

Doctoral thesis

VARIETIES OF THE SALE CONTRACT

ABSTRACT

Scientific Supervisor,

Phd. Student

Univ. Professor Phd. ION DOGARU

PĂDURE (TUDORAȘCU by marriage)

MIHAELA MIRUNA

News and Study Degree of Research Theme

Increasing of the role in international and national jurisprudence led to the necessity of determining the ratio of international jurisdiction - national jurisdiction. Thus, we consider this study as being desirable to know the value of the practice and doctrine regarding this issue, in the current situation; we followed to draw conclusions on guessing possible provisions.

These judgments were the basis for designing this study, based on researching the theory regarding the sale contract, amounting to investigate the central theme, varieties of the sale contract, then the comparison being made between varieties, and between varieties and contract of sale itself. We put high value on practice, important in treating and wearing discussions on theories put forward by the great theorists.

In the first part of this thesis, we put the accent on the sale contract in common law matters, for prospective to accomplish the passing to the varieties of the sale contract and an exact determining of them, than we made a optimal comparison between these juridical institutions. We made the efective analisis of all important aspects which define the sale contract, even it is a synthetic one, because the contract

of sale itself is not the main actor of this study, but its varieties, widely treated in the second half and then compared in the third part of the paper. Sure, we gave an important role to the jurisprudence, not treated very extensively in the first part of the thesis, but very carefully raised in the second part, to highlight the practical importance of the discussed institutions. In this approach we have covered studies of Romanian and foreign authors, which is revealed in the literature, extensively exposed at the end of the thesis.

In the second part of the thesis, I treated at length, one by one, the contract of sale varieties with emphasis on issues raised by well-known theorists and then secure with their own interpretations, looking as I have already mentioned, both in Romanian doctrine as and foreign doctrine.

As a novelty, given the times in which we are, that the elaboration by the legislature of the New Civil Code (adopted by Law no. 287/17.07.2009, Issuer Romanian Parliament, published in Official Gazette no. 511 of July 24, 2009) I referred in parallel to its provisions and how they are treated as institutions who have interest to us, in the new law text.

So we made the transition to the core of the addressed problem: judicial practice and doctrine, in other words whether or not containing general rules and special requirements.

Thus, the core of the second part is the approach of jurisprudence and doctrine relating to describe in detail and understanding the varieties of sale, were analyzed comparatively in terms of the Romanian doctrine and foreign doctrine, the Civil Code provisions and special rules provisions relating to the New Civil Code, in order to reach at relevant conclusions. Furthermore, we developed an analysis both internally and internationally.

In the third part, we tried a result of the first two chapters, the first, delimitation between varieties of the sale, in the second part of the third chapter to achieve a distinction between the contract of sale from ordinary matter and each variety of sale.

The fourth chapter is the conclusions, which completes development work in this paper, chapter in which we tried to outline our views on civil institutions analyzed throughout the thesis.

Thesis aim and objectives

The main purpose of this thesis is a comparative study of the varieties for sale doctrinal concepts, especially the jurisprudence and doctrine in this area.

Achieving this goal has led to drawing and accomplishing of the following objectives:

1. Clarifying the concept of contract of sale.
2. Clarifying the concept of variety of sale (of each sale variety).
3. Analysis of each variety for sale in part, why it is or why not would fall into this category.
4. The research of these institutions in terms of comparative study.
5. Comparison between institutions, to highlight the role of the varieties sale.
6. Analysis of jurisprudence which is defining for these institutions.

Methodological and theoretical support of the scientific work

Research the topic on the sale contract (the synthetic mode) and widely the varieties of sale, it necessitated an extensive study that was based on a theoretical doctrinal material of Romanian and foreign researchers (as shown above) and also a vast law rules and practical material.

All these were the methodological and scientific-technical support of this thesis.

Scientific novelty of the results

The Investigations made by this study revealed that the current stage of development of our society is characterized by increasing importance of consistent

jurisprudence and its positive influence on individuals in which it gives confidence in justice.

Being at a stage where we can make a comparison between the 1864 Civil Code and the New Civil Code published in 2009, in the studied material we discern some differences, sure that the new provisions are not yet in force, the varieties of sale are covered, which are not covered in the Civil Code in force, but it was imperative to be covered: ex. retractor dispute, electronic selling, etc.

By consulting numerous inquiries and doctrinal studies, both Romanian and foreign, we have managed to bring some light on some lesser-known institutions or interpreted in classical doctrine, which find their place proudly among varieties sale in our point of view, such as electronic selling, time-sharing system selling.

Importance of theoretical and applied value of work

Analyzing the trigonal **legal norm - doctrine - legal practice**, including in terms of comparative law, because it is a topic of interest for most theorists in this field, we tried to find theoretical solutions, because the jurisprudential criterias must pass background before those used by the legislator.

The work is characterized by predominantly doctrinal analysis, results and conclusions can be used in the legal and professional training and improvement.

Structure

This doctoral thesis is structured according to the purpose and research objectives, depending on the addressed issues, as reflected in the theory and philosophy of law.

The work contents: introduction, four chapters, appendices, bibliography.

The first chapter of the thesis entitled „*SYNTHETIC VIEW ON THE SALE CONTRACT*” sale includes four sections, which in turn are divided into subsections,

and seeks an overview of the contract of sale. In the chapter that we speak about, we consider the following aspects:

In Section 1, *Introduction to contract law*, we have achieved a broad definition of the concept of contract in relation to the concept of convention, both Etymologically, but mainly legal, based on national law, through various international legislation incidents matter, and not least presenting also community rules.

We referred then in Section 2, *The term and validity conditions of the sale contract*, keeping the construction of such institutions as built by great theorists in the field. On this route, however, as a novelty, we have developed a reporting at the relating New Civil Code provisions, running parallel with the analysis of legal point of view, what is and what will be. We covered topics such as: the concept of sale, the parties to the sale, speaking specifically about the third parties, the legal character of this institution, conditions of validity (capacity to contract, by reference to the incapacities, the special consent of the parties, the contract object - about goods and about the price, the cause of the sale contract and other conditions of validity, bringing into question here the form of the contract of sale and prior authorization of the sale of goods).

Section 3 is devoted to *The Effects of the sale contract*, here looking on all obligations of the seller and the buyer, in Section 4, *Good faith in contract of sale*, to get out of classical pattern of the sale contract analysis, and to detail some issues reported in good faith, or in plain language, the mutual loyalty of partners, an interesting aspect that characterizes such a contract. We also analyzed in this section, the fraud and violence, leading to bad faith cases.

Chapter II of the paper is its foundation, because it is a general presentation of the varieties of the sale contract. Includes two sections, namely: *Varieties of the sale contract that depend by the position of the buyer*, and the second: *Other sale varieties*.

In the first section, we included: *Selling by weight, number or extent of pile Sale, Sale's taste, The attempted sale, Sale by sample (sample based) and Sale of*

future goods. Why I chose the separation of varieties for sale in this way? Because when those varieties which have already been spoken, the moment of concluding the sale contract is the moment of conclusion of the agreement of wills, which is different by the moment of property transferring, and the buyer's position in this regard is defining.

In the second section we included other varieties treated, like: Sale of Covenant (option) for redemption (the institution that raises many questions and is terribly controversial, poorly legislated but with real prospect in the future), Sales agreements consumer away from business premises or remote (sure that this institution is subject to commercial law, but seemed to treat Interested present here due to an interesting legal issue, namely the right of unilateral termination of the sale, with sale specific), Sale of an inheritance, Sale of debt rights, legal institutions relatively slow and very common now in the social realities we face), Sale of litigious rights (as a controversial institution, with many issues in legal practice), Sale at auction, a novelty in varieties, and new to our law generally Selling spatio-temporal system common-ownership, with emphasis on both the Romanian and the French law, E-sale (to treat this institution, we made a small sociological study, also a technical one, within their knowledge, because this being a very new to all trade what we've noticed in particular) Selling a property located next stage of building, Selling with a deposit, The public sale of homes built from state funds and funds of state, Selling homes owned by state between March 6, 1945 to December 22, 1989, Sale of real estate purchase (since this type of sale is a special application of a practical and knows more features, more specialty doctrine because I met a lot of controversy, as is and as a practitioner, I dare cataloging such selling as a possible variety), the last variety treated in this chapter, The sale price paid in installments (selling arrangement governed by special law).

The third chapter, entitled *THE COMPARISON BETWEEN THE CONTRACT OF SALE ITSELF AND HIS VARIETIES*, has two divisions, namely: *Comparative*

view of different kinds of varieties for sale, between them, and Comparative view on the relationship between the sale contract and sale variants.

The first section involves a comparative analysis between the different kind of sale contract varieties with discretion sale of the buyer and with the sale which not involves the position of the buyer. Seemed suggestive such a comparison for a better understanding of the institutions. Then we realized comparisons among other varieties, focusing on „pignorative” contract, litigious retract and debt rights selling.

The second section is an analysis of the boundary agreement of sale by the lot sale, sale by weight, number or measure, and the sale of future goods, then: the taste sale, the sale based on test sample, and then finally other sales.

Nowadays, the sale contract has a privileged place, given that the movement of goods and commodities in general, requires the existence of this institution.

We are dealing with offers that involve negotiations¹, with real estate, with different types of available documents which takes the form of sale, here, therefore, this form of transfer of ownership is extremely present in actuality.

As a result, the sale contract appears as customary legal document most frequently used nowadays.

The sale appears as a refined exchange. Why? In the past, the people exchanged goods, then, by today, both in civil and commercial matters, appeared currency exchange, and now we use instruments such as bills of exchange, promissory notes, CEC (mainly in commercial settlements), people making great progress, facilitate the conclusion of numerous sales of goods and raw materials².

If instead we refer to varieties of sale, we must mention that "for certain types of sale, are applicable, in addition to general rules specific to any sale, some special

¹ I. Dogaru, L. Săuleanu, *Teoria generală a obligațiilor comerciale*, E.D.P., București, 2006, pag. 109-110

² I. Rosetti-Bălănescu, Al. Băicoianu, *Drept civil român. Studiu de doctrină și jurisprudență*, Vol. II, Ed. Socec, București, 1943, pag. 277.

rules"³, for this reason should be classified as other sale types, or varieties of the contract of sale.

Opinions are extremely contraversate in the doctrine, in the present paper we tried to capture the vast majority of which was made in this speech, and expressing their opinions pro and con.

The third chapter is meant to be a consequence of those already analyzed in the first two chapters, a pragmatic discussion on the thread of all work.

Finally in the fourth chapter, or *Conclusions*, we bundled the basic ideas and the interest of the work, expressing personal opinions.

The paper also includes also an extensive list of references, both Romanian literature, the most notorious theorists of law being present, and also foreign literature, predominantly French. I used laws in force, national and international; we also consulted pages in electronic form. Finally two appendices are included, that are specific texts in full of casuistry collected from Alba Iulia Court of Appeal.

The work comprises 134 Bibliography.

Key words: contract of sale, sale varieties, doctrine, taste sale, trying sale, deposit, rensome pact, electronic commerce, auction, real estate, the next stage of building.

³ Ioan Popa, *Contractul de vânzare-cumpărare, Studiu comparativ de doctrină și jurisprudență*, Ediția a II-a, Universul Juridic, București, 2008, pag. 420.