EXERCISE OF THE RIGHT OF PRE-EMPTION OVER THE GOODS

Ion-Cristian ZĂVOI*

Abstract

As a method of application, the "*protimisis" has known two variants:*

***Pre-purchase** (original version, of Byzantine origin), in the hypothesis that the person who wanted to sell an asset was obliged to make the privileged an offer of pre-emption (denuntiatio); if the privileged person refused this invitation to pre-purchase or did not exercise his/her option within 30 days, the seller became free to sell to anyone.*

***Repurchase (withdrawal)** – hypothesis in which the seller had the obligation to sell to the pre-emptor, but could also sell freely to a foreigner, with the risk that the privileged person may exercise the right to repurchase the good at the real price within ten years. In terms of the seller's breach of its obligation to make the pre-purchase offer to the pre-emptor, the sanction (withdrawal) was identical, regardless of the method of exercising the protimisis.*

Regarding the right of pre-emption in the light of the provisions conferred by the Civil Code, one can notice the legislator's desire to provide the protection and the value corresponding to the right of ownership over the goods, making available to the holders of the right of pre-emption the possibility to benefit from an adequate means to give this right effectiveness and efficiency.

Keywords: *pre-emption right, pre-emptor, purchase priority.*

1. Introductive notions

It should be noted that on the territory of our country since ancient times under the name of "protimisis", the right of pre-emption[1] appeared in two distinct forms: the first - that of re-purchase, "actual protimisis" and the second - in the form of redemption, "withdrawal".

Since the regulatory framework in this area is extensive, the right of pre-emption is currently provided for both by the provisions of the Civil Code, and by numerous provisions of special laws (Law no. 31/1990 on companies, Law no. 137/2002 on measures to speed up privatisation, Law no. 10/2001 on the legal status of properties wrongfully taken over between 6 March 1945 and 22 December 1989, Law no. 422/2001 on the protection of historical monuments, Law no. 238/2004 on oil, are just a few examples), we refer mainly to the provisions of the Civil Code, which regulate the scope of the right of pre-emption.

The current Civil Code now combines the regulation of the agreement of preference and the right of pre-emption into a single legal institution in art. 1730-1740. Whenever the Civil Code establishes a right of pre-emption in relation to a contract of sale, it uses the concept of pre-emption: the right of pre-emption for the sale of forest land established in favour of co-owners or neighbours (art. 1746), the right of pre-emption for the sale of agricultural property established in favour of the lessee (art. 1849).

2. Notion

Here are some definitions offered to this legal institution in law and in literature: "under the conditions established by law or contract, the holder of the pre-emption right, named pre-emptor, may purchase as a priority an asset"[2]; the right of pre-emption is the faculty recognized by a person or administrative entity, by virtue of a contract or a legal provision, to acquire the ownership of an asset, in case of its sale, with preference to any other buyer ; "that civil subjective right, recognized by law to certain holders, by virtue of which they enjoy priority when buying an agricultural land outside the built-up area, in the order and other conditions provided by law'[3]' Regarding the right of pre-emption regulated by the Forest Code, „civil, legal, patrimonial, inaccessible and temporary subjective right, recognized to the State as a legal person, on the basis of which it may acquire the ownership of the lands that constitute enclaves of the public forest fund or are adjacent to this fund, as well as the lands covered with forest vegetation, in case of their sale, with preference to any buyer, at equal price and under equal conditions"[4]; "the faculty recognized to a person or an administrative entity, by virtue of a contract or a legal provision, to acquire the ownership

* PhD Candidate, Faculty of Law, „Titu Maiorescu" University of Bucharest, Bailiff, Craiova Law Court (e-mail: cristian.zavoi@gmail.com).

[1] Legal right of pre-emption – Bulletin of Notaries Public, page accessed on 18/03/2022 11:22.

[2] See section 4.4. art. 1730 (1) Civil Code.

[3] Gh. Beleiu, *Romanian Civil Law*, 10th ed., Universul Juridic Publishing House, Bucharest, 2011, p. 34.

[4] E. Chelaru, *Civil Law. The main real rights*, C.H. Beck Publishing House, Bucharest, 2012, p. 28.

of an asset, in case of its sale, with priority over any other buyer".

The right of pre-emption confers preference on a person, called a pre-emptor, when buying a good at an equal price when its owner sells it.

3. Modalities of the right of pre-emption

The right of pre-emption, depending on its source, is contractual or legal. The legal right of pre-emption is a priority right when buying a good, being expressly provided by law in favour of certain natural or legal persons or even of the State[5], which satisfies a general interest.

In the doctrine prior to the entry into force of the current Civil Code, it was considered that "unlike the pact of preference– which has a contractual nature because the priority right to purchase of the beneficiary of the pact is born on the basis of the consent between the parties, the right of pre-emption has a legal nature, being established by an imperative rule".

The conventional right of pre-emption results from an agreement by which the owner of a good undertakes to another person, called the pre-emptor, that, if it is decided to sell the good, he/she will prefer it as a buyer, at equal price and conditions. In this situation, we specify that the owner of the good does not undertake to sell the good, but only to give preference, in case of sale, to the person with whom it has concluded the agreement. The conventional right of pre-emption concerns only a particular interest[6]. For the right of conventional pre-emption, the provisions of the Civil Code are supplementary rules, from which the parties may derogate, establishing other conditions of exercise.

Regarding the legal pre-emption right, obviously, the regulation of this Civil Code regarding the pre-emption right being the common law, the special rule, insofar as it contains different provisions, derogates from these provisions.

4. Exercise of the right of pre-emption in the case of sale of the good to a third party

The offer of sale must be accepted by the holder of the right of pre-emption in within a maximum 10 days of its communication, in the case of the sale of movable property, or not later than 30 days in the case of the sale of immovable property, otherwise the offer shall be deemed to be rejected.

The holder of the right of pre-emption who has rejected an offer for sale may no longer exercise that right in respect of the contract proposed to him/her. When the owner sells the property in respect of which there is a right of pre-emption to a third party, the legislator presumes that this sale was made under the condition precedent of the non-exercise of the right of pre-emption.

The seller is obliged to immediately notify the pre-emptor of the content of the contract concluded with the third party, the latter having only a faculty in this regard.

Thus, the pre-emptor can exercise his/her right by communicating to the seller his/her agreement to conclude the sale contract accompanied by the recording of the price available to the seller. By exercising pre-emption in this way, the contract of sale shall be deemed to have been concluded between the pre-emptor and the seller under the terms of the contract concluded with the third party, the latter contract being cancelled retroactively[7]. This exercise procedure is applicable when the seller or the third party immediately notifies the pre-emptor of the content of the contract concluded with the third party, in accordance with art. 1732 of the Civil Code.

If the notification is not made and the third party is aware of the existence of the right of pre-emption, the right acquired by him/her will remain a conditional one, even when the contract of sale contains clauses that would aim to prevent the exercise of the right of pre-emption. In the view of the legislator, such clauses do not produce effects towards the pre-emptor, being in the presence of a partial absolute nullity. If the notification is not made, but the third-party buyer does not know the existence of the right of pre-emption (third party in good faith), we believe that the legislator admits the possibility of exercising the pre-emption right, given the provision according to which "the seller is liable to the third party in good faith for the eviction resulting from the exercise of the pre-emption". We are in the presence of this hypothesis when the right of pre-emption is conventional and concerns a movable asset or when the right of pre-emption is conventional and concerns a building, but it is not noted in the land book, as well as when the right of pre-emption is legal and the conditions for invoking the error of law are met.

Another related issue is that of the term within which the pre-emptor can address the court in order for it to compel the seller to make the notification. In the absence of a special limitation period, the general term of 3 years shall apply, a term that starts to run from the

[5] F. Deak, *Treaty of Civil Law. Special contracts*, Universul Juridic Publishing House, Bucharest, 2011, p. 28.

[6] In case of competition of pre-emptors, priority shall be given to the holder of the pre-emption right arising from the law before conventional pre-emption rights.

[7] F.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Civil code comments by articles*, 3rd ed., C. H. Beck Publishing House, Bucharest, 2021, p. 2074.

date when the pre-emptor knew or should have known the birth of the right to action, *i.e.* the fact that the seller alienated the good to a third party.

Failure to bring the action in due time does not mean the achievement of the negative suspensive condition (of the non-exercise of the right of pre-emption by the pre-emptor), as one of the conditions for the exercise or not of the right of pre-emption, respectively the condition of notifying the holder of the right of pre-emption has not been fulfilled. Therefore, the right of the third party is not consolidated with retroactive effect at the expiry of the limitation period.

If the seller voluntarily exercises the legal obligation to "do" (the pre-emptor's notification), the latter has the possibility to exercise its right, the third-party buyer in bad faith may oppose in defence of the real right purchased only the usucaption.

Eviction of the acquiring third-party by exercising the right of pre-emption. If the right of first refusal concerns a movable asset and the third-party buyer is in good faith, the possibility of eviction will be circumstance by the fact of the actual possession of the asset by the third-party.

Thus, from the provisions of art. 937 (1) Civil Code, according to which "the person who, in good faith, concludes with a non-owner a translative act of ownership for valuable consideration having as object a movable property, becomes the owner of that property from the moment of its taking into effective possession", it is obvious that even when the act is concluded with an owner (as it happens in the hypothesis we are considering) the acquirer must be recognized an unconditional property right, the essential condition of the recognition of this right is that the third party enters into the "effective possession" of the property.

Also, the fact that the property remains in the custody of the seller until the exercise of the pre-emption is likely to lead to the eviction. If the buyer has not obtained possession of the good, the right of first refusal may be exercised against this, even if it is in good faith[8].

If the property is immovable and the right of pre-emption is not recorded in the land book, the third-party buyer becomes the owner of that property from the moment of registration of his/her right in the land book. The possibility of eviction in such a case is excluded.

5. Entry in the land book of the right of pre-emption over a building

The conventional right of pre-emption in relation to a building is recorded in the land book - art. 1737 Civil Code. If the right of pre-emption has been noted, the pre-emptor's consent is not necessary for the person who bought under suspensive conditions to enter his/her right in the land book, under the contract of sale concluded with the owner.

The registration of the right of the third party is made under the suspensive condition that, within 30 days from the communication of the conclusion by which the registration was ordered, the pre-emptor does not notify to the land book office the proof of recording the price at the available to the seller.

The notification made within the term of the land book office replaces the communication provided for in art. 1732 (3) of the Civil Code, having identical effects. On the basis of this notification, the pre-emptor may request the deletion from the land book of the right of the third-party and the recording of his/her right. If the pre-emptor has not made the notification in due time, the right of pre-emption shall be extinguished and deregistered *ex officio* from the land book.

6. Competition between the pre-emptors and the multiple goods sold

Where multiple holders have exercised their pre-emption in respect of the same property, the contract of sale shall be deemed to have been concluded:

a) with the holder of the legal pre-emption right, when competing with the holders of conventional pre-emption rights;

b) with the holder of the legal pre-emption right chosen by the seller, when in competition with other holders of legal pre-emption rights;

c) if the property is immovable, with the holder of the conventional pre-emption right that was first entered in the land book, when it is in competition with other holders of conventional pre-emption rights;

d) if the property is movable, with the holder of the conventional right of first refusal having the earliest common date when competing with other holders of conventional pre-emptive rights.

Any clause contrary to the provisions of para. (1) is considered unwritten.

Under the assumption of the multiple goods sold30, where the pre-emption is exercised in respect of a good purchased by the third-party together with other goods for a single price, the seller may claim from the pre-emptor only a proportionate part of that price.

If goods other than those subject to the pre-emption have been sold, but which could not be separated from it without having damaged the seller, the exercise of the right of pre-emption can be done only if the pre-emptor records the price established for all the goods sold.

[8] F. Moțiu, *Special Contracts in the New Civil Code*, university course, 4th ed., Universul Juridic Publishing House, Bucharest, 2013.

7. Right of pre-emption of the lessee

The new Civil Code provides for a right of pre-emption of the lessee (art. 1849 Civil Code) – he/she has a priority right to the sale of agricultural goods subject to the lease contract, the exercise of which follows the rules established by the provisions of art. 1730-1739 Civil Code, as is the case in the exercise of the tenant's preference right.

The lessee's right of pre-emption applies to the sale of any leased agricultural property, but not to its disposal under other property transfer contracts, such as exchange, annuity or donation contracts. The seller is obliged to notify the lessee-pre-emptor of the contract concluded with a third-party, and the pre-emptor may exercise his/her right of pre-emption within 10 days of the date of notification in the case of the sale of movable agricultural property and 30 days in the case of the sale of immovable agricultural property. By exercising pre-emption, the contract of sale shall be deemed to have been concluded between the seller and the pre-emptor under the terms of the contract concluded with the third-party and the latter contract shall be cancelled retroactively.

8. Termination of the conventional right of pre-emption

As a rule, the conventional right of pre-emption is extinguished by the death of the pre-emptor, unless it was established for a certain term[9].

Thus, where the death of the pre-emptor occurred before the expiry of the period on which it was established, the right of pre-emption shall continue to apply after the death of the holder.

For its part, the conventional right of pre-emption may be established for a definite period of or during the life of the pre-emptor. If it was established for a definite period, the right shall expire either at the end of the term or before the end of the term, in case of the death of the pre-emptor, being thus during life, resulting that the right of conventional pre-emption produces effects only between the owner and the pre-emptor, not towards the heirs of the pre-emptor, not transferring to them upon the death of the pre-emptor.

There is also the hypothesis of a conventional pre-emption right established, for example, in considering the neighbour of a fund and, which obviously does not concern the person of the pre-emptor, but her/her quality, which could also subsist in the person of his/her heirs. Then, having regard to the alternate provisions in the matter of the conventional right of pre-emption, nothing can prevent the owner and the pre-emptor from agreeing that the right of pre-emption be passed on to the heirs of the pre-emptor.

9. Conclusions

Analysing the right of pre-emption under all the provisions conferred by the Civil Code, one can notice the determination of the legislator to provide the appropriate protection and value the right of ownership of the goods, by making available to the holders of the right of pre-emption the possibility of having an appropriate means of giving that right its effectiveness and efficiency.

The manner of exercising the right of pre-emption differs if the exercise takes place before or after the conclusion of the contract of sale: before the conclusion of the contract of sale, by accepting the sale offer by the holder of the right of pre-emption; after the conclusion of the contract of sale with a third-party, by communicating to the seller the agreement of the pre-emptor to conclude the contract of sale together with the recording of the price available to the seller.

In principle, in case of non-compliance with the legal provisions regarding the right of pre-emption, which makes it impossible to exercise the right of pre-emption, its holder may obtain the ineffectiveness of the legal act concluded with the third-party, by invoking the relative nullity.

Regarding the characters of the right of pre-emption, regardless of its nature, the Civil Code imperatively enshrines the indivisible character, meaning that the pre-emptor exercises it unitarily, without the possibility of dividing it, and its inaccessible character.

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