CLUSTER OF COMMERCIAL SALE AGREEMENTS

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Abstract

The object of this article is the analysis of some actual issues regarding the content and particularities of the cluster of agreements involved by the sale-purchase agreement. We identified mainly two categories of contractual relationships that are specific to sale transactions that we classified in the legislated/regulated cluster of agreements and the contractual conventional cluster existing in relation to the sale-purchase agreement. Given that the problems are many and complex, we limited ourselves to the issues regarding the transfer of ownership and bearing the risk of perishing of the goods subject to sale, but which have to be carried from the place where they are to the buyer's office/domicile, or to some other destination mentioned by the latter. We reached the conclusion that a distinction should be made between the transfer of ownership and bearing the risk of perishment of goods, which pertain exclusively to the relationship between the seller and the buyer, and the issues regarding the liability for the destruction/loss of goods, which pertain to the contractual relationship with the other participants in the transaction (shipper, carrier, insurer, etc).

Keywords: *agreement, sale-purchase, contractual group, risk, perishment of goods, deterioration, loss, liability.*

1. Introduction

From its appearance and up to the present, the sale-purchase agreement has been one of the most used agreements, both within the relations between simple individuals, and within the trade relationships between various participants in such relationships. Truly, sale-purchase is the agreement that meets a multitude of needs of natural persons, in their capacity of consumers of various goods and services, but also the main tool of agency of exchange and movement of goods (raw materials, materials, products, merchandise, etc.) both from manufacturers to distributors, and from the latter to the end recipients. It is indubitable that the sale transactions in their various forms are the main means of marketing the goods both on large (regulated) markets), as provided in Law no. 357/2005 regarding commodity exchanges[1]and the Regulation regarding the approval, supervision, control and sanctioning the activity of commodity exchanges[2] and within the usual relationships between consumers, or between consumers and professional traders.

Sale transactions have evolved over time, the most significant progress being witnessed, undoubtedly, in relation to commercial sales.

2. Content

2.1. Particularities of the commercial sale-purchase

As it is well-known, by the enactment of this Civil Code, the sale-purchase was doubly regulated, in the meaning that the common law relations (between simple individuals) were legislated in the Civil Code (of 1864), while the ones specific to commercial sale were legislated in the Commercial Code[3]. The duality of the regulation was based on the specifics of the two categories of transactions. Several characteristics forming the specifics of commercial sale-purchase the purpose of sale, the economic function of sale, the capacity of contractual parties, the condition and particularities of the goods subject to sale, the price and method of payment, etc.

Repealing the Commercial Code has not led, however, to the disappearance of commercial sale-purchase transactions, because the specifics characterizing them consist of veritable intrinsic elements of such categories of transactions. More precisely, given that commercial relationships have not disappeared, neither have so the specific differences between the commercial sales and the civil ones.

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[1] Official Gazette no. 1115 of 9 December 2005.

[2] Official Gazette no. 850 of 21 November 2014.

[3] for an analysis of the commercial sale-purchase transactions subject to the Commercial Code, see St. D. Cărpenaru, Romanian Commercial Law, 5th edition, All Beck Publishing House, Bucharest, 2004, p. 409 *et seq*

We do not intend to analyze hereby all the elements forming the difference between the civil sale-purchase agreement and the commercial sale-purchase agreement, but we limit ourselves to the ones arising from capacity and the place where the contractual parties are. We proceed in this way because, undoubtedly, in light of parties' capacity, at least one participant in the sale is a professional trader, in the meaning of the Civil Code, while, in light of the place, most commercial sale agreements are negotiated, entered into and implemented between remote persons.[4]

These features of commercial sale-purchase generate, among others, also a series of other categories of legal relations, some being intrinsic to the sale, as tools of marketing through sale (such as consignation, commission, supply, franchise, leasing, agency relations, etc.), while others extrinsic to it (such as shipping, transport, insurance, etc.), but without which, actually, the commercial sale-purchase could not achieve its purpose.

Surely, each of these categories of relations forms the legal content of an agreement, which is regulated and autonomous in the Civil Code or in other normative acts. Given that these are closely interconnected and serve a common purpose, that of marketing through sale, such categories of legal relations look like a veritable „cluster of agreements" gravitating around the commercial sale-purchase, which is the „queen" of the other civil or commercial transactions, as the case may be.

2.2. Main commercial sale-purchase agreements

The actual analysis of the legal relations involved by commercial sale-purchase shows that they cluster in two categories of agreements. One category contains those agreements that have a natural connection with commercial sale, such as the relation sale-leasing-mandate and we consider the actual cases in which the financer mandates the user to search for and negotiate with the supplier the essential elements of the sale-purchase agreement for the goods that are to be used on a leasing basis[5].

We called such contractual relations „a natural cluster of agreements" or „a regulated/legislated cluster of agreements" due to the connection existing between them, in the meaning that sale, as the main transaction of marketing the goods, involves the intrinsic (natural) existence of such agreements.

Besides the contractual transactions which have a natural (intrinsic) connection with commercial sale, there is a series of other agreements that the contractual parties connect to the commercial sale agreement. Such examples are the shipping agreement, the transport agreement, the insurance agreement, the customs service agreement, etc., that we call „the conventional/volitional cluster of agreements". Such agreements do not have an intrinsic connection, but facilitate the performance of commercial sale transactions, and increase efficiency of the particularity of the commercial sale-purchase agreement of being negotiated, concluded and implemented between remote persons. The conventional cluster of agreements is based on real facts, in the meaning that, given the parties are placed within a distance from each another, or the merchandise is found in a certain place or in a certain condition (such as in the case of sale of future goods)[6] and should be carried to the buyer's domicile/office, or to another destination mentioned by them. For the operations of transport of merchandise, a shipping company may be mandated, and if the merchandise carried (bought) is to transit the territory of other states as well, the services of a customs agent are used. Likewise, as regards the merchandise carried (that is subject to sale-purchase), the parties may agree on taking up an insurance policy for the duration of transportation (CARGO). In this way, the same goods (subject to the sale-purchase agreement) are subject to an entire chain of other separate sale agreements, but in close connection with it. Mainly the goods that are subject to sale are, at the same time, subject to the shipping agreement and/or to the transport agreement, subject to the insurance agreement, subject to customs formalities, etc. The situations are even more complex, if the goods are bought or are to be marketed through agency, commission, consignation, franchise, distribution relations or any other relations, when, issues specific to the mandate agreement, with or without representation, are also involved in the case.

2.3. Correlation between the agreements within the conventional cluster with commercial sale transactions

Hereinafter, we intend to point out several issues related exclusively to the conventional cluster of agreements involved by the implementation of the commercial sale-purchase agreement, even if, in fact, both clusters of agreements may coexist.

We mentioned above that the conventional cluster of agreements is created by the parties to the sale-purchase agreement, depending on their understanding of the distribution of the obligations incumbent on them. For instance, the agreement stipulates that the issues regarding the loading and carrying of goods are the responsibility of the seller, while the ones related to

[4] for the analysis of the mechanism of conclusion of an agreement between remote persons, see L. Pop, I-F. Popa, St. I. Vidu, Civil Law.Obligations), UniversulJuridic Publishing House, Bucharest, 2015, p. 67-68; P. Vasilescu, Civil Law. Obligations, Hamangiu Publishing House, 2012, p. 301-302.

[5] For details regarding the analysis of the leasing agreement, see St. D. Cărpenaru, Treaty of Romanian Commercial Law, UniversulJuridic Publishing House, 2019, p. 599 *et seq*.; V. Nemeș, Commercial Law, third edition revised and supplemented, HamangiuPublishing House, Bucharest, 2018, p. 396 *et seq*.

[6] for the analysis of sale of future goods, see St. D. Cărpenaru, Treaty of Romanian Commercial Law, op. cit. p.455; V. Nemeș, Commercial Law, op. cit. p.307-308.

insurance and customs services are incumbent on the buyer. Likewise, the parties may establish, based on the principle of freedomof contract, that all the issues regarding the arrival of goods at destination be the exclusive responsibility of one of the contractual parties. It is understood that the substance of the conventional character of the cluster of agreements is provided by the will of the parties, both as regards the correlation elements, and in light of the knowledge of their content. This because, as shown by facts, the parties procure the protection of contractual provisions, by inserting some confidentiality clauses, or even by entering into veritable agreements in this respect, from the very beginning of negotiations.

A „contractual hierarchy" is thus created, according to which sale is clearly the main transaction/agreement, while the others are not necessarily subsidiary, but, undoubtedly, should serve the purpose of sale.

The contractual parties may choose also a third solution, especially, within trade relations with extraneous elements, that of mandating a specialized entity, an agent(we consider the agent in the agency contract regulated by the Civil Code and not the agent in the meaning of ordinary language),who is to take care of the conclusion of all the agreements involved by sale, and also of the performance of transactions/deeds, such as the loading/stacking of merchandise, its transfer, unloading at destination, etc., especially, in situations in which the nature of goods requires special handling machinery/techniques. Such agent of sale and of related transactions takes care of the transfer within the group of the main contractual elements, or this may be done by the very seller/buyer, a kind of contractual union being thus formed, within which certainly the seller/buyer is to be the leader. Such a contractual technique may be used in the case of a group of companies [7] within which named or unnamed agreements may be implemented, containing clauses specific to several transactions performed by the group (for example, sale and leasing, sale and commission, etc.), subject to the groups' changing economic needs.

Irrespective of the option chosen by the parties to the sale agreement, it is sure that certain essential elements of each agreement within the group are known by all the group members. More precisely, the carrier knows the main clauses of a sale agreement; likewise, an insurer is no stranger to the sale, transport and shipping relations, etc. Undoubtedly, on the correlation between the agreements within the group, depends the success of the commercial sale-purchase relations. This because, as mentioned previously, all the other agreements within the group should contribute to the achievement of the main objective of the commercial sale-purchase agreement. Certainly, from a legal standpoint, each of the agreements within the group may be analyzed inclusively as to their application, both individually, and collectively, looking like a contractual conglomerate of sale.

2.4. The main legal effects of the conventional cluster of agreements related to the commercial sale-purchase.

In order to grasp the importance and effects of the conglomerate of sale related agreements, it is sufficient to recall the issue of liability/covering damages. More precisely, if the goods subject to commercial sale are deteriorated in full or in part, the issue of bearing the risk of perishment arises, having its root in the sale agreement, and also the issue of liability of the shipper, carrier, the insurance company, etc., and, last but not least, issues related to the transfer of the property title.

The issues become, therefore, complex enough, and might overwhelm the seller/buyer, however specialized they could be. This is exactly the reason why we showed above that the seller/buyer may outsource these services/deliveries to an agent specialized in such transactions[8].An example would be using the commission agreement as a transaction facilitating the identification of contractual partners, group members, and of the relations serving for the purpose of commercial sale. But another contractual mechanism may be also conceived, such as the letter of credit, whereby many sale related transactions are performed by financial institutions, such as the correspondent bank (the acknowledging bank, the approving bank).

2.5. Liability versus bearing the risk in case of the conventional cluster of agreements

Some of the most important issues related to the sale-purchase agreement are the ones regarding the transfer of the property title to the goods subject to sale and the liability/bearing the risk of perishment of goods. As regards commercial sale, such issues arise, especially, within the relationship seller-buyer-carrier and CARGO insurer. Indeed, in commercial matters, the scope of sale consists mainly of generic goods, which have sometimes the particularity of being „future goods" (which do not exist concretely at the time of negotiation of the agreement) and which have to be carried from the seller's domicile/office or from the place where they are to the buyer's office/domicile, or to another place mentioned by the latter. Or, during transportation, the merchandise may suffer certain deterioration or loss, and the issue of liability for damages arises, respectively, bearing the risk of perishment of goods subject to sale, but also of the other agreements, in close connection with this agreement.

I. Transfer of ownership

As regards the transfer of ownership, the Civil Code regulatessuch issue, depending on the nature of goods. Thus, as regards future goods, art. 1658 in the Civil Code stipulates that, if the subject of sale is some

[7] Manole Ciprian Popa, Group of Companies , Publishing House C. H. Beck, Bucharest, 2011

[8] for a detailed analysis of the agency transactions/agreements within commercial relations, see D.A. Sitaru, *Agency Contracts within Commercial Activity*, Hamangiu Publishing House, Bucharest, 2012

future asset, the buyer acquires ownership when the relevant asset is realized. The ownership over generic goods is transferred to the buyer as of the date when they are individualized through delivery, counting, weighing, measuring, or by any other means agreed or prescribed by the nature of goods (art.1.678 in the Civil Code). On the other hand, if the goods are sold in bulk and for a single aggregate price, the ownership is transferred to the buyer as soon as the agreement is concluded, even if the goods were not individualized (art.1.679 In the Civil Code). As noticeable, as regards generic goods, except for those sold in bulk and for a single aggregate price, the transfer of the property title is related to the actual fact of delivery of goods. Given that goods move through the carrier, it means that the actual act of delivery takes place in relation to the carrier or the shipper, as the case may be. The solution is substantiated also by the provisions under art. 1.667 in the Civil Code, according to which, in the absence of contrary usage or stipulation, if the goods have to be carried from one place to another, the seller should take care of shipping, at the buyer's expense. The seller is released when delivering the goods to the carrier or shipper. We infer from this that, once the goods are delivered to the carrier, the property title is transferred from the seller to the buyer.

II. Bearing the risks

The delivery operation is related also to the issue of bearing the risks of full or partial perishment of the goods subject to the sale agreement. As regards, especially,generic goods, art. 1686 par.3 in the Civil Codestipulates that, as regards generic goods, the seller is not released from the obligation of delivery, even if the lot the relevant goods belonged to perished in full, unless the said lot was expressly mentioned in the agreement. It may be easily inferred that the risk of full or partial perishment of goods is the responsibility of the debtor of the delivery obligation, namely the seller, *res perit debitori*, while, after delivery, the risk of perishment is transferred to the buyer. The rule expresses the general principle in such matters, as regulated under art. 1274 in the Civil Code, which sets forth that, in the absence of a contrary stipulation, to the extent goods are not delivered, the risk under the agreement stays with the debtor of the delivery obligation, even if the ownership was transferred to the acquirer. Therefore, as a rule, the delivery of goods to the carrier realizes both the transfer of ownership, and the transfer of the risk of full or partial perishment of goods to the buyer. The issues regarding bearing the risk of perishment interconnect with the ones regarding liability, in the hypothesis of full or partial destruction/deterioration of the goods during transportation.Certainly, the issue of bearing the risk of full or partial perishment of the goods carried, subject to the sale-purchase agreement arises only within the relationship between the buyer and the seller, and this fact is settled, as we showed above, to the detriment of the buyer, in the meaning that, in the absence of a contrary stipulation, the latter bears the risk, being obliged to pay the price to the seller. On the other hand, the issues regarding the liability for deterioration/loss of goods during transportation arise mainly within the relationship buyer-shipper-carrier and the insurer of the merchandise. As a consequence, the carrier shall be held liable for all the losses arising during transportation. Certainly, there are essential differences between the two instances, namely bearing the risk and the liability.

2.6. The difference between bearing the risk of perishment and the liability for deterioration / destruction

The issue of bearing the risk of full or partial perishment of the goods arises only under agreements transferring ownership (we consider the period of negotiation and execution of the agreement), or, the only agreement transferring ownership within this contractual mechanism is the sale. Consequently, if the full or partial perishment (deterioration or loss) of the goods occurred during transportation, the other members of the contractual group (shipper, carrier, insurer, etc.) do not bear the risk of perishment of the goods, but may be kept liable for the contribution/risk undertaken upon the occurrence of damage. More precisely, as regards the carrier, pursuant to the provisions under art. 1.984 in the Civil Code, this is liable for the damage caused by the full or partial loss of goods, due to their alteration or deterioration, arising during transportation. The legislator sets forth, under art. 1.991 in the Civil Code, the cases that exempt the carrier from liability, a situation which is, undoubtedly, more privileged than that of the person liable for bearing the risk. [9]. Likewise, as regards the insurance of goods, the insurer undertakes , upon the occurrence of the risk insured, to pay the insured, the beneficiary of insurance or other entitled persons (art. 2.214 in the Civil Code). [10]

Therefore, as regards the other agreements than the sale one, the only issue is the liability for covering the damage caused, such as in the case of the shipper and carrier, or of the damage undertaken by contracting some risks, as in the case of the insurance agreement, but not also of bearing the risk of full or partial perishment of the goods.

[9] for the issues regarding the carrier's liability, and also other essential elements of the transport agreement, see Gh. Piperea, CarriageLaw, 3rd edition, C.H.Beck Publishing House, Bucharest, 2013; A.T Stănescu, Ț-A. Stănescu, Transport Agreement, in the new Civil Code. Comments per Articles 2nd edition, C. H. Beck Publishing House, Bucharest, 2014, p. 2106 *et seq*.; M. Afrăsinei, Transport Agreement in the new Civil Code. Comments, Doctrine and Case Law)Vol.III, Hamangiu Publishing House, 2012, p. 324 *et seq*.; O. Crauciuc, Transport Agreement in the new Civil Code, Vol.III, Part II, Studies and Comments), p. 277 *et seq*

[10] as regards the goods insurance agreement, see V. Nemeș, Insurance Law, Hamangiu Publishing House, Bucharest, 2012, p. 256 *et seq*.; C. Iliescu, Goods Insurance Agreement in Romania, All Beck Publishing House, Bucharest, 1999; I. Sferdian, Goods Insurance Agreement, Lumina Lex Publishing House, Bucharest, 2004.

Undoubtedly, the legitimacy of the capacity to sue in the action for covering the damage stays with the person that entered into the contract, being thus a personal/contractual action. The question is if, for example, the obligation of entering into the transport/shipping agreement or the insurance agreement is incumbent on the seller, does the buyer still have the legitimacy to sue such persons? More precisely, if, during transportation, goods are destroyed, stolen or lost, and the transport agreement was concluded by the seller, is the buyer able to request payment of the damage from the carrier, although, hypothetically speaking, he is not party to such an agreement? Without proceeding further with the analysis, for space related reasons, we believe the answer is yes. The main argument is that, as we have showed, in the absence of a contrary stipulation, the concrete fact of delivery of goods to the carrier for loading transfers the property title and transfers the risk of the full or partial perishment of goods. Thus, any deterioration or loss of the goods subject to sale is borne by the buyer, given that all such losses are to be borne through the latter's assets. Therefore, as the owner of goods and as an injured person following the full or partial loss of such goods, the buyer may not be denied the right to be indemnified by the author of the loss. In conclusion, given that the adverse impact of the loss is on the buyer's assets, the latter should be acknowledged anaction in tort against the shipper, carrier, the insurer and any other persons that caused damages to the goods.

3. Conclusions

The sale-purchase agreement is first and foremost one of the most important and frequent agreements not only within civil relationships, but also within commercial activity. What is specific to commercial activity is that sale-purchase in almost any situations is in close connection with a multitude of other agreements, forming, thus, a regulated cluster, or, as the case may be, a conventional cluster of agreements. All such agreements created around sale should serve the essential purpose of sale, namely that of marketing the goods until reaching the end recipient of such goods. Objectively, the goods subject to sale are, at the same time, subject to other agreements, such as shipping, transport, insurance, etc. agreements. The main issues arising in such a contractual context regard the transfer of the property title, the transfer of bearing the risk of full or partial perishment of goods and the liability for the damages caused. Given that not all such issues are regulated in detail by the legislation in force, it is advisable that at least the essential aspects of the three categories of issues be an object of concern to the contractual parties, being inserted in the contracts the latter enter into.

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