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THEORETICAL ASPECTS REGARDING THE EXCHANGE CONTRACT IN THE LIGHT OF THE NEW CIVIL CODE

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Abstract: *Under the conditions of diversification of legal relations, the exchange contract was the archetype that generated the most used civil contract: the sale-purchase contract. The exchange contract still retains the individualized juridical characters in the sphere of contractual relations born between legal subjects, which cover the most diverse subjective rights.*

Key words: *legal relationship, exchange, sale - purchase, subjective right.*

1. Preliminary notions

This contract was first regulated for practical reasons as it was applied since ancestral times; considering some information, this contract appears along with the first social division of work, when agricultural communities had been divided from those of shepherds, therefore exchange was the ideal judicial tool in a closed, autarchic economy, which was not based on the exchange of merchandise.

Paradoxically, exchange would last until contemporary times although it was the initial array which allowed for the rise of the selling contract; nowadays, exchange is a large part of the civil and commercial circuit.

Exchange, generically known as swap (Mallaurie, Aynes and Gautier, 2017, p. 419) is revived every time the monetary economy was in crisis (for example, France between the years 1940-1946), but it becomes a useful tool in the area of legal relations which arise in international commerce where the main actors, as subjects of law, can have specific interests which can be legally materialized by the form and content of the exchange contract.

Thus, the countries which suffer from the lack of convertible money, for example the dollar are determined to practice exchange to the detriment of sale (Mallaurie, Aynes and Gautier, 2017, p. 419).

In antique societies, swap was the archaic expression of a property transfer and the subject was an object derived from a good or a mass of goods transferred from one person to the other. Thus, swap appears as a distinctive judicial operation which later became an autonomous judicial construction as a judicial tool meant to satisfy certain

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interests of people in regard to their material life. In specialty literature, swap was described as the compensation exchange.

In our endeavour to allocate a certain concept to the above mentioned term in regard to the internal will of the subjects of law which participate in this specific legal relation, we notice a certain mental anticipation of the counter performance of the other party, in agreement with the desire to satisfy his own interest. All these caused discussion about the equivalence of the performances owed by the parties.

This aspect was likely to create the premise for the more legally determined operation of sale, in which the principle of equivalence was taken over and expressed in the form of an amount of money, thus causing another stage of development which easily met all the demands of a commercial operation.

The bilateral character of the performances fully define the specifics of this contract which generates the most frequently used operation in the area of commercial relations, namely the empti contract, the predecessor of sale.

However, the exchange contract is the first one to emphasize the obligation to give. Thus, a part of the French doctrine questions the notion of the obligation to give (Fabre-Magnan, 1996, p. 85) as by achieving the agreement of will between the parties, the normal effect of transfer of property occurs ,,lato sensu,,. Thus, "*the transfer of property depends entirely on the will of the parties, who agree on the way it occurs, whether onerous or free*" (Popa, 2018, p. 50).

Also, the transfer of property occurs ,,uno ictu,, as an effect of the concurring meeting of the two legal wills belonging to the parties of the contract.

According to some data, approximately 35% of world commerce is based on exchange, practiced by weakly developed countries, where the quality of products is below the standards which could favour the conclusion of sale contracts.

It is however true that this contract combines the mutual interests of the parties, but it also shows some obvious inconsistencies in regard to hidden vices, invoking the exception of non-execution of contract or in regard to the resale of the acquired goods (Popa, 2018, p. 50). In regard to international commerce, the so called "compensation operations" (Stăciulescu, 2014, p. 205) are frequent, operations by which the countries which own natural resources and exchange them for industrial products.

Nowadays, "exchange can have significant application in case of immobile goods or exploitation of intellectual property law".

It was justly pointed out by specialty doctrine that the exchange contract gave rise to the sale contract as sale is mainly just an exchange for an amount of money (Alexandresco, 1910, p. 1).

The lawmaker of the new Civil Code regulates this type of contract in 3 articles (1763-1766), by comparison to the sale contract.

Thus, in article 1763 of the new Civil Code, exchange is defined as "the contract by which each of the parties, called counterparties, are obliged to transfer a good in order to acquire another good".

In a much more synthetic definition, the French Civil Code, states, in article 1702, the very essence of this contract by showing that "exchange is that certain contract by which the parties provide each other with a certain good". Thus, the counter

performance is a good and not an amount of money, as is the case of sale (Mallaurie, Aynes and Gautier, 2017, p. 491).

Much like sale, exchange is a contract which transfers property. But as specialty doctrine correctly pointed out "exchange can transfer not only property, but also real rights or debts (Deak, 1998, p. 88).

Starting from the first definition phrased by our lawmaker, the exchange contract entails the fact that nothing prevents the parties to conclude a pre contract which sets the basis on which the exchange is achieved, considering the expression according to which "the parties are obliged to transmit …".

However, this was not regulated by the 1865 Civil Code, which, in article 1405 stated that exchange is a "contract by which the parties provide one good in exchange for another good" (Deak, 1998, p. 88).

Speciality doctrine correctly pointed out that exchange can't be assimilated to "a variety of sale or double sale followed by the compensation of prices" (Deak, 1998, p. 88) as "transfer of property occurs not in exchange for a price, but for another good" (Perju, 2000, p. 84-85).

Exchange, as a contract distinct from sale, can't be qualified as a double sale because if it is found not be valid, it becomes resolute, thus affecting both transfers of property (Deak, Mihai and Popescu, p. 256).

In essence, the object of the exchange contract is achieved by the legal material operation by which two goods are exchanged among them, provided these goods are found in the civil circuit. It is irrelevant if these goods are equal as value (see exchange with payment).

Even money of different value can be subject to exchange, thus a bill of 100 lei can be exchanged for two bills of 50 lei each or 10 bills of 10 lei each and so on.

Doctrine is unanimous in stating that, in exchange for a certain good, the other party is obliged to perform a service, to perform a certain action or refrain from performing a certain action; we are not in the presence of an exchange contract if the parties conclude an unnamed contract (Turianu, 2000, p. 40) or another contract such as the enterprise contract or the franchise contract (Prescure, 2012, p. 97).

It is however forbidden that, in exchange for a good, the other party receives a sum of money or a monetary debt, as, in such a case, we are in the presence of a sale contract.

Nothing prevents the parties to provide as an equivalent good, a future good, thus the real transfer of property occurs at the time the promised good is provided or at the moment it is individualised.

In the definition of article 1763, the parties are called co contractors.

Doctrine has also called them counter exchangers, a term which contains the legal-material operation which is achieved by the exchange contract – permutatia fit rebus – (goods are specific to exchange).

According to article 1764 second alignment of the Civil Code "Each of the parties is considered to be a seller in regard to the good it transfers and a buyer in case of the good he acquires".

2.The judicial characteristics of the exchange contract

The exchange contract is usually consensual and bilateral, of onerous nature, commutative and it transfers property.

a) The consensual character – if the law does not state otherwise, the simple agreement of wills is not only necessary, but it is sufficient to create a contract. There are certain situations regulated by law, as is the case of sale, when the exchange contract, must be concluded in a solemn form in order for it to be valid. According to article 1244 of the Civil Code, exchange of an immobile good, must be concluded in authentic form, as the sanction is annulment of the act. Thus, the mentioned article expressly regulates the fact that conventions which transfer real rights are to be registered in the Cadastral Register, such as to be opposable to third parties. Registration in the Cadastral Register is performed based on the authentic act concluded by the parties. In case one of the goods is a debt, the debtor must be notified of the transfer of his debt, as achieved by the exchange contract. In all cases, if the good or goods which are subject to exchange have a value of below 250 lei, the written form is required ad probationem (see article 309 second alignment of the Civil Procedure Code). If one of the parties of the exchange contract is a professional and the exchange occurs in the exercise of his duties, witnesses can be heard in case there is no contract;
b) Exchange is a bilateral contract. The definition of exchange states that the parties' obligations are mutual and interdependent. Thus, one party's obligation is the legal cause of the other party's obligation (the parties transmit a good in order to acquire another good), by considering the guarantee obligation which they owe to each other;
c) Exchange has an onerous character. When the contract is concluded, each of the parties aims to fulfil a patrimonial interest, by having the material representation of the use they might acquire from the counter performance owed in agreement with the contract. In case there is an imbalance in regard to the goods, it is regulated by an amount of money, provided that its value is not greater than the good provided in exchange, as in this case, we would be in the presence of sale;
d) Exchange is a commutative contract. When they conclude the contract, the parties know the existence and the extent of their obligation, as they are not affected by future and unsecure events - aleo - which would create a state of uncertainty regarding the use of the parties, which would expose them to risk;
e) Exchange contract transfers property. Doctrine mentioned the double character of the transfer of property right, which is achieved at the time the contract is concluded provided the parties are the owners of the goods which are to be exchanged. Also, the goods must not be generic, they must be individually determined, there must not be a clause which postpones the transfer of property right to a date agreed upon by the parties (for example, when the additional amount of money is paid in several instalments).

According to article 1274 of the Civil Code, as long as the parties had not agreed differently, in bilateral contracts, the risk of contract is upon the debtor of the obligation

to transfer a good, even if property was transferred to the debtor.

As a result, risk is transmitted by the transfer of the good and not by transfer of the right (Romanian Civil Code, Notary guideline, p. 494).

However if the good is still in the possession of the initial owner, the risk of the contract is upon him, as he is the debtor of the obligation which is impossible to execute (Stăciulescu, 2014, p. 208).

3. Applying the rules of sale

To the extent to which it does not impair on the nature and effects of the exchange contract, the rules of the sale contract are common to those of the exchange contract, something which is expressly regulated by the lawmaker who states in article 1764 first alignment of the Civil Code that "The provisions regarding sale are also applied to exchange. Similarly, article 1651 of the Civil Code states that "the obligations of the seller are applied to the owner in case of any contract which results in the transfer of a right".

Considering that each party of the contract acquires both the quality of seller as well as the quality of buyer, the rules of sale regarding the expenses of the contract which are paid by the buyer do not apply.

In this situation, according to article 1765 of the Civil Code, in lack of contrary provisions, the parties equally pay the expenses incurred when concluding the exchange contract.

The rule according to which unclear clauses are to be interpreted against the seller is also not applied, thus the general rule according to which unclear clauses are interpreted in favour of the debtor applies in this case – in dubio pro reo.

The rules which govern the ad validity conditions of the sold good also apply - see the mutual obligation to turn in the good and guarantee for the good against any vices - and even those regarding the price - in case of the additional amount of money - provided the value is not greater than the value of the acquired good, as in such a case, we are in the presence of sale, and the regulations regarding the price can't apply - because this type of contract is a sale with a commissioning payment (Deak, Mihai and Popescu, p. 89).

Similarly to the provisions of article 1700 of the Civil Code which regulates the situation of the seller who can't use the good he acquired and the other party is in the same situation, in addition to the quality of seller, he also has the quality of buyer, thus he is entitled to require the dissolution of the contract as well as the awarding of damages.

This forces the other party to give back the good he acquired and pay damages to the party who requested the dissolution of the contract, namely all the expenses he had to pay as a result of his inability to use the good he had received - in regard to the fruit or the trial expenses or any other expenses regarding the fulfilment of the contract.

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