

CONSIDERATIONS REGARDING THE SPECIFIC ELEMENTS OF THE REPURCHASE AGREEMENT (REPO)

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Abstract

The current article focuses on the specific elements of the repurchase agreement, as they are regulated in the new Civil Code (Law no. 287/2009). In the beginning the author makes a general characterization of this type of contract, from the perspective of the specific elements regarding the contracting parties, the object of the contract and the moment of fulfilling certain obligations assumed by the parties. Then, the study defines the notions of “repo” and “reverse repo” and differentiates the repurchase agreement (repo) from other similar contracts, configuring thus more clearly the analyzed convention. A specific element of the contract is represented by its legal nature of sui-generis contract, which the author explains by the fact that in the doctrine there is no unanimous opinion concerning this aspect. At the same time, the specificity of the repo is highlighted by presenting its main effects: the double transfer of property, the transmission of the accessory rights, the original buyer’s obligation to exercise his option, and the original seller’s obligations to make available for the original buyer the funds necessary for exercising the right of option and for making the payment. Last but not least, the specificity of this type of contract is revealed through reflecting the differences between the liquidation, prorogation and renewal of the debated convention. The study presents the viewpoints expressed in the literature, as well as the author’s opinions as regards the controversial legal problems in the studied field.

Keywords: repurchase agreement (repo); reverse repo; the original seller; the original buyer; immediate payment; settled sum; financial instruments and/or securities; obligation to exercise the option; liquidation, prorogation and renewal of the repo.

JEL Classification: K12

1. Notion and general characterization of the repurchase agreement (repo)

In compliance with the provisions of art.1772 Civil Code, the repurchase agreement represents *the convention through which a party, named original buyer, buys from another party, named original seller, with immediate payment, financial instruments and securities*², trading on the market and commits at the same time to resell to the original seller the financial instruments or securities from the same kind, at a certain maturity, in exchange for settled sums. The legislative base is found in Book V (“About obligations”), Title IX (“Different special contracts”). Chapter IV (“The repurchase agreement”) in the Civil Code.

From the beginning we criticize the fact that the law-maker, in the mentioned text of law, expressed the object of the repurchase agreement only in a cumulative way: financial instruments “and” securities.

The coordinating conjunction “and” designates the circumstance that the financial instruments and securities can represent the object of the repurchase agreement only together.

In reality there is no reason for which the law-maker aimed only at the cumulative variant and eliminated the possibility that the object of the contract should be represented by any of the two goods, separately. Thus, *in our opinion*, the object of the repurchase agreement can be either only the financial instruments, or only the securities, or the financial instruments and securities together, cumulatively. As the law-maker formulated only the cumulative way, although his intention could not be this, we propose *de lege ferenda* that the text of law [art.1771 para.(1)] should be formulated by using “and/or”³. Hence, it would be eliminated the mentioned fault and it would be provided a more rigorous regulation.

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² “And” conjunction connects grammatically coordinate words, phrases, or clauses – see *Dictionarul explicativ al limbii române (The Explanatory Dictionary of the Romanian Language)* (DEX), 2nd ed., Univers Enciclopedic Publishing House, Bucharest, 1998, p.1055.

³ The disjunctive conjunction “or” connects words, phrases, or clauses representing alternatives, see DEX, *op. cit.*, p.948.

The specific elements that configure the identity of this convention are those referring to: a) the capacity of the parties, b) the object of the contract and c) the moment of the payment.

a) as regards *the contractual parties*, the specificity of the repurchase agreement consists of two aspects:

On the one hand, the repurchase agreement is different from the sales contract through the *name of the parties: the original buyer*, the person who buys financial instruments and/or securities and who commits to resell them and *the original seller*, the person who sells the financial instruments and who commits to repurchase titles from the same kind⁴.

On the other hand, unlike the sales, the transfer in the case of the repurchase agreement is double, in a way and in the opposite way, having as object the financial instruments and the sums of money. The double transfer is done between *the same persons*, at different maturities and for a settled sum⁵.

b) *The object* of the repurchase agreement⁶ consists of two successive juridical operations: buying first financial instruments and/or securities trading on the market⁷ and then reselling financial instruments and/or securities of the same kind.

The literature unanimously considers that if there is no contrary stipulation the repurchase agreement is applied the rules for the sales⁸. At the same time, the validity of the repurchase agreement is also conditioned by the compliance with some requirements specific for the object of the main obligations of the parties⁹.

The object of the obligation is represented¹⁰ by the services to which the debtor commits, but, as it results from the definition of the repurchase agreement, the object of the essential obligations of the original buy is *to pay immediately* the financial instruments and/or securities and to resell to the original buyer the financial instruments and/or securities of the same kind, and the object of the essential obligations of the original seller is to transfer the right on the financial instruments and/or securities and to pay the settled sum.

The goods are objects derived from the essential obligations: financial instruments and/or securities on the one hand and the payment of the price on the other hand.

The financial instruments and/or securities have to be susceptible of trading on the market, and it is not necessary to have stock exchange quotation.

If at the maturity the original buyer does not resell to the original seller the financial instruments and/or securities of the same kind, but financial instruments different from those established at the conclusion of the contract, this is the case of *objective novation*¹¹.

The repurchase agreement is included in the financial guarantee contracts with transfer of property¹², thus the provider of the guarantee transmits to the beneficiary the full property on the guarantee, with the view of guaranteeing or insuring in a different way than that of carrying out guaranteed financial obligations (art.2 lett.e) of G.O. no.9/2004).

⁴ See D. Ungureanu *Contractul de report (The Repurchase Agreement)*, in the collective work, eds. Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul cod civil. Comentarii pe articole (The New Civil Code. Comments on Articles)*, C.H.Beck Publishing House, Bucharest, 2012, p.1089.

⁵ See *Codul comercial adnotat (The Annotated Commercial Code)*, 2nd ed., vol.I, Tribuna Publishing House, Craiova, 1994, p.133.

⁶ According to art.1225 para.(1) Civil Code: "*The object of the contract is represented by the legal operation such as sale, lease, loan etc., established by the parties, as it results from the totality of the contractual rights and obligations*".

⁷ In compliance with art.2 pt.33 of Law no.297/2004 regarding the capital market, the securities are: a) stocks issued by corporations and other equivalent securities, negotiated on the capital market; b) bonds and other debt securities, inclusively government bonds with a maturity higher than 12 months, negotiable on the capital market; c) any other common negotiable financial instruments, which confer the right to purchase the securities by taking up shares or change, leading to a clearing, except for the payment instruments.

⁸ See *Codul comercial adnotat (The Annotated Commercial Code)*, op. cit., p.10.

⁹ See R. Dincă, *Contracte civile speciale (Special Civil Contracts)*, Universul Juridic Publishing House, Bucharest, 2013, p.78.

¹⁰ See art.1226 para.(1), Civil Code

¹¹ In compliance with art.1609 para.(1) Civil Code, "*Novation takes place when the debtor contracts against the creditor a new obligation, which replaces and extinguishes the initial obligation*".

¹² In compliance with O.G. nr.9/2004 regarding certain financial guarantee contracts, published in "The Official Journal of Romania", Part I, no.78 on 30.01.2004, which transposes the directive 2002/47/EC of the European Parliament and of the Council on 6 June 2002 concerning the financial guarantee contracts.

As concerns the obligation of the original buyer to pay the price (“*immediate payment*”), this cannot be affected by modalities. The immediate payment belongs to the essence of the repurchase agreement, which means that including a term in the contract would lead to creating another juridical nature and the rules specific to the repo would not be applied anymore.

At the same time, *the obligation* of the original buyer *to resell* the financial instruments and/or securities of the same kind is affected by a suspensive term, while the repurchase agreement is not affected by a suspensive condition.

The promise to resell made by the original buyer, at a price previously established, gives the right to the original seller to request to the court to pronounce a sentence meant to replace the contract of resale, in the case when the original buyer does not fulfill in time the obligation to resell.

c) Another element specific to the repurchase agreement is represented by *the moment* when are fulfilled the obligations of immediate payment of the financial instruments by the original buyer and of payment of the sum settled by the original seller.

Thus, *the immediate payment* of the financial instruments and/or the securities has to be done by the original buyer at the conclusion of the repurchase agreement, and the price cannot be affected by modalities, as we have already mentioned.

At the same time, the payment of *the settled sum* representing the counter value of the reselling of the financial instruments and/or the securities of the same kind will be done at the value settled at the moment of the conclusion of the repurchase agreement.

The price established at this moment is meant to prevent the fluctuations of the financial instruments according to their market value.

We consider that from the text of art.1772 Civil Code it results, unequivocally, the fact that in the case of the repurchase agreement there are two prices: the first one, the immediate payment, paid by the original buyer to the original seller at the date of the conclusion of the contract, and the second, the settled sum which the original seller commits to pay to the original buyer at the date of the maturity¹³.

2. The notions of “repo” and “reverse repo”

The repurchase agreement finds its application in the situation in which a person, owning some financial instruments, needs urgently cash, but does not want either to alienate them for good, or to gage them, because he would obtain a disadvantageous loan in comparison with the value of the financial instruments.

Consequently, that person can choose to conclude a repurchase agreement. On the basis of this contract the person (the original seller) sells financial instruments to another person (the original buyer) for a certain nominal sum (immediate payment), which he receives at the moment of the conclusion of the repurchase agreement. Through the same convention, the parties agree that, at a certain date, the original buyer should resell to the original seller the same number of stocks, of the same kind, for a *settled sum*, usually higher than the nominal price. The difference between the *settled sum* paid by the original buyer at the maturity and the *immediate payment*, given by the original buyer at the conclusion of the contract is called *repo*. *The repo* behooved to the original buyer and represents the profit¹⁴, the reward¹⁵ for the fact that he was deprived of his money capital for the period of time settled in the repurchase agreement.

According to the above mentioned, the repurchase agreement offers advantages for the both contractual parties. Thus, the original seller obtains a sum of money (*immediate payment*) for his financial instruments that is higher than in the case of a gage contract and at the same time he does

¹³ The literature corresponding to the previous legislation (art.74 Commercial Code) considered that in the situation of the repurchase agreement would exist only one price, i.e. that settled by the parties and payable at the maturity; see St.D. Cărpenaru, *Drept comercial român (The Romanian Commercial Law)*, All Beck Publishing House, Bucharest, 2001, p.459; C.Petrescu-Ercea, *Curs de drept comercial (Commercial Law Course)*, vol.I, Lito Schildkrant Publishing House, Cluj, 1948, pp.78-80.

¹⁴ See St. D. Cărpenaru, L. Stănciulescu, V. Nemeș, *Contracte civile și comerciale (Civil and Commercial Contracts)*, Hamangiu Publishing House, Bucharest, 2009, p.408.

¹⁵ See *Codul comercial adnotat (The Annotated Commercial Code)*, op. cit., p.133.

not renounce at them definitively. At his turn, the original buyer has the advantage that he keeps the repo and that for a period of time he becomes the owner of the property right on the financial instruments and/or securities and can exercise absolutely the attributes of the property¹⁶.

The reverse repo is the reverse operation of the repo and emerges and is carried out when a person needs financial instruments and/or other securities for a certain period of time¹⁷. In this case that person (*the original buyer*) buys those financial instruments and commits to resell after a certain period of time, at a settled price, to the person who sold them (*the original seller*) the same amount of financial instruments, of the same kind.

In this case, the operation is in the advantage of the owner of the financial instruments (the original seller), who will sell them at a nominal price, but at the maturity will pay the settled sum to the original buyer that cannot be lower than the nominal price.

The difference between the nominal price (*immediate payment*) and the price of the resale (*settled sum*) is called *reverse repo*¹⁸.

Such a contract is governed by the same legal norms like in the case of the repurchase agreement¹⁹.

In conclusion, the repurchase agreement is concluded in the favour of the person who agrees to give a helping hand to the other person in urgent need, which cannot be postponed. Consequently, in the case when the original seller needs sums of money for solving certain necessities, then he has to support the repo in the favour of the original buyer.

Symmetrically, if the original buyer needs financial instruments and/or securities, then he will support the reverse repo in the favour of the original seller.

In other words, the person who has the immediate need will pay more (the repo or the reverse repo, according to the case) to the other party, because the latter agreed to the conclusion of the repurchase agreement.

3. The differences between the repurchase agreement and other contracts

The specific features of the repurchase agreement are useful to differentiate this contract from other similar contracts: contract of sale with buyback clause, gage contract and bailment agreement.

Thus, in comparison with the *contract of sale with buyback clause*, the repurchase agreement differentiates *first of all* through the fact that the option in the case of the former is a facility given to the seller²⁰, which he can exercise or not, while the resale of the financial instruments and/or securities in the case of the repo is compulsory.

Secondly, in the case of the *contract of sale with buyback clause* the object is represented by the same good or right transmitted to the buyer, while in the situation of the repurchase agreement the object of the resale is not represented by the same financial instruments purchased from the original buyer, but by other financial instruments and/or securities of the same kind²¹.

¹⁶ See Vivante, *Traité Le dr. Com.*, Ed. Giard, Paris, 1912, vol.IX, pag.260, apud *Codul comercial adnotat, op. cit.*, p.134.

¹⁷ In the doctrine it was mentioned the case when a person, shareholder of a company, buys stocks from another shareholder to obtain a majority in the General Assembly. See St.D. Cârpenaru, L.Stănciulescu, V.Nemeş, *op. cit.*, p.408.

¹⁸ See I.M. Finţescu, *Drept comercial român (The Romanian Commercial Code)*, vol.I, All Beck Publishing House, Bucharest, 2002, p.423.

¹⁹ See C. Petrescu-Ercea, *op. cit.*, p.76.

²⁰ See B. Florea, *Drept civil. Contractele speciale (Civil Law. Special Contracts)*, Universul Juridic Publishing House, Bucharest, 2013, p.88; A.Nicolae, N.Crăciun, *Consideraţii asupra valabilităţii actuale a contractului de vânzare-cumpărare cu pact de răscumpărare (Considerations on the Current Validity of the Purchase Agreement with Buyback Clause)*, in *Dreptul* no.1/2004, p. 242; St. D. Cârpenaru, L. Stănciulescu, V. Nemeş, *op.cit.*, p.60.

²¹ See D. Ungureanu, *Contractul de report (The Repurchase Agreement)*, in the collective work, eds. Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *op. cit.*, p.1611.

Thirdly, the two contracts differ through their legal nature. While *sale with buyback clause* is a contract affected by a resolutive condition²², the repurchase agreement is the expression of a sale, doubled by a promise of resale²³.

Fourthly, the buyback in the case of the contract of sale is done at the price settled by the seller (to which are added the expenses for the conclusion of the contract and the formalities of publicity, if the case). On the contrary, in the situation of the repurchase agreement, the resale price is a sum settled by the parties, which is different from the nominal price that the original seller received at the conclusion of the contract.

Eventually, the two contracts differ as regards their duration. Thus, in the case of the sale, the buyback option has to be expressed in a term of maximum 5 years since the date of the conclusion of the contract, while the resale of the financial instruments in the case of the repurchase agreement is not conditioned by a certain term, but has the maturity at the date established by the contractual parties.

As concerns the *gage contract*²⁴, the ground for the differentiation is the fact that at this contract the creditor obtains the possession of the pledged good and has to return the same thing, while the original buyer does not have to resell the same financial instruments and/or the same securities, but only of the same kind.

Also, in the case of the gage contract, the creditor who possesses the good is not liable for its loss when the cause is a force majeure, the age or the normal and/authorized use of the good²⁵. On the contrary, in the situation of the repurchase agreement, the original buyer, who obtains the property of the financial instruments and/or the securities, supports the risk of their loss, like any owner.

The differentiation of the repurchase agreement from *the bailment agreement* is clarified by the text of law that regulates the latter. Thus, in compliance with art. 2146 Civil Code, the bailment agreement is the free contract through which a party, called bailer, gives a movable or immovable asset to the other party called bailee, to use this good, with the obligation to return it after a while.

Hence, *a first difference* between the two contracts is that the return of the good in the case of the bailment is free, while in the case of the repurchase agreement the resale of the financial instruments and/or of the securities takes place on the condition of an immediate payment, being an onerous contract.

The second difference consists of the fact that the object of the bailment is a good that has to be returned in its individuality, while the object of the resale of the repurchase agreement is represented by other financial instruments and/or securities.

The third difference consists of the fact that in the case of the bailment can be returned also a chattel, while the repurchase agreement can have as object only goods of such a nature.

4. The legal nature of the repurchase agreement

In the legal literature there is no unanimous opinion regarding the legal nature of the repurchase agreement.

Thus, one opinion²⁶ considered that the legal nature of the repurchase agreement is of the type of a guaranteed loan having as object certain financial instruments and in which the original seller is the guarantor debtor, while the original buyer is the guarantee creditor.

This orientation was criticized²⁷ with the argument that in the case of the guaranteed loan, the guarantee creditor does not become the owner of the financial instruments received in guarantee and consequently cannot use them. On the contrary, in the repurchase agreement, the original buyer

²² See E. Safta-Romano, *Contractele civile. Încheiere, executare, încetare (Civil Contracts. Conclusion, Execution, Termination)*, Polirom Publishing House, Iași, 1999, p.59-60; St.D. Cârpenaru, I. Stănculescu, V. Nemeș, *op. cit.*, p.60.

²³ See D. Ungureanu, *op. cit.*, p.1811

²⁴ See *Codul comercial adnotat (The Annotated Commercial Code)*, *op. cit.*, p.134.

²⁵ See art.2490, Civil Code.

²⁶ See C. Petrescu-Ercea, *op.cit.*, p.78-80.

²⁷ See St. D. Cârpenaru, L. Stănculescu, V. Nemeș, *op.cit.*, p.409 .

can dispose exclusively of the financial instruments, of the capacity of owner, being forced to resell at the maturity financial instruments of the same kind.

Another opinion²⁸ considered that in the case of the repurchase agreement there are two sales: an immediate one, pure and simple and the other one affected by a term.

Eventually, in the doctrine²⁹, it was expressed the opinion according to which the repurchase agreement has the legal nature of a single sale, doubled by a promise of resale, for a price settled before.

Most of the authors consider that the two operations (sale and the promise of sale) do not have to be separated as they form a whole, being the inseparable elements of a unique contract concluded between the same persons and having the same object (financial instruments of the same kind). The mentioned features made this contract to be considered a *sui-generis contract*³⁰.

The notion of *sui-generis*³¹ is used rarely in the doctrine and in the content of the legal regulations. This designates the “specialty, originality, particularity and unicity”³² of a legal institution. The legal nature of the repurchase agreement as a *sui-generis* contract expresses the juridical features of a kind of contract different from any other³³.

5. The juridical characteristics of the repurchase agreement

a) The repurchase agreement is a *synallagmatic* contract as the obligations of the parties are interdependent and mutual. Thus, the original seller sells the financial instruments and/or the securities in considering the immediate payment that he will receive from the original buyer and vice versa. The non-execution of the obligation by one of the parties would lack of cause the obligations of the other one³⁴.

At the same time, the mutual obligations of the parties have the source in the same repurchase agreement and are not generated by different sources.

b) Repurchase agreement is an essentially *onerous* contract as each party aims at obtaining a gain equal to the deprived patrimonial value³⁵.

Therefore, the original seller aims at obtaining immediately a sum of money because he needs cash, on the condition of regaining the property on the financial instruments. The original buyer, at his turn, aims at capitalizing advantageously the cash available liquidities, cashing the repo.

c) The repurchase agreement has *commutative* character because, at the moment at its conclusion, it is certain both the existence of the rights and obligations and their extent. The certitude of the extent of the rights and obligations derive from the fact that the random element does not govern them, as long as the sale with the immediate payment of the financial instruments, as well as the resale at the maturity are done at the quantum established at the moment of the conclusion of the contract.

d) The repurchase agreement is a *real* contract as it is concluded validly only if the agreement of will is accompanied by the return of the financial instruments and/or the securities; if these are registered shares it is required to be fulfilled the formalities necessary for transmitting

²⁸ See L. Uță, *Contracte speciale în noul Cod civil (Special Contracts in the New Civil Code)*, Hamangiu Publishing House, Bucharest, 2012, p.163.

²⁹ See D. Ungureanu, *Contractul de report (The Repurchase Agreement)*, in the collective work, eds. Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *op.cit.*, p.1811.

³⁰ *Ibidem*.

³¹ From Latin: “Of its own kind/genus”, see L. Cîrjan, *Dicționar de cultură juridică latină (Dictionary of Latin Juridical Culture)*, Universitară Publishing House, Bucharest, 2013, p.188.

³² See C-tin Anechitoaie, M. Casapu, M. Stan, *Drepturile sui-generis ale fabricanților de baze de date (I) (The Sui-generis Rights of the Database Producers)*, in *Revista Română de Dreptul Proprietății Intellectuale* no.2/2007, p.33.

³³ In Latin “sui-generis, genus-eris” means “species, kind, genus”. See C. Toporu, E. Crețu, *Dicționar de cuvinte și expresii latinești și eline în contexte literare românești. Abrevieri latinești (Dictionary of Latin and Greek Words and Phrases in Romanian Literary Contexts. Latin Abbreviations)*, Humanitas Educational Publishing House, Bucharest, 2013, p.71.

³⁴ See V. Stoica, *Rezoluțiunea și rezilierea contractelor civile (Resolution and Annulment of the Civil Contracts)*, All Educational SA Publishing House, Bucharest, 1997, pp.22-23.

³⁵ See R. Dincă, *op.cit.*, p.25.

them. The only exception aims at the situation of the shares to bearer, if they are already in the possession of the acquirer, then the repurchase agreement is valid without the material consignment of the financial instruments.

e) As the repurchase agreement involves two operations of sale, it has the character of a *translative contract of property*. The contract operates a double transfer of the property right on the financial instruments and/or the securities that represented its object.

The two transfers take place at different moments: the first transfer occurs at the date when the contract is concluded, while the second at the term established in the contract. In the first transfer, the transmitter is the original seller, and the acquirer is the original buyer, while in the second transfer the operation is the other way round with other financial instruments of the same kind.

6. The conditions of validity of the repurchase agreement

In order to be validly concluded the repurchase agreement has to comply with some conditions³⁶, such as:

a) it should be an *agreement* between the original seller and the original buyer, as regards the sale with immediate payment and the resale at a certain maturity;

b) the manifestation of the agreement as concerns the sale and resale between the same persons should take place *simultaneous*, and not at different intervals of time;

c) the object of the sale and resale is represented by the *financial instruments and/or securities trading on the market*;

d) the resold financial instruments and/or securities should not be the same with those that represented the object of the sale, but only *of the same kind*;

e) the sold financial instruments and/or securities have to be *effectively remitted* by the original seller to the original buyer, except for the shares to bearer, if they are in the possession of the acquirer;

f) *two prices* of the financial instruments and/or securities should be mentioned in the contract: one representing the value of the titles transmitted by the original seller to the original buyer (immediate payment) and another one designating the value of the financial instruments and/or securities of the same kind (the settled sum), which will be resold by the original buyer the original seller at the maturity.

7. The effects of the repurchase agreement

Like any other *synallagmatic* contract, both parties assume obligations, these being mutual and interdependent. As the repurchase agreement is a *sui-generis* contract, according to the above mentioned, its effects are special. They aim mainly at: the double transfer of property on the financial instruments and/or securities; the transmission of the accessory rights; the obligation of the original buyer to exercise the option; the obligation of the original seller to give to the original buyer the amounts of money necessary for making the payments.

7.1. The transmission of the property right on the financial instruments and/or securities

As a double translative contract of property, the repurchase agreement requires that both parties should transfer the property right on the financial instruments and/or securities that represent its object.

The transfer operates at distinct moments³⁷: at the date of the agreement the first transfer occurs, when it is transmitted the property right on the financial instruments and/or securities from

³⁶ See St. D. Cărpenaru, L. Stănciulescu, V. Nemeş, *op.cit.*, p.409; L. Uţă, *op.cit.*, p.164.

³⁷ See St.D. Cărpenaru, L. Stănciulescu, V. Nemeş, *op.cit.*, p.410.

the original seller to the original buyer, and at the maturity the second transfer takes place the other way round, from the original buyer to the original seller, on some financial instruments and/or securities of the same kind. Both transfers are subject to the rules of common law.

7.2. The transmission of the accessory rights

At the date of the transfer of the right on the financial instruments and/or securities from the original seller to the original buyer, there are also transmitted, if there is no other contrary stipulation, the accessory rights conferred by them (art.1773 Civil Code).

The right to collect the fruits produced by the financial instruments and/or securities is a consequence of the transfer of property right on these goods, conferring the prerogative to use them. Thus, according to art.1692 Civil Code, if it was not established otherwise, the fruits of the sold good behooved to the buyer since the day of obtaining the property.

Therefore, the interest and the dividends that reached the maturity during the repurchase agreement will be collected by the original buyer, if the parties did not settle otherwise.

7.3. The obligations of the original buyer to exercise the option

Although it may seem a paradox the fact that the same effect produced by the repurchase agreement for the original buyer is formulated by the lawmaker both like right and obligation, the things are not at all confusing. Thus, in compliance with art.1774 para.1 Civil Code (“The obligation of the original buyer to exercise his option”), the original buyer has the obligation to exercise his option upon the original seller during the repurchase agreement, if the financial instruments grant such a right, under the conditions of the special law.

It is natural to ask the question: is the original buyer the debtor of the obligation to exercise his option conferred by the financial instruments or is he the owner of the right to exercise that option? The answer is very simple: the right to option belongs to the original seller, emerged from the special law, and is transmitted to the original buyer, temporary, together with the financial instruments. During the repurchase agreement, the original buyer has the obligation to exercise the right of option of the original seller, granted by the financial instruments. In other words, the interest that the original buyer should exercise the right to option is of the original seller³⁸.

7.4. The obligation of the original seller to make available to the original buyer the necessary funds

The obligation of the original seller to make available to the original buyer the necessary funds derives from his interest that the latter should exercise the right conferred by the transmitted financial instruments during the repo. Consequently, the original seller has to make available to the original buyer the funds necessary to exercise the right to option, with at least three days before the maturity. In the case in which the original seller does not fulfill this obligation, the original buyer has, at his turn, to sell the right to option on the behalf and on the expense of the original seller, under the conditions of the special law (art.1774 para.(2) Civil Code).

7.5. The obligation of the original seller to make available to the original buyer the amounts of money necessary for making the payments

The obligation of the original seller to make available to the original buyer the amounts of money necessary for making the payments in the account of the financial instruments and/or securities has to be fulfilled if, during the repurchase agreement, emerges the obligation of making

³⁸ In the doctrine (see D. Ungureanu, *Contractul de report (The Repurchase Agreement)*, in the collective work, eds. Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *op. cit.*, p.1814) it was exemplified this obligation in the context of the special situation stipulated by Law 137/2002 regarding some measures for the acceleration of the privatisation. According to art.12 para.(5¹) of this act, the shareholders existent in the company of the state at the date of the increase of the registered capital with the value of the lands for which were released license certificates of the right of property have a preferential right, which can be exercised at a price established without share premium. If there is a repurchase agreement having as object shares of companies found in the above mentioned situation, the shareholder, i.e. the original buyer has to exercise the preferential right, being in the interest of the original seller.

the payments. Hence, in compliance with the provisions of art.9 of Law no.31/1990³⁹, in the situation of an integral and simultaneous taking over of the registered capital by all the subscribers of the constitutive act, the difference between the subscribed capital will be paid after the date of matriculation, in a term established by the text of law⁴⁰.

If the obligation to make the payments reaches the maturity during the repurchase agreement, the original buyer, who is the owner of the stock, will have to make the payments using the necessary sums that the original seller has to provide with at least three days before their maturity.

For the left payments, the original buyer can be summoned, according to art.100 para.(1) and para.(2) din Law no.31/1990.

If the original seller does not fulfill his obligation to provide the original buyer the amounts of money necessary for the payments, with the view to be protected from the sum that the society can claim against him, the original buyer can proceed to the *forced liquidation of the contract* [art.1175, 2nd sentence, Civil Code]. The forced liquidation of the repo means that to the original buyer will be returned by the original seller the sum paid for the financial instruments and/or securities as well as the repo premium. In exchange the original seller will receive the stocks and will become the debtor of the obligation to make the payments that reached the maturity⁴¹.

8. Liquidation, prorogation and renewal of the repurchase agreement

The liquidation of the repurchase agreement means its termination as a consequence of its effects (art.1776 para.(1) Civil Code). The operation of liquidation takes place the second day after the maturity. It consists of the fact that the original buyer transmits the property on some financial instruments and/or securities of the same kind, and the original seller will pay the settled sum.

Although the current Civil Code does not stipulate anymore the possibility of *prorogation of the repurchase agreement*, like the old regulation did⁴², we consider that its prorogation is possible with the agreement of the parties.

The parties could be interested to prorogate the repurchase agreement, either because the original seller would need more money for a new period of time, and the original buyer would want to capitalize the sums of money, or because any party expects that at the new term of prorogation of the contract the difference of exchange rate should be in his favour.

The prorogation of the repurchase agreement involves the fact that the operations should be done on financial instruments of the same kind and at the same amount, and the price of the resale should be the same like that established in the initial contract.

The renewal of the repurchase agreement is a legal operation distinct from prorogation⁴³, which can be done at the maturity, after liquidation. Thus, according to art. 1776 para.(2) Civil Code, if at the maturity of the repurchase agreement, the parties liquidate the differences, making the payment and renewing the repo, either on some instruments and/or securities that differ by their amount or kind, or on other price, then it is considered that the parties concluded a new contract.

The difference between the prorogation of the repo and its renewal is obvious: at the prorogation of the repurchase agreement the object of the contract remains the same like in the original, initial contract and it is not necessary a new remittance of the goods that represent the

³⁹ Republished in *The Official Journal of Romania*, Part I, no.1066 on 17 November 2004 with the further completion and amendments.

⁴⁰ For the shares issued to capital contribution in cash, the subscribed registered capital will be paid in 12 months since the date of the matriculation of the society, and for the shares issued for a contribution in kind, in at most 2 years since the same date.

⁴¹ See D. Ungureanu, *Contractul de report (The Repurchase Agreement)*, in the collective work, eds. Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *op. cit.*, p.1815.

⁴² See art.75 in *Codul comercial (Commercial Code)*, abrogated by the coming into force of Law no.287/2009 regarding the Civil Code.

⁴³ See M. Eftimie, in the collective work *Noul Cod civil. Comentarii, doctrină și jurisprudență (The New Civil Code. Comments, Doctrine and Jurisprudence)*, vol.III, art.1650-2664, Hamangiu Publishing House, Bucharest, 2012, p.140.

object of the repurchase agreement, while at the renewal it is needed a new effective consignment of financial instruments and/or securities from the original seller to the original buyer.

9. Conclusions

In the legal framework of the special civil contracts, the repurchase agreement has its own characteristics, which define it as such. This study presented some of these features. The analysis invites to further debates, the author being convinced that any new regulation is not meant to throw away the old regulations, but on the contrary, it must preserve what is traditional and valid, in order to harmonize the national past with the European present⁴⁴.

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⁴⁴ In this regard see M.Duțu, *Cuvânt înainte. Noua legislație penală în ecuația cercetării științifice (Foreward. The New Penal Legislation in the Equation of the Scientific Research)*, a study presented at the International Conference “Noua legislație penală – etapă importantă în dezvoltarea dreptului român” (The New Penal Legislation – An Important Step for the Development of the Romanian Law), 21 March 2014, organized by “Acad.Andrei Rădulescu” Institute of Scientific Research of the Romanian Academy, p.8.