PRESENT ISSUES REGARDING THE JURIDICAL LAND CIRCULATION

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Abstract. *The Romanian economy's recovery under the market economy's rules brought alone a significant land value increase, resulting in the juridical circulation acceleration of these assets. For this reason, the legislator adopted a series of regulations concerning this matter. Unfortunately, in this field also, the legislation is not unitary yet, which can give rise to confusion.*

In the present paper, we analyze some of the stipulations contained by the X Title of the Law no. 247/2005, that represents the ordinary law in the juridical land circulation matter, and also we analyze the special law's stipulations incidence in this matter. Concretely, we share our point of view regarding the disputed issue of whether the Law no. 18/1991 stipulations, that established the temporary alienations restraint, are still in force or not; we analyze the correlations between the Law no. 50/1991 stipulations and those of the Law no. 350/2001, that force , as a preliminary, to obtain an urbanism certificate, especially for the civil actions and for the notary operations regarding the land circulation, when the operations have as object a parceling or a parcel fusion, in order to attain construction projects, and also when they have as object a passing servitude regarding a real estate; we also share our considerations regarding the forest land alienations pre-emption right, stipulated by the Forest Code.

As well, we present the new Civil Code stipulations concerning the juridical land circulation. Essentially, analyzing these stipulations, we came to the conclusion that the property right alienations and also the constitution and extinction of any other real right, having as object lands registered in the cadastral register, have to be made by authentic acts. The authentic act doesn't alienate the property right but represents the title on the grounds of which the right is tabulated in the cadastral register. Only the tabulation produces the alienation or the constitutive effect.

1. Preliminaries. The Romanian Civil Code did not contain any special provisions for the juridical land circulation. As a consequence, the juridical circulation of these assets was subject to the juridical regime of common law, whose essential features can be extracted from the provisions of art. 475 paragraph 1 and of article 971 of Civil Code. The first mentioned provisions mention that "anyone can freely dispose the assets that belong to him, with the modifications established by law" and, according to the second provision, in the agreements that have as an object the transmission of ownership of a real right, the ownership or the right being transmitted by the effect of the consent of the parties.

So we can mention that in the conception of the Civil Code, the transmission of ownership by juridical documents, which had lands as object, were subject to the principle of consensualism. An exception from this rule, were donations, mortgage agreements and testaments, which had to be concluded in an authentic form, *ad validitatem.*

The importance of these assets has soon lead to the adoption of some normative documents that modified this juridical regime. These modifications were dramatic during the communist regime; the normative documents that were adopted concerning this matter almost lead to the

annihilation of the juridical circulation of lands. The returning of Romania to a democratic regime and to an economy based on the rules of market economy and the adoption of some regulations on the grounds of which the majority of buildings taken by the state or by other juridical persons were taken from the ancient owners, has lead to a considerable growth of the economical importance of lands, with the consequence of intensification of the juridical circulation of these assets. This lead to the adoption of some new specific laws. Unfortunately, this was also a matter for which the Romanian state did not know what it wanted, so the matter was standardized, successively, by the means of many normative documents.[1]

The normative document which standardizes the actual juridical regime of the circulation of lands is the Title X "Juridical Land Circulation", of Law no. 247/2005. Its provisions are supplemented with some provisions of Law no. 18/1991 concerning the Real Estate, of Forest Code (Law no. 46/2008) and Law no. 312/2005 concerning the acquiring of ownership right by foreign citizens and stateless people, as well as by foreign juridical persons.

The fact that this matter is not standardized in single normative documents, but as well as the ulterior adoption of other special regulations is meant to create confusion and controversies. The purpose of this paper is to offer an individual point of view concerning controversial problems, but as well to present and comment the new regulations that have an incidence in this matter. The references to the provisions of the new Civil Code (Law no. 287 of 17th of July 2009) will not be omitted.

2. The principle according to which the lands which are private ownership can be alienated without restrictions. According to art. 1 of Title X of Law no. 247/2005, "Lands of private ownership, indifferent of their destination and of their owner, are and remain in the civil circuit. They can be alienated and freely acquired by any of the means stipulated by law, with the observance of the stipulations of the present law."

From the legal provision mentioned, it results that all lands of private ownership are in the general civil circuit, indifferent of destination and indifferent of their location: agricultural lands, lands on which there can be built, lands with other destinations, situated within or outside localities, lands with forestry destinations, alpine fields, etc. In this manner there was a unification of the juridical regime of the circulation of lands, and the provisions of Emergency Government Ordinance no. 226/2000 concerning the juridical circulation of lands with forestry destination were canceled.[2] As we will see, this situated last until the adoption of the new Forest Code.

As well, the alienation of lands can be achieved by any of the methods stipulated in art. 644 and 645 of the Civil Code: juridical documents between living people (including forced real estate sale) and for death cause, legal inheritance, real estate accession and acquisition by prescription.

Lands that are in the civil circuit without any restrictions and can be transmitted only in what concerns the ownership right as a whole, but there can appear dismemberments of this right (usufruct, use, superficiality and servitude). More to it, there is the possibility to grant the use of these lands by the means of juridical documents, like leasing, renting, concession, personal right of use.

3. Exceptions from the mentioned principle. By exception, some lands have a restrictive regime for their juridical circulation or are taken out of the general civil circuit.

3.1. Temporary interdiction to alienate certain lands. Because of the institution of a special law, we appreciate that the interdiction to alienate lands that made the object of the

[1] For the presentation of the evolution of legislation consecrated to juridical land circulation see *E.Chelaru,* Civil Law. Main real rights, 2nd Edition, C.H.Beck Publishing House, Bucharest, p.138-143.

[2] For the presentation of the standardization evolution of juridical land circulation with forestry destination, see *E. Chelaru*, Juridical Land Circulation which are private ownership with forestry destination, C.J. no.4/2004,p.93 and the following.

constitution of ownership right, is maintained in the conditions of art. 19 paragraph (1), art. 21 and art. 43 of Law no. 18/1991 republished[3]. According to art. 32 of the same law, these lands cannot be alienated by agreements between living people for a period of 10 years, calculated from the beginning of the next year in which the registration of the ownership was made, under the sanction of absolute nullity of the alienation documents, the action in nullity can be formulated by the town hall, prefecture, prosecuting attorney, as well as by any other interested person.

The provision of art. 32 could not be part of Chapter IV "Juridical Land Circulation" of Law no. 18/1991, and so the replacement of the standard given for the matter of juridical circulation of such goods, was achieved by the adoption of some ulterior normative documents (Law no. 54/1998 and then the Title X of Law no. 247/2005), which had no effect over these ones.

In the juridical literature there was also the opinion according to which, by the adoption of Law no. 54/1998 the temporary interdiction for the alienation of lands which made the object of the constitution of the ownership right, in the conditions of art. 19 paragraph (1), art. 21 and art. 43 of Law no. 18/1991 republished, was restrained only to agricultural lands situated outside the locality, so that it would be totally eliminated by title X "Juridical Circulation of Lands" of Law no. 247/2005[4]. The author mentions that art. 4 of Law no. 54/1998 according to which "the alienation of agricultural lands situated in the locality is free" and has tacitly and partially cancelled the provisions of art. 32 of Law no. 18/1991.

The systematic interpretation of the provisions of Law no. 54/1998 leads us to the conclusion that the dispositions of art. 4 did not have in view only the exception of agricultural lands situated in the locality from the exercise of the preemption right, that is standardized by the following article (art. 5), in the case of alienation by sale of agricultural lands situated outside the locality. Or, under this aspect, there is no difference compared to the standard contained in chapter IV of Law no. 18/1991.

In the same manner, the provisions of art. 1 of Title X of Law no. 247/2005, "Lands of private ownership, indifferent of their destination and of their owner, are and remain in the civil circuit. They can be freely alienated and procured by any of the methods stipulated by law, with the observance of the dispositions of the present law", and cannot have the significance of the total tacit cancellation of the provisions of art. 32 of Law no. 18/1991, as it is mentioned, but only the significance of the limitation of the circulation of agricultural lands situated outside the locality by the cancellation of the preemption right.

Being a *propter rem* non-alienation, in the case of owner's death, his inheritors will not be able to alienate the land before the expiry of the 10 years term[5].

3.2. The conclusion of some juridical documents having as object lands must be preceded by the acquiring of a town planning certificate. As in the former standard, no administrative authorization must be obtained for the valid conclusion of juridical documents for the alienation of lands.

Exception makes the alienation of real estate goods belonging to some autonomic administrations, alienation which must be performed with the approval of the resort ministry (art. 5 paragraph (3) of Law no. 15/1990 concerning the reorganization of state economic units as autonomic administrations and as commercial companies).The conclusion of the alienation document for such a land, in the absence of some prior approval, will be sanctioned with absolute nullity[6].

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[3] For the same scope, see *L.Pop, L.M.Harosa*, Civil Law. Main real rights. Universul Juridic Publishing House, Bucharest, 2006, p.152-154.

[4] See *Gh.Dobrican,* Juridical land Circulation procured by the constitution of ownership right in the conditions of Law no.18/1991 of real estate fund. Dreptul, no.4/2009, p.143 and the following.

[5] See *E.Chelaru,* Civil Law, Main real rights, 2nd edition, C.H.Beck Publishing House, 2006, p.98.

[6] For the same scope, *I. Adam,* Civil Law. Main real rights, All Beck Publishing House, 2005, p.239.

In exchange, the legislation which standardizes urbanism and territory arrangement imposes the prior acquirement of a town planning certificate in the case in which one intends to conclude some juridical documents that have as objects lands.

The town planning certificate fulfils two main functions: of information and of obligatory administrative documents, that represents the basis for the issuance of the building authorization or constitutes a validity condition for the conclusion of some juridical documents[7].

For the simple information, the town planning certificate can be requested by any person who wants to know the situation of a certain land.

When the town planning certificate is requested for the building of some construction or for some other works or in order to conclude some juridical documents, the request must be formulated by the person who is the rightful owner of the respective land. This is what results from the provisions of art. 29 of Law no. 350/2001 concerning territory arrangement and town planning.

The provision of art. 6 of Law no. 50/1991 emphasize the function of information, when they define the town planning certificate as an "information document" by which competent local and departmental authorities present to the solicitant the elements concerning the juridical, economical and technical regime of lands and existing constructions at the date of the request, in conformity with the provision of town planning and of standards afferent to these ones, or of plans of territory arrangement, according to the case, approved according to law; establish the urbanistic requirements that must be fulfilled according to the specificity of the emplacement; establish the list with the approvals and certificates necessary for authorization; make known to the investor or to the solicitant the obligation of contacting the competent authority for the protection of the environment.

Art. 29 of Law no. 350/2001 emphasizes the second function when it stipulates that "The town planning certificate is the information document with an obligatory character by which the authority of the public departmental or local administration presents the juridical, economical and technical regime of buildings and the conditions which are necessary for the performance of investments, real estate transactions or of any other real estate operations, according to law."

The information which refer to the juridical regime of the building, contained in the town planning certificate, make reference to the ownership right over the building and the servitudes of public utilities that belong to this one; the emplacement of the building outside the locality or inside the locality; provisions of urbanism documentation that institute a special regime over the building - protected areas, definitive or temporary interdictions for construction or if this one is registered in the list of historical monuments of Romania and over which, in case of sale, there is necessary to exercise the right of preemption of the state according to law, as well as other facts stipulated by law (art. 31 letter a of Law no. 350/2001).

Cases in which the request of the town planning certificate is obligatory are partially standardized in a different manner by the two mentioned normative documents.

There is no contradiction in what concerns the necessity to obtain the town planning certificate in order to the issue of the construction authorization. Differences appear in the situations mentioned by the provisions of art. 6 paragraph 6 of Law no. 50/1991 and art. 29 paragraph 2 of Law no. 350/2001.

According to the first mentioned text, the following juridical operations concerning lands are performed only on the grounds of a town planning certificate, under the sanction of nullity of the document: concession of lands; procurement by auction of the planning of public works in the phase "Feasibility Study"; requests in court and notary operations concerning real estate circulation when the respective operations have as an object the division or combination of lots solicited in the scope of achieving some construction works as well as the construction of some passing servitude

[7] In the juridical literature it was mentioned that the data from the certificate of urbanism make the proof for the juridical, economic and technical regime of the construction to which it refers. See *V.Stoica,* Civil Law, Main real rights, vol.1, Humanitas Publishing House, Bucharest, 2004, p.340.

concerning the building (the last juridical operations, are the ones stipulated in art. 6 paragraph 6, letter c, will be considered void, if they will be executed in the absence of a town planning certificate).

The provisions of art. 29 paragraph 2 of Law no. 350/2001 have the following contents: "The issurance of a town planning certificate is compulsory for the procurement by auction of designing works and of execution of public works as well as for the drafting of the necessary cadastral documentation for accumulation, respectively for de division of some real estate assets in at least three lots. In case of sale or purchase of buildings, the town planning certificate contains information concerning urbanistic consequences of the juridical operation, the request for the town planning certificate being in this case, facultative."

We can notice that in the case enumerated in both texts of the law, the procurement by auction of the designing of public works also appears. The design is not a juridical document but it is a technical operation, and so, the sanction of absolute nullity is not applicable to it. The juridical document that can be sanctioned in this manner, for the absence of the town planning certificate, is the administrative document of granting the agreement of design services, which is performed in the conditions of Emergency Government Ordinance no. 34/2006 concerning the attribution of agreements of public procurement, of agreements for the concession of public works and of agreements of concession of services. The assignment of these agreements can be achieved not only by auction but also by other procedures, respectively by a competitive common dialogue, negotiation and offer request. For the identity of ration, one must accept the idea that the procurance of the town planning certificate will be compulsory, indifferent of the assignment procedure for the agreement for the design of some public works.

The provision of art. 6 of Law no. 50/1991 impose the procurance of the town planning certificate, as a validity condition, in the case of request in court and of notary operations concerning real estate circulation when the respective operations have as object the division or accumulation of lots solicited in the scope of achievement of some construction works. The text of the law is confusedly drafted and partially inapplicable.

The legislator might have had in view the division of lands, action which can be performed individually or by the means of a judicial method. The scope of the division is constituted by the stopping of the co-ownership state, and the destination that the future owners will give to the lots, and these ones will become the lots of each one of them and this cannot be ascertained in this moment.

On the other hand, the accumulation is not a juridical document, but a juridical operation made by the means of some juridical documents[8].

The servitude of some real estate right, so the reference to the same text of Law no. 50/1991 is made at the servitude of passing "the real estate" is inadequate. It is not understood why the procurance of the town planning certificate is necessary in the case of the constitution of transferring servitude, but it is not necessary in the case of constitution of another dismemberment of the ownership right, which grants the right to build on the land of another person - the surface right.

From the provision of art. 29 paragraph 2 of Law no. 350/2001 and the ones of art.30 of the General regulation for urbanism, approved by Government Decision no.525 of the 7th of June 1996[9], it results that the prior acquirement of the town planning certificate is compulsory and in the case of division of lands in order to build some new constructions.

The division into lots is the operation of land surface division in minimum 3 lots, in order to perform new constructions. The authorization of these lots execution, on the basis of the general

[8] *V. Stoica,* op.cit., p.342

[9] Implicitly modified by the disposition of Law no.350/2001, mentioned above.

urbanism Standard, is permitted only if every different lot cumulatively observes a series of conditions referring to the surface, dimensions and road opening.

3.3. Alienation of some forestry lands is made with the observance of the state preemption right. The new standard for the juridical circulation of lands, contained in Law no. 247/2005 has suppressed the preemption rights that must be observed by the alienation of some categories of lands, canceling the legal provisions of these ones. This preemption right appeared under the empire of the new Forest Code (Law no. 46/2008). According to art. 45 paragraph 5 of the mentioned document “the State has the right of preemption for the procurement of forests that is included in the forestry fond of public of the state or close to this one, at the price and according to legal provisions." The state participates in the juridical reports that involve the exercise of the preemption right in its quality as a juridical person. By exception from this rule, according to which, within the civil right, the state is represented by the Ministry of Finances, the law stipulates the provision that the exercise of the preemption right is made by the "administrator of forests which are in the public ownership of the state, which in the present is the National Administration of Forests." Its preemption right exists only if the object of alienation is constituted by a forest (and not any other land with forestry destination) which is private ownership, in the meaning of the Forest Code (art. 2), forests are the lands with a surface of at least 0.25 hectares, covered with trees, which, in conditions of normal vegetations, reach at their maturity a minimum height of 5 m. Forests are lands contained in forestry arrangements, but as well forest curtains for protection, fields with forests of a consistence bigger or equal with 0.4, calculated only for the surface occupied by the forestry vegetation. In order to make the object of the preemption right, the forest which is on private co-ownership must not be close to the forestry fund that constitutes the public ownership of the state or that constitutes insertion into this one. These insertions are lands surrounded by the forestry fund of public ownership. Only voluntary alienation, and not the forced ones, which are performed by sale, is subject to the preemption right. The conclusion of a sinalagmatic promise of sale-purchase (ante-agreement) for such a forest does not lead to the transmission of the ownership right, and does not fall under the incidence of the pr-emption right of the state, right which must be observed only if the valorification of the respective promise is wanted, by the conclusion of sale-purchase agreement. On the other hand, in the case when the forest makes the object of the common ownership right for the parties, only the sale of the forest by all the co-owners, and not sale of a part of the ownership right over this one, this falling under the incidence of the preemption right.

What happens when the object of the sale is constituted by the nude ownership over the forest, and the sale keeps for himself and does not alienate to another person the usufruct right? Apparently, the preemption right of the state must be observed. In such a situation, if the state would decide to buy, the forest would enter in its public ownership. The juridical regime of this ownership excludes the possibility of creating and maintaining the veritable dismemberments of the ownership right, this meaning that the usufruct might not exist. The owners of forests that constitute insertions into the forestry fund which is a public ownership of the state or is close to this one would practically be, put in the impossibility of alienating only the nude ownership; fact that would constitute a limitation of the ownership right that can be instituted only by a legal disposition.

There are reasons for which we believe that the sale of the ownership will not fall under the incidence of the preemption right of the state.

The preemption right is exercises “at the price and in legal conditions”.

To be able to exercise the preemption right, the sale has the obligation to notify in written the administrator of the forests which are public ownership of the state, mentioning his intention to sell. The state has at its disposal a 30 days term to exercise its right (art. 46 paragraph 6 Forest Code) and within this 30 days term, the state must manifest in written its intention to buy. If the 30 days terms reached its due date, and state has not exercises its preemption right, the land will be freely sold.

The sale must still observe the price and conditions announced by the seller in the notification that was sent to the administrator of forests which are public ownership of the state.

The sanction for the failure to observe the preemption right of the state is the absolute nullity of the concluded sales-purchase agreement (art. 46 paragraph 8 Forest Code).

The sanction of absolute nullity is excessive, because it can be expressed at any time, thus putting in danger the dynamic safety of the civil juridical circuit[10].

In fact, the sanction of nullity, in general, lacks finality, not being used for the scope for which the preemption right of the state was instituted (the correction of the limits of the forestry fund which is the public ownership of the state and the extension of this one). This is why, ferenda law, we believe that the replacement of this sanction with a provision will be opportune, this provision being able to allow the direct substitution of the state in the place of the buyer, within the concluded sales-purchase agreement.

Such a solution was conceived by the law maker, by art. 19 and art. 20 of O.U.G. no.40/1991 concerning the protection of tenants and the establishment of rent for spaces having as destination a place to inhabit, in case of failure to observe the preemption right of the tenant at the time when the rented inhabitation is bought.

The ones who wrote the Civil Code adopted a similar solution. So, according to art. 1733, "By the exercise of the preemption right, the sales agreement is considered as being concluded between the preemptor and the seller in the conditions contained in the agreement concluded with third parties, and this latter agreement is being retroactively cancelled. Despite all these, the seller responds in front of the third party with good will for the eviction that is the result of the exercise of the preemption right.

4. Rule of concluding juridical documents in authentic form, *ad validitatem*. Article 2 paragraph 1 of Title X of Law no. 247/2005 stipulates: "Lands with or without constructions, situated inside the locality or outside the locality, indifferent of their destination or length, can be alienated and acquired by juridical documents between the living persons, concluded in authentic form, under the sanction of absolute nullity."

There is no difference of juridical regime, under the aspect of the form of the alienation document, as the lands which are situated inside or outside the locality are alienated or according to the function of the category of their use. As a consequence, the alienation document for a construction land or for which there is a construction has to be concluded in an authentic form.

Art. 1273 of the Civil Code after which, by its first paragraph consacrates the principle of consensualism in the matter of constitution and transfer of real rights, by paragraph 3 it shows that the dispositions in the matter of the land book remain applicable. In the same manner, the provisions of art. 1676 stipulate that, in what concerns the sale of real estate, the transfer of the ownership from the seller to the buyer is subject to the provisions for the land book. In its turn, art. 877 stipulate that accurate real estate rights which are tabular, are acquired, modify and cancel only with the observance of the rules for the land book.

Art. 885 paragraph 1 consacrates the rule for the procurement of the ownership right over ownerships registered in the land book, between the parties, and third parties, only by their registration in the land book, on the grounds of the document or of the fact that justified the registration. In the same manner, real rights will be lost or cancelled, by their deletion from the land book with the approval of the owner, approval given through a notary authentic document (art. 885 paragraph 2).

[10] See *D. Chirică,* Treaty of Civil Law. Special Contracts, volume 1, Sale and Exchange, C.H.Beck Publishing House, Bucharest, 2008, p.105.

To conclude with, according to art. 888 “the registration in the land book is performed on the grounds of the notary authentic document, of the court decision which is definitive, of the inheritor certificate, or on the grounds of any other documents in the case when the law stipulates so."

The conclusion that appears from the provision of the new normative documents, mentioned above, is that juridical documents for alienation of ownership right, as well as those for the constitution or cancellation of dismemberments of this right, having as object lands registered in the land book, must be concluded in authentic form. The authentic document is not, by itself, translative of ownership or constitutive of any other real rights, and constitutes only the title on the grounds of which these rights are intabulated in the land book. Only the intabulation will produce the translative or constitutive effect of real rights, according to the case.

According to art. 5 paragraph (2) “in the situation in which, after the conclusion of an ante-agreement concerning the land, with or without constructions, one of the parties ulterior refuses to conclude the agreement, the party which has fulfilled its obligations can notify the competent court which can give a decision that will be considered an agreement.”[11]

The provision of art. 1669 of the new Civil Code standardize the effects of the bilateral sale-purchase promise, showing that, in the case when one of the parties refuses, based on grounded reasons that belong to it, to conclude the promised agreement, the other party can request the pronouncement of a decision that will replace the agreement, if all the other conditions are met and validated. The action is prescriptible in 6 months’ term from the date when the agreement had to be concluded. These provisions are also applicable in the case of unilateral sale-purchase promise.

[11] For the features of the sale-purchase ante-agreement, its elements and its effects, see: *E.Chelaru,* Civil Law. Main real rights, op.cit., p.146-152; *D. Chirică,* Treaty of Civil Law. Special contracts, volume I Sale and Exchange, op.cit., p.168-214; *I. Adam,* Civil Law. Main real rights, op.cit., p.230-234.