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THE SALE OF ALTERNATIVE GOODS AND THE SALES CONTRACT WITHVOLUNTARY OBLIGATIONS

Bujorel FLOREA[1]

Abstract:

The present study contains the presentation of the most relevant aspects of the variety of sale which covers the alternative goods and the one characterized by the existence of a voluntary obligation. The paper addresses these sale varieties both in terms of the regulations contained in the previous Civil Code (in 1864) and of those related to the current Code. We review the legal and doctrinal definitions of the types of sales examined, the moments in which the ownership and risk right is transferred according to the opinions expressed in research literature as well as the rights arising in favour of the contracting parties.

The author analyzes the different hypothesis when the principal benefit becomes unenforceable. The study addresses both theoreticians and practitioners in civil law, opening the possibility of completing the author's opinion and of expressing other points of view.

Keywords:

alternative goods; alternative sale; right of option; principle of unity of execution of obligation; voluntary obligations; the main benefit.

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1. The sale of alternative goods in the previous Civil Code

In the Civil Code of 1864 the sale of alternative goods was described by Article 1296 paragraph (2) that was completed by the general provisions of the matter of obligations under Articles 1026-1033. According to Article 1296 paragraph (2) of the Civil Code Alexandru Ioan Cuza: "*The sale may cover two or more alternative things.* "So, the variety of the sale of alternative goods lies in the possibility of one of the parties to opt in terms of the purpose of contract between two or more things. The benefit of choosing mainly belonged to the seller (Article 1027 of the old Civil Code). As an exception, the buyer could also choose the object of sale, if such a possibility was granted to it expressly by the seller. The sale of alternative goods means that the seller freed itself from the performance of the obligation, if it delivered one or another of the goods promised, but could not oblige the buyer to take over part of a good and part of the other good (Article 1018 of the previous Civil Code). The sale and purchase contract of the alternative goods is concluded validly at the time when the parties express their consent in this regard (Alexandresco D. (1925):140), (Iliescu, Al. B. (1919):78). The transfer of ownership and of risks took place at the time the holder of the right of option exercised this right and chose one or another of the agreed alternative goods.(Babiuc V.(1982):55), (D. Chirică, *The Transfer of Ownership and Risks in the Sale Contract* in Revista Română de Drept Privat no. 2/2007: 46).

Once the risk intervened as a result of a destruction of property, the right to choose the good regardless of the holder extinguished. As such, the alternative obligation turned into a mere obligation. Likewise, the sale and purchase contract of alternative goods turned into a simple sale and purchase contract, the property and the risks being borne by the buyer.

The risks problem was analyzed from the perspective of the person who had the right to choose the good: of the seller or of the buyer. If the right of choice belonged to the seller, two hypotheses occurred. In the first scenario, if an alternative good perished fortuitously or both goods perished, one fortuitously and the other due to the fault of the seller, obviously before the moment of the choice, the risk of the good and of the contract belonged to the seller. In the second case, if both goods perished fortuitously before exercising the right of option, the seller's obligation extinguished and the buyer was not held to pay the price (Mangu, C. E.(2013):329)

In the other case, namely the one in which the right of choice belonged to the buyer, as a result of the parties' agreement, if one of the goods perished fortuitously, the buyer would lose the right of option and received the good that did not perish. If both goods perished, one

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fortuitously and the other due to the fault of the seller, the buyer's right of option was extinguished and had the right to receive the price of the good perished due to the fault of the seller (Article 1032 of the previous Civil Code).

2. The legal regime of the sale of alternative goods covered by the Civil Code in force

The instrument of the sale of alternative goods can be found in the current Civil Code in Articles 1461-1467. The legal regime of the sale of alternative goods in the current legislation does not differ from the one regulated by the old Civil Code. This is configured via the legal provisions corresponding to alternative obligations.

According to Article 1461 paragraph (1) Civil Code: "The obligation is alternative when it covers two principal benefits and the execution of one of them frees the debtor from the entire obligation", and in accordance with paragraph (2) of the same legal text: "The obligation remains alternative, even if at the moment when it is born, one of the benefits was unenforceable."

So, if the seller retains an alternative obligation, relating to two main benefits, this means that the obligation may be satisfied by carrying out one of the benefits, chosen by a party, usually the seller.

The goods covered by the alternative obligation may be both fungible and non-fungible goods.

When concluding the contract of sale of alternative goods, the goods in alternativity should be specified explicitly (Almăşan, A. (2007):10) In research literature(Chelaru, E., Constantinovici, R., Macovei, I. (2012):1550 – 1552) the alternative obligations were limited by other legal arrangements, such as remission of the debt, novation by change of object, simulation in partial disguise, the conditional obligation, the characteristics of alternativity being highlighted more clearly.

Also, it was rightly appreciated (Almăşan A., Obligaţiile plurale (2012):22-23) that the obligation is considered to be simple, not alternative, where there are two goods subject to the obligation, but one of them is unlawful, immoral or impossible.

In accordance with the provisions of Article 1462 Civil Code: "(1) *Choosing the benefit that will extinguish the obligation lies with the debtor, unless it is expressly granted to the creditor. (2) If the party to whom the choice of the benefit belongs does not express its choice within the term granted to this end, the choice of the benefit will belong to the other Party."*. In principle, the right of option will be exercised by the seller, according to the axiom of interpretation of legal norms in favour

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of the ones which undertakes. The buyer may not refuse the choice of the seller, if there is no contrary stipulation. Like any other property right, the right to choose is transmitted to the seller's heirs By way of an exception, if the choice is expressly granted to the creditor, then it will exercise its right of option.

The party which is the holder of the right of choice must exercise it within the period prescribed for this purpose. Otherwise, the right will be granted to the other party, the original proprietor losing the benefit of faculty to choose the concrete way of exercising the right to vote. The concrete expression of exercising the right to choose lies either in the delivery of an alternative good or in the real offer, if the other party refuses receipt, or by express declaration.

The choice, since it was made, is irrevocable, with some exceptions, such as: the case of the execution offer declined to be received by the other party without legitimate basis (Article 1524 Civil Code); the case of alternative plurality that overlaps the successive character of the benefit the situation when, in accordance with general rules, the parties agree otherwise (mutuus disensus); the case of alternative obligations with the successive performance of subsequent benefits; the situation when the choice was made in error (Alexandresco D. (1906 – 1926):152) In this latter case, in order for the revocation to be allowed, the error must bear the alternative nature of the obligation, meaning that the holder believed that the obligation fulfilled was pure and simple.

Or, as the alternative obligation arises from the contract of sale, it includes the right of option which, by being not exercised, the execution is inconsistent with the title and, as such, it is an unlawful payment. The doctrine (Laurent, F. (1878):247) argued that if the holder of the right of option executed both benefits, being convinced that the obligation is conjunctive, may demand the return of one of the benefits. The scenario in which at least one of the two goods perished fortuitously is excluded.

Regarding the time of transmission of property in the research literature two distinct theses have been outlined. The first of them, the majority one (Stătescu, C., Bârsan, C.(2008):416) to which we rally, claims that ownership of the property sold by the contract of sale of alternative goods is transmitted to the patrimony of the buyer when exercising the right to choose the good.

So far, the object of the benefit is unknown, one single good being due. As it is not in the presence of suspensive conditions, retroactivity does not operate.

The second thesis expressed in terms of the moment of submitting the ownership (Otetelişeanu, A. (1939 – 1940):654) believes that choice

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operates as a suspensive condition, and if the transfer of ownership occurs at the time of the conclusion of the contract, the effects of the suspensive condition would be inadmissible.

The fulfilment of obligation should be circumscribed to the principle of unity of execution.

According to Article 1463 Civil Code, the debtor cannot claim the creditor to receive the pay fractionally, part of a benefit and part of another benefit. Moreover, even if the benefit is divisible, the creditor may refuse to accept a partial execution [Article 1490 paragraph (1) Civil Code].

As we said above, the choice of benefit may belong either to the seller or to the buyer. When the choice of benefit belongs to the seller, it may face a risk that one or both benefits become unenforceable. In the event that one of the alternative goods is fortuitously destroyed or cannot be delivered for various reasons, including due to the fault of the seller, it is obliged to submit the property of the other good [Article 1464 paragraph (1) Civil Code].

The buyer will not be able to transfer the price of the good received as it is not the object of the obligation, which became simple by the destruction of one of the two alternative works.

In the second case, namely when both benefits become unenforceable, and one of them is caused due to the fault of the seller, it will be required to pay the amount of the work that perished last [Article 1464 paragraph (2) Civil Code].

In the event that the choice of benefit is the buyer's attribute, namely, by way of exception, by express stipulation, the law distinguishes several situations resulting from the impossibility of implementing one, or both benefits (Article 1465 Civil Code).

Thus, *when one of the benefits has become impossible to be executed*, we distinguish:

a. the impossibility of execution is not caused by the fault of either party - the buyer is obliged to receive the other benefit because it becomes pure and simple,

b. the impossibility of execution is attributable to the buyer - it can claim: - either the execution of the other benefit, compensating the seller - or to release it from the execution of the obligation, as this is a potestative right of the buyer.

c. impossibility of execution is attributable to the seller – the buyer may ask:-either compensation for the benefit unenforceable,- or the other benefit.

If both *benefits became unenforceable and the impossibility is attributable to the seller,* the buyer may claim compensation for any of the two benefits. *If both*

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objects have perished through no fault of the seller, the obligation will be settled under the condition that the destruction took place before the notice of default of the seller (Article 1466 Civil Code). If destruction occurs after the time of the notice of default, the seller shall bear the risks.

3. The sale contract with voluntary obligations

Voluntary obligations were regulated for the first time in the current Civil Code. They have taken account the fact that the doctrine has paid special attention to that legal principle about which it was claimed to complement a practical necessity.

Thus, voluntary obligations were legal relationships that were intended to one benefit at their occurrence, the debtor being able to free itself from the debt through the execution of a subsidiary benefit, set by mutual agreement (Motica, R.I., Lupan, E. (2008):185).Unlike the alternative obligation, in case of a voluntary obligation there is a single benefit at the time of the legal relationship occurrence.

Taking over the views expressed in research literature, in the Civil Code in force the legislature has regulated expressly voluntary obligations. Thus, according to Article 1468 Civil Code: "(1) *The obligation is facultative when it covers one main benefit of which the debtor may free itself executing another benefit set. (2) The debtor is released if, through no fault of it, the main benefit becomes impossible to be executed."*

The sales contract which contains the voluntary obligation grants the seller the advantage that it can execute another subsidiary benefit, if the goods in the principal benefit perish without the fault of the seller. The legal regime of voluntary obligation is known along with the occurrence of the legal relationship and in advance to execution (Hamangiu C., Rosetti-Bălănescu I., Băicoianu A., (1928-1929):686). The seller can choose the payment faculty to extinguish the alternative obligation, without being able to execute partly the due obligation (the main benefit) and partly the optional benefit. The main benefit consisting of the transfer of ownership of a good can be substituted with the voluntary benefit.

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