

SALE SUBJECT TO MODALITIES

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Abstract

The study proposed by the author discusses a distinct version of the sale-purchase agreement, i.e. the sale subject to term or condition. The scientific approach of the author concentrates on highlighting the main legal aspects specific to the analysed category of sales and their correct interpretation. Moreover, the paper supplements the scientific study of the varieties of the sale-purchase agreement, the range of which is practically infinite, given the principle of contractual freedom governing the civil circuit in our legal system. The author examines the legal norms in the current Civil Code that regulate the modalities that the sale-purchase agreement in question is subject to, the term and condition, as well as the means in which they influence the legal relationship existing based on the conclusion of such agreement, especially with regard to the rights and obligations of the contracting parties. The study also presents certain doctrinal points of view in this regard and is addressed equally to legal sciences theorists, researchers, professors, students, MA students and PhD students, as well as attorneys, who it provides with a few reference points that could arouse their interest for researching the subject and expanding the conclusions with regard to the fair application of the special norms in the examined field.

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In accordance with the principle of contractual freedom, the parties can conclude any sale-purchase agreement subject to modalities, such as the term or condition, that the occurrence or execution of their obligations depends on.

Therefore, on one hand, we are dealing with a sale-purchase agreement subject to term and, on the other hand, with a sale-purchase agreement subject to condition.

1. The sale-purchase agreement subject to term

The term can be defined as a modality of the obligations consisting in a future event that is sure to occur, materialized through the passing of a certain period of time and affecting the enforceability or settlement of the obligation².

Terms can be classified as: certain, with their opposite – uncertain, and suspensive, with their opposite extinctive.

Certain terms are known precisely when the binding legal relationship is created. Uncertain terms are those the expiry of which is related to a future event that is sure to occur, but the moment of occurrence of which cannot be precisely predicted³.

Suspensive terms are those that postpone the execution of obligation until their expiry, while extinctive terms are those that lead to the settlement of the execution of obligations upon expiry.

Suspensive terms are of interest for the sale-purchase agreement since, based on them, the contracting parties can agree on postponing the moment of property transfer.

Extinctive terms are not applicable in the case of the sale-purchase agreement since it is in its nature to have the main effect of the permanent transfer of the right of ownership over the goods that are the object of the transaction⁴.

In the case of suspensive terms, the buyer cannot conclude forced execution documents and cannot sue the seller. However, he does have the possibility of exercising the Paulian action and deeming the seller in default, if there is no provision to the contrary⁵.

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² See A.-G. Uluitu, *Comentariu critic* in F.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *Noul Cod civil. Comentariu pe articole. Art. 1-2664*, Ed. C.H. Beck, Bucharest, p. 1492.

³ See L. Pop, *Tratat de drept civil. Obligațiile. Vol. II. Contractul*, Universul Juridic, Bucharest, 2009, p. 151.

³ See C.E. Mangu, *Riscul și principalele contracte civile potrivit noului Cod civil*, Universul Juridic, Bucharest, 2013, p. 336.

Essentially, the term favours the debtor, which can be the seller for the obligation of transferring the ownership over the sold asset, or the seller for the obligation of payment.

The debtor is not the beneficiary of the terms in situations when the law states, due to the will of the parties or the circumstances, that the term was established in favour of the creditor or both parties [art. 1413 par.(1) of the Civil Code].

If the term exclusively benefits one party, it can waive it at any time, without the agreement of the other party [art. 1413 par.(2) of the Civil Code].

If the suspensive term affects the moment of ownership transfer, the buyer cannot ask for the transfer to take place before the expiry of the term. However, if the seller transfers the asset willingly and being aware of the consequences thereof before the expiry of the suspensive term, he can no longer ask for the asset to be returned, since he made a due payment.

It's possible and legal for the contractual parties to agree upon postponing establishing a term for the transfer of ownership or to grant one party the exclusive attribute of establishing the suspensive term. In both cases, if the term has not been established after a reasonable amount of time has passed, at the request of one of the parties, the court shall fix the term, taking into account the nature of the obligation, the situation of the parties and any other relevant circumstances [art. 1415 par.(1) of the Civil Code].

The court can also establish the term if the ownership transfer obligation implies a term and the parties to the sale-purchase agreement have not agreed upon a conventional determination with regard to establishing the term.

The judicial establishment of the term shall be performed in accordance with the rules applicable to interim measures. The action for the judicial establishment of the term is prescribed in the general limitation period (3 years), that starts on the date when the sale-purchase agreement is concluded.

In certain situations, that are expressly provided by the law,⁶ the seller no longer benefits from the term suspending the ownership transfer, which means that the obligation to hand over the property becomes immediately enforceable.

Waiving the benefit of the term, as well as the lapse of the benefit, both mean that the property transfer obligation subject to the term becomes a simple obligation (art. 1418 of the Civil Code).

If the sale-purchase agreement provides the statement of the parties according to which a future event represents the term, as a result of the frequency and regularity of its manifestation or as a result of other circumstances, the non-occurrence of the event leads to the enforceability of the obligation (art. 1420 of the Civil Code).

For example, the contractual parties decide that the obligation of transferring the ownership over the wheat harvest on a certain lot shall be enforceable when "Harvest day" is celebrated in a certain city and this event is planned to take place on September 3-4, 2016. If this event does not take place, the obligation of transferring the ownership over the wheat harvest shall still become enforceable on September 4th 2016.

As for the risks in the case of a sale-purchase agreement subject to term, they are borne by one of the parties, depending on the obligation the execution of which is subject to the term.

Thus, if in the sale-purchase agreement, the suspensive term relates to the obligation of handing over the asset, the risks are related to the expiry date of the established term. Therefore, before the expiry of the term, the risks continue to be borne by the seller, and, after the expiry of the term and if the seller fulfils his obligation of handing over the asset, the risks are transferred to the buyer.

⁵ See I. Turcu, *Noul cod civil republicat. Cartea a V-a. Despre obligații, art. 1164-1649*, 2nd edition, C.H. Beck, Bucharest, 2011, p. 554.

⁶ In accordance with art. 1417 par. (1) of the Civil Code, these situations are: insolvency declared by the law; the conduct of the debtor, consisting in a prohibited action – diminishing the guarantees of the obligation with intent or due to gross negligence; or in case of inaction – failure to establish the promised guarantees.

However, if we refer to the payment obligation subject to the suspensive term, the risk of loss and the contractual risk are transferred from the seller to the buyer when the former executes his obligation of handing over the asset, with the term having no effect on the transfer of risks.

2. The sale-purchase agreement subject to condition

The condition, as a modality of the sale-purchase agreement, means a future and uncertain event, the realization of which the enforcement or cancelling of the obligation depends on.

Thus, for example, the obligation of transferring the property that is the object of the sale that is incumbent on the seller becomes effective when the suspensive condition is met or is terminated when the resolutive condition is met.

From the information above, one can infer that there are two types of conditions that the legal document can be subject to, i.e. the suspensive condition and the resolutive condition.

The current Civil Code also mentions the impossible, illicit or immoral condition (art. 1402), as well as the purely potestative condition (art. 1403).

The former is considered unwritten and, if it refers to the cause of the agreement, shall result in its absolute nullity. If the latter depends exclusively on the will of the debtor, it produces no effects. As such, these last categories of conditions shall not be analysed in the case of the sale-purchase agreement.

Returning to the suspensive and resolutive conditions, we shall first characterize them briefly in order to better understand the effects that they produce when a sale-purchase agreement is subject to them.

The suspensive condition represents that future and uncertain event, the occurrence of which the creation of the obligations and the correlative civil rights are dependent on— in the words of the doctrine⁷, or that the efficacy is dependent on—in accordance with the law⁸.

Once the suspensive condition is met, the content of the legal relationship changes to one specific to a simple obligation. Thus, the obligation of the debtor is created at the moment when the condition is met. The correlative subjective right is created at the same time and the legal relationship becomes effective.

Thus, if a sale-purchase agreement subject to a suspensive condition that refers to the obligation of the seller to transfer the property when the condition is met, the correlative right of the buyer, i.e. that of claiming the transfer of the property, is also created when the condition is met.

The same applies in the case of the sale-purchase agreement subject to a suspensive condition referring to the obligation of the buyer to pay the price of the asset that is the object of the convention at the moment when the condition is met. The correlative right of the seller to ask the buyer to pay the agreed-upon price is created at the same moment.

The premise of the resolutive condition is the existence of an actual validly established legal relationship. Up to the point when the resolutive condition is met, the obligation is simple⁹. After the resolutive condition is met, the binding legal relationship is terminated retroactively.

If a sale-purchase agreement is subject to a resolutive condition regarding the transfer of ownership, up to the moment when the condition is met, the obligation of the seller to hand over the asset is simple and the buyer has the correlative right to claim the transfer of the property at the due date.

Similarly, in the case of the sale-purchase agreement subject to the resolutive condition referring to the payment of the price, the obligation of the buyer to pay the price exists up to the moment when the condition is met, with the seller holding the correlative right to ask for the payment to be made.

⁷ See I. Adam, *Drept civil. Teoria generală a obligațiilor*, All Beck, Bucharest, 2004, p. 450.

⁸ See art. 1400 of the Civil Code.

⁹ See A. Rățoi, *Noul cod civil. Note. Corelații. Explicații*, C.H. Beck, Bucharest, 2011, p. 252.

After the resolutive condition is met and the binding legal relationship is terminated retroactively, the parties to the sale-purchase agreement return to the situation previous to its conclusion.

With regard to the effects of the condition, regardless of its nature (suspensive or resolutive), the Civil Code [art. 1407 par.(1)] mentions that, when the condition is met, it is presumed that it shall produce effects retroactively, starting with the moment when the sale was concluded, so long as the will of the parties, the nature of the agreement or the legal provisions are not to the contrary.

In this legislative framework, the risks are borne as follows:

- up to the moment when the suspensive condition is met, the risks are borne by the seller and, after it is met, they are borne by the buyer.
- before the resolutive condition is met, the risks are borne by the buyer and, after it is met, they are borne by the seller.

The moment when the condition is met or not is determined in relation to the criteria fixed by the parties or that they probably intended, based on the circumstances [art. 1404 par.(1) of the Civil Code] or through legal presumptions.

The legal presumptions relate either to an objective criterion – the occurrence of the event or absence thereof, or to a subjective criterion – the conduct of the subjects of the binding legal relationship¹⁰.

When objective criteria are used, the legal presumptions are within the scope of the following hypotheses [art. 1404 par.(2) and par.(3) of the Civil Code]:

- the parties contract the obligation under the condition of the occurrence of an event within a certain term, in which case, if the term expires before the occurrence of the event, it leads to the ascertainment that the condition has been met;
- the parties contract the obligation under the condition of the occurrence of an event, without agreeing upon a term for its occurrence, in which case, when it is certain that the event is not going to occur, it is considered that the condition has been met;
- the parties contract the obligation under the condition that an event does not occur within a certain term, in which case it is considered that the condition is met: on one hand, previous to the term, if it is certain that the event won't occur and, on the other hand, upon expiry of the term, even if, hypothetically, the event could occur subsequent to this moment;
- the parties contract the obligation under the condition that an event will not occur, without agreeing upon a term, in which case it is considered that the condition is met only if it is certain that the event will not occur.

When subjective criteria consisting in the conduct of the parties are used, the legal presumption are (art. 1405 of the Civil Code):

- when the debtor bound by the condition prevents its occurrence, it is considered that the condition has been met;
- when the party interested in the condition being met determines the occurrence of the event in bad faith, it is considered that the condition has not been met.

The party benefitting from the event's occurrence or lack thereof can waive the condition (art. 1406 of the Civil Code). Waiver, as a unilateral manifestation of will must be expressed only before the moment when the condition is met; if the waiving party was not aware of the fact that the condition had been met, the waiver manifested subsequent to the condition being met does not produce any effects.

The main effect of the waiver consists in the transformation of the obligation from a conditioned obligation into a simple one.

In the case of the obligation subject to a suspensive condition, it becomes effective at the moment of the waiver. For example, in the case of the sale-purchase agreement subject to the condition according to which the seller commits to transfer the ownership over a real estate asset of

¹⁰ See A.-G. Uluitu, *Comentariu critic* in FI.-A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coord.), *op.cit.*, p. 1488-1489.

he leaves the city where the asset is located (suspensive condition), waiving the condition before its realization commits the seller to transfer the property over the asset simultaneously with the waiver.

In the case of the obligation subject to a resolutive condition, at the moment of the waiver, the existence and execution of the obligation are consolidated retroactively. For example, in the case of a sale-purchase agreement subject to the condition according to which the seller commits to transferring ownership over a real-estate asset, but if he were to relocate to the city where the asset is located, the sale would be cancelled, waiving the condition would equate to a retroactive transfer of ownership at the date of the agreement's conclusion.

Pendente conditione, in the case of the suspensive condition that the obligation of transferring the ownership over the sold asset is subject to, the buyer has the right to conclude any deeds for the preservation of his right (art. 1409 of the Civil Code).

If the modality of the obligation consists in a resolutive condition, the buyer can exercise, *pendente conditione*, all of the attributes specific to his subjective right and all of the actions for the defence of his property right, not only deeds of preservation.

3. A few conclusions

Knowing the aspects specific to sales subject to the modality of term or condition by those called to use such an agreement is a premise necessary for the elimination of unidirectional visions, incapable of exceeding the limitations of purely subjective interests and lacking the logical and legal foundation that is so necessary in order to ensure the presumption of economic balance in the relationships created through the conclusion of this type of sales.

The development of the approached subject is imposed for reasons related to offering a portfolio of legal information with a scientific foundation, that can ensure that the discussed convention produces legal effects, in accordance with the thorough interpretations of the norms specific to this field.

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