlahide, *Repetiţia principiilor de drept civil*, vol I, Europa Nova Publishing House, Bucharest, 1994, p. 83; G. Boroi, L. Stănciulescu, *Instituţii de drept civil în reglementarea noului Cod civil*, Hamangiu Publishing House, Bucharest, 2012, p. 17 – that this criticism was not justified, because the expression "to enjoy" a thing designate both the use and the possession over it. In any case, the current regulation has eliminated any controversy in this regard, so that art. 555 of the new Civil Code expressly provides: "The private property is the right of the owner to possess, use and dispose of a thing in an exclusive, absolute and perpetual manner, within the limits established by law."

[5] In the old regulation, the legal definition of the private ownership right, contained in art. 480 of the 1864 Civil Code, made reference only to the absolute and exclusive characters, but in the juridical doctrine all authors had analyzed, in addition to these juridical characters expressly provided by the law, the perpetuity of ownership.

and 645 of the 1864 Civil Code[6] had been considered in the juridical literature primarily incomplete, because it did not refer to the constitutive or translative of rights judgments or to the way of acquiring movable goods and fruits by possession in good faith. Equally, this list has been criticized as confusing, because it mentioned the succession, without any explanation, and distinctly legacies (in fact testamentary succession) as ways of acquiring private ownership right[7].

Therefore, within the current regulation, according to article 557 paragraphs 1 and 2 of the new Civil Code, the ownership right may be acquired, under the conditions provided by law, by convention, legal or testamentary succession, accession, acquisitive prescription, possession in good faith of movable goods and fruits, occupation, handing over, translative of property judgment, administrative act. This legal enumeration is not limitative, since art. 557 paragraph 3 of the new Civil Code expressly states that the law may also regulate other ways of acquiring the ownership right.

Finally, we think that a brief analysis, with reference to art. 562 of the new Civil Code entitled (wrongly, we think, in relation to the entire content of this text of the law) "Termination of the ownership right", may prove necessary.

Thus, paragraph 1 of art. 562 of the new Civil Code states correctly that the ownership right lasts as long as the thing exists and does not terminate by non-use, which are actually the effects of the perpetual nature of this right.

Subsequently, however, the legislator introduces the concepts of abandonment of movable goods, by releasing them, or renunciation of the ownership right of immovable goods by means of a declaration of renunciation registered in the real estate register, as ways of extinguishing the ownership right (article 562 paragraph 2 of the new Civil Code). Thus, according to the new regulation, the ownership right is extinguished at the moment of releasing the movable thing or at the moment of registering the declaration of renunciation of immovable thing. We believe that this statement is inaccurate because the ownership right is perpetual in nature, lasts as long as the thing which is its object lasts. This does not mean that a thing must belong to the same person, but actually the ownership right may be transferred from one holder to another without being extinguished. Therefore, in the cases envisaged by article 562 paragraph 2 of the new Civil Code, the ownership right ceases in the patrimony of the person who abandons or renounces the thing, but is reborn in the patrimony of territorial administrative unit. Thus, in reality, in the cases taken into account, the ownership right is not extinguished, but it is transmitted from one patrimony to another. Also, for the same reasons, we consider it is inaccurate the insertion into art. 562 of the new Civil Code of provisions on expropriation and confiscation, as they do not lead to the termination of the ownership right, since the thing which is its object continues to exist, even if it belongs to someone else.

2. Aspects concerning the protection of the private ownership right – Action for recovery of property

New Civil Code regulates distinctly in Section II, called "The protection of private ownership right" from Chapter I of Title II - Private property, the principal juridical means which provide specific legal protection of the ownership right, namely the action for recovery of property and the negatory action. Therefore, it is worth noting that the new Civil Code establishes an express regulation of the main means of defending the ownership right, the action for recovery

[6] Art. 644 and 645 of the 1864 Civil Code had provided the following ways of acquiring ownership right: succession, legacies, convention, handing over, accession or incorporation, prescription, law and occupation.

[7] See, in relation to all these critics, L. Pop, op. cit., p. 209-210 and the authors mentioned there; P. Vlahide, op. cit., p. 112.

of property, adopting, with amendments, some of the solutions expressed in the juridical literature and jurisprudence under the 1864 Civil Code.

Thus, regarding the action for recovery of property, the current regulation stipulates, in art. 563 paragraph 2 of the new Civil Code, that it is not prescriptive from the extinctive prescription point of view, without any distinction related to its movable or immovable character, unless otherwise provided by law[8].

As far as the standing within the action for recovery of property is concerned, according to article 563 paragraph 1 of the new Civil Code, the defendant may be the non-proprietary possessor and any other person who holds the thing (therefore precarious possession) without any title. The plaintiff in such action is of course the holder of the ownership right over the thing, who is the only one entitled to exercise such action, in order to recover his property.

In this regard, it should be noted that, unlike the rules outlined under the 1864 Civil Code[9], the new regulation expressly provides that an action for recovery of common property may be brought even by one co-owner (art. 643 paragraph 1 of the new Civil Code). However, in such case, the judgment contrary to the plaintiff will not be opposable to the other co-owners, but the decision in behalf of the common property will benefit all of them (article 643 paragraph 2 of the new Civil Code). Unlike previous regulation, when as a principle the proof of the ownership right was made with titles, art. 565 of the new Civil Code provides that, in the case of immovable goods registered in the real estate register, the proof of the ownership right is made with the extract from the real estate register. This solution derives logically from the fact that, in cases of immovable goods, according to art. 557 paragraph 4 of the new Civil Code, the ownership right is acquired by registration in the real estate register, so that the entry in the real estate register is constitutive of rights, having no longer only a function of opposability towards third parties. It should be noted, however, that the legal provisions mentioned above will become fully applicable only after the completion of cadastre for each territorial-administrative unit and the opening, on request or ex officio, of the real estate registers for those immovable goods (art. 56 paragraph 1 of Law no. 71/2011 for the application of Law no. 287/2009 on the Civil Code[10]).

As a result of admitting the action for recovery of property, the defendant will be obliged to return the thing and its products to the owner plaintiff. As an exception, the defendant will be obliged to pay compensation, without distinction in relation to his good or bad faith, but only if the thing has perished due to his fault or it has been alienated. Compensation is calculated in relation to the value of the thing at the time of restitution. Therefore, in the meaning of article 566 paragraph 1 of the new Civil Code, if the thing has perished from unforeseeable circumstances or force majeure, the defendant is released from his obligation to return the thing, whether he acted in good or bad faith.

Regarding the fruits of the thing, the possessor in good faith shall keep, in all cases, the fruits perceived as long as his good faith is maintained (art. 948 paragraph 2 of the new Civil Code), while the possessor in bad faith or the precarious holder may be obliged, only at the

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[8] It is, for example, the hypothesis of avulsion governed by art. 572 of the new Civil Code, in which case the owner of the land from which a portion was removed by a river's course may bring an action to recover property within 1 year after separation.

[9] Most authors and the jurisprudence had expressed the opinion that the action for recovery of common property should be brought by all co-owners, since such action aims to restore the thing in the patrimony of the plaintiff, which would lead to the termination of co-ownership if only one of the co-owners acts - see, in this respect, for example, L. Pop, op. cit., and authors cited therein. Subsequently, the European Court of Human Rights had pronounced the judgment of 14 December 2006 in the case Lupaş and others v. Romania (published in Official Journal of Romania no. 464/10.07.2007) which held that the strict application of the unanimity rule in the matter of the action for recovery of common property impedes the right of access to a court. Therefore, after this decision, some authors have considered that unanimity should be nuanced in the sense of recognizing standing to bring the action for recovery of common property only to some of the co-owners when the consent of others could not be obtained - see, in this respect, G. Boroi, L. Stănciulescu, op. cit., p 57-58.

[10] Published in the Official Journal of Romania, Part I, no. 409/10.06.2011.

request of the owner, to return the fruits produced by the thing until its restitution to the owner, namely the ones he perceived as such and the value of those he failed to perceive (art. 566 paragraph 2 in conjunction with art. 948 paragraph 5 of the new Civil Code).

Instead, the defendant may request to oblige the plaintiff owner to reimburse the expenses necessary to produce and perceive or collect the fruits and the products of the claimed thing. Moreover, according to article 566 paragraphs 6 and 7 of the new Civil Code, it is expressly recognized, to the defendant in such action, a right of retention over the fruits and products (and in no case over the producing thing which was the object of the action for recovery of property) until the reimbursement, by the owner, of expenses incurred for producing and collecting them, with the following exceptions:

a. the owner provide sufficient guarantee to the defendant to pay such amounts;

b. the entering into physical possession of the thing that was the object of the action was made by violence or fraud;

c. the fruits and products are perishable goods or lose significantly their value in a short period of time.

Equally, the defendant is entitled to seek reimbursement of expenses incurred in maintaining the thing, as long as it was in his possession. According to article 566 paragraphs 3 and 4 of the new Civil Code, necessary expenses will be always reimbursed, while useful expenses will be borne by the plaintiff owner only within the limit of the increase in value caused to the thing. Instead, the owner may not be obliged to bear the voluptuary expenses, and the defendant is entitled to take the works performed in this regard, to the extent that no damage occurs to the property claimed (article 566 paragraph 8 of the new Civil Code).

3. The juridical limits of the private ownership right

Although the ownership right is defined as an exclusive and absolute right, it must be exercised within the limits and subject to the restrictions prescribed by law. However they should not be regarded as interferences with the ownership right, but they are meant to ensure its normal exercise, for the purpose this right is recognized by the law. This is the meaning of both the constitutional provision contained in art. 44 paragraph 1, according to which the content and the limits of private ownership right are established by law and the provisions of articles 555 and 556 of the new Civil Code[11].

Unlike the prior legal regulation in the field of limits and restrictions on the private ownership right, the new Civil Code contains a regulation which is more coherent, structured according to the classification outlined by the juridical literature[12], into legal and conventional limits. In addition to these two categories, recognized by most authors under the 1864 Civil Code, the new Civil Code expressly provides a third, namely judicial limits to private ownership right.

3.1 Legal limits of the private ownership right

As mentioned above, in paragraph 2 of article 556 of the new Civil Code, the legislator states, as a principle, the idea that the law may establish a number of restrictions in the normal

[11] Thus, art. 555 of the new Civil Code, entitled "The content of the private ownership right ", states that the attributes of this right must be exercised within the limits set by law, and art. 556 of the new Civil Code, entitled precisely "The limits of the private ownership right", introduces the distinction between material limits, determined by the existence and the material shape of the thing which is its object, and juridical limits of the ownership right, making reference, in relation to the second category of restrictions, to legal and conventional limits.

[12] See in this respect L. Pop, op. cit., p. 176, I. Filipescu, A. Filipescu, *Drept civil. Dreptul de proprietate şi alte drepturi reale*, ACTAMI Publishing House, Bucharest, 2000, p. 232.

exercise of the private ownership right. These legal limits of private ownership right are regulated below, in articles 602-625 of the new Civil Code.

Thus, article 602 of the new Civil Code expressly introduces the idea, already developed in the juridical doctrine under the influence of the previous regulation[13], that the ownership right is exercised with the observance and within the scope of two categories of limitations or legal restrictions, namely restrictions concerning the public interest and restrictions concerning the private interests.

The restrictions referring to public interest give expression to the need to ensure the protection of the general interests of society, and some of these are provided by the Romanian Constitution itself. Thus, for example, according to article 44 paragraph 5 of the Constitution, for projects of general interest, the public authority may use the subsoil of any immovable property, having the obligation to compensate the owner for the damage caused.

Also, the fundamental law states the severest restriction to the private ownership right, in the public interest, namely the expropriation for public utility. According to article 44 paragraph 3 of the Constitution, "No one may be expropriated except in the public interest, established by law, with just and prior indemnity." This constitutional provision was actually taken by the new Civil Code, in principle in the same terms, in paragraph 3 of article 562.

Other normative acts also provide for different restrictions of private ownership right justified by the protection of public interest, such as for example, the urban limitations referring to constructions[14]. Moreover, this is the meaning of the provision contained in article 625 of the new Civil Code, which refers to special laws adopted in various matters, such as the legal regime of land and constructions or forests, national heritage, property belonging to religious cults and so on.

Regarding the legal limits of private nature on the ownership right, referring therefore to the private interests of its owners, the legislator took, in the new Civil Code, the view expressed by most authors[15] and by the jurisprudence[16] under the previous regulation, meaning that the so-called natural and legal servitudes, in the conception of 1864 Civil Code (articles 578-619 of the 1864 Civil Code), are not actually servitude rights, but legal restrictions to ownership right arising out of neighborhood relations.

Therefore, they were all accurately qualified as legal limits of private nature on the ownership right. There are to be found in the new regulation within the category of legal restrictions of private interest the following:

- Limits concerning the natural flow of water - art. 604 of the new Civil Code;
- Obligations referring to the drip of gutter - art. 611 of the new Civil Code;
- Rules on the use of springs - art. 608 of the new Civil Code;
- Rules concerning minimum distance to buildings or trees - art. 612 and 613 of the new Civil Code;
- Restrictions concerning the sight to the neighbor's property - art. 615 and 616 of the new Civil Code;
- Rules on the passage right on the land owned by the neighbor - articles 617-620 of the new Civil Code.

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[13] See, in this respect, for example, I. Filipescu, A. Filipescu, op. cit., p. 232, E. Safta-Romano, *Dreptul de proprietate privată şi publică în România*, Graphix Publishing House, Iaşi, 1993, p. 37.

[14] Contained, as a principle, within the Law no. 50/1991 on the authorization of executing construction works, republished in the Official Journal of Romania, Part I, no. 933/13.10.2004, as well as in other normative acts adopted in the field.

[15] See, in this respect, for example, C. Hamangiu, I. Rossetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil*, vol. II, Naţionala Publishing House, Bucharest, 1928, p. 55; C. Bârsan, *Drept civil. Drepturile reale principale*, Hamangiu Publishing House, Bucharest, 2008, p. 254.

[16] For example, Supreme Tribunal, Civil Section., decision no. 1770/1972, in Culegere de decizii 1972, p. 87

In addition to ownership limitations mentioned above, which were taken from the old regulation with some amendments due to the solutions proposed by the jurisprudence[17], the new Civil Code introduces equally other legal restrictions of private interest in the exercise of ownership right, determined in most cases by the inherent requirements of modern life, by the evolution of civilization and progress in relation to the entry into force of the old Civil Code. We may mention in this respect the following:

a. limitations concerning the provoked flow of water, provided by art. 605 of the new Civil Code, according to which lower land owner can not prevent any water flow caused either by higher land owner or any other person, if that precedes shedding in a stream or in a ditch. This restriction of ownership right also knows exceptions, so it is not applicable when on the lower land there is a building, with related garden and courtyard or a cemetery (art. 605 paragraph 3 of the new Civil Code).

b restriction referring to irrigation works (article 606 of the new Civil Code), according to which the owner who wants to irrigate the land has a right to execute, on the opposite land owned by riparian owner, the work required for water collection, but with a fair and prior compensation. Equally, this restriction on the ownership right of the riparian opposite land will not be applicable if on this land there is a building, with related garden and courtyard or a cemetery.

c. the obligation of the owner having excess water in relation to current needs to provide the surplus to another owner of a neighboring land, who may only obtain water with excessive expenditure (article 607 of the new Civil Code).

d. the right of passage in special cases, other than the lack of access to public road (article 621-623 of the new Civil Code).

Thus, the new Civil Code recognizes the passage right on the land belonging to an owner of utility networks (water, gas, electricity etc.), serving neighboring lands or lands situated in the same area, with payment of a compensation, but only if passing through another part would be impossible, dangerous or very expensive (article 621 of the new Civil Code), except in the case of new underground pipes and channels, when the subdued thing is a building or the courtyard and its garden.

At the same time, art. 622 of the new Civil Code recognizes the passage right of the neighboring owner, with payment of a compensation, for the performance of works that are necessary to his property or for trimming off branches and picking fruits. As in the previous hypothesis, the right of passage is recognized only if passing through another part would be impossible, dangerous or very expensive.

The third hypothesis in which there is recognized a right of passage concerns the access of a person on the land belonging to another owner, with payment of compensation for the damages caused as a result of access, and those caused by the thing, in order to regain possession of a thing belonging to him, arrived by chance on the land owned by somebody else (art. 623 of the new Civil Code). This right of passage may be exercised only with prior notice to the owner of the land.

Finally, among the legal limits of the private ownership right, article 624 of the new Civil introduces the state of emergency, meaning that one can use or destroy the property of another in order to protect a person from an imminent danger. In such a case, however, the owner of the thing used for this purpose or destroyed shall be entitled to seek compensation only from the

[17] Thus, the Civil Code of 1864 had regulated the natural flow of water into art. 578 Civil Code, the drip of gutter in art. 615 Civil Code, the use of springs in art. 579 and 581 Civil Code, the minimum distance in constructions in art. 610 Civil Code, the minimum distance for trees, plantations and hedges in art. 607 Civil Code, the sight to the neighbor's property in art. 611-614 Civil Code, the passage right of the owner lacking access to public way in art. 616-618 Civil Code.

saved person, except for the cases in which he had provoked it himself or he had favored the emergence of danger.

3.2 Conventional limits of the private ownership right

Under the previous regulation, it was unanimously agreed that the owner, by his will, may restrain or restrict the content of the ownership right belonging to him[18]. Moreover, all real rights dismemberments of the private ownership right, established by the will of the owner, lead to a voluntary restriction on the exercise of attributes of the ownership right by its holder.

The possibility of setting limits on the ownership right by the will of its owner is now expressly recognized, as a principle, by article 626 of the new Civil Code, under the condition of complying with public order and morality.

Moreover, the legislator regulates distinctly and *in extenso* the inalienability clause, considered as a conventional restriction to the private ownership right, thus aiming to put to an end the controversy about its admissibility and validity, created in the doctrine and jurisprudence under the 1864 Civil Code[19].

Therefore, according to article 627 of the new Civil Code, the inalienability clause is valid if established by contract or will, but only for a maximum period of 49 years from the date of acquiring the property and if there is a serious and legitimate interest. Moreover, according to paragraph 4 of article 627 of the new Civil Code the inalienability clause is considered as implicit in the conventions that create an obligation to transfer, in the future, the ownership of a thing to a determined or determinable person, such as, for example, a bilateral promise of sale-purchase.

Concerning its effects, in addition to the interdiction to alienate the thing through *inter vivos* juridical acts, the inalienability clause determines the impossibility of pursuing the goods subject to it (art. 629 paragraph 3 of the new Civil Code), but it can not prevent the transmission of property by inheritance (art. 627 paragraph 5 of the new Civil Code).

In order to be invoked against third parties, namely the subsequent acquirers of the goods or the creditors of the owner, the inalienability clause must fulfill the opposability conditions provided by law, respectively the formalities of publication, in case of immovable goods, or possession in good faith, in case of movable goods (art. 628 paragraphs 1, 2 and 3 of the new Civil Code). In the case of contracts concluded with gratuitous title, the inalienability clause is opposable and shall take effect against the previous creditors of the owner which assumed the obligation to observe the inalienability clause. In this respect, however, we can not refrain from observing the terminological inconsistency of the legislator, which in the same legal text or the one immediately following uses the expression "owner of the thing" (paragraphs 1 and 5 of art. 628 of the new Code civil) or that of "acquirer of the thing" (paragraph 4 of art. 628 or paragraph 1 of art. 629 of the new Civil Code), actually referring to the same concept. Moreover, in the same article 628 of the new Civil Code, the term "acquirer of the thing" is used in the sense of third subsequent acquirer in paragraph 1 and with the meaning of owner of the thing, party to the contract within which the inalienability clause was stipulated, in paragraph 4, which undoubtedly is not likely to contribute to the clarity of the text of law.

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[18] See, for example, I. Filipescu, A. Filipescu, op. cit., p. 245.

[19] The old Civil Code did not expressly regulate the possibility to incorporate inalienability clauses within juridical acts. Therefore, the admissibility of such clauses has been disputed in the juridical literature - see, for example, C. Hamangiu, I. Rossetti-Bălănescu, Al. Băicoianu, op. cit., p. 95, L. Pop, op. cit., p. 47-48; I. Filipescu, A. Filipescu, op. cit., p. 246. On the other hand, the jurisprudence had admitted the validity of inalienability clauses, to the extent that they are determined by a legitimate and serious interest, are not set for a long period, and the inalienability is not general – for example, Supreme Tribunal, Civil Section, decision no. 400/1978, in Culegere de decizii 1978, p 22.

The non-observance of the inalienability clause by the owner of the thing may result in the annulment of the subsequent alienation act which disregarded it. In addition, it may be requested the termination of the contract containing the non-observed inalienability clause (art. 629 paragraphs 1 and 2 of the new Civil Code).

3.3 Judicial limits of the private ownership right

Next to the legal and conventional limits that may be imposed to the private ownership right, the new Civil Code distinguishes a third category of restrictions as consequences of judgments, namely judicial limits.

Thus, according to article 630 of the new Civil Code, the court of law may allow the continuation of the performance of activities causing to the neighboring owner inconvenience higher than normally resulting from neighbor relations, if the damage produced is minor in relation to the usefulness or necessity of the activity. Otherwise, the court will pronounce the restoration to the previous situation, thereby stopping the continuation of the harmful activity. In any event, however, the injured party is entitled to compensation.

At the end of these considerations, we believe that certain details on the application in time of the analyzed legal texts are necessary. Thus, article 5 paragraph 1 of Law no. 71/2011 for the application of Law no. 287/2009 on the Civil Code[20] states, as a principle, the idea that the new law, namely the provisions of the new Civil Code, applies to all acts and facts concluded, produced or committed after its entry into force as well as to legal situations arisen after its entry into force. According to paragraph 2 of the same article, the new Civil Code shall also apply to legal situations prior to its entry into force, and which still currently subsist, derived, *inter alia*, from ownership or neighborhood relations.

However, in the field of juridical limits of the ownership right, art. 59 and 61 of Law no. 71/2011 expressly provide that the legal texts governing the legal and judicial restrictions apply only to legal situations arisen after the entry into force of the Civil Code. Regarding the inalienability clause, according to article 60 of Law no. 71/2011, its validity and legal effects must be assessed under the law in force at the date of its establishment.

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