OWNERSHIP TRANSFER AND SELLER'S OBLIGATIONS. LOOKING FOR UNITY IN SALE AGREEMENT REGULATION

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Abstract

The Renaissance intelectuals, mostly Italians, considered Rome the climax of the European civilization and from this assumption it seemed self - evident that the Roman law was superior to any kind of regulation of other people in the Middle Ages. Later, for almost two centuries as a consequence, in a kind of inertia, in European civil law, Roman law has been taken as the sole model in order to elaborate modern civil codes. Main legal institutions belonging to Roman law were deeply analysed and their sense were strongly disputed in the frame of the European universities.

If the Roman legal structure was considered a superior one to the Middle Ages peripheral usages, in the frame of the sale agreement and other contracts as well, it has looked normal that regulating seller's obligations or ownership transfer to take place under the shadow of the Roman law.

However, the authors of the modern civil codes have ignored the fact that Roman law had had a long evolution and sometimes contradictory or at least difficult to assess; unfortunately, they avoided that the rules designed by them will have to be analyzed beyond the perception of Roman law.

This article aims to briefly highlight the evolution of Roman law in order to see if the full takeover of some of its institutions is justified today. We shall try also to point out the possible way to reconcile what now it seems to be irreconcilable in the sphere of European systems influenced by ius civile.

Keywords: *sale agreement, ownership transfer, seller's obligations, consensus principle, delivery*

1. Introduction

Undoubtedly, the sale agreement is the most complex and also the most used contract in order to exchange of goods in modern society.

Despite its obvious importance, its international regulation has been permanently obstructed even the level of international exchanges has increased strongly within the frame of the latest waves of globalization.

It is notorious that after many attempts before and after the World War Two, under the tutelage of the United Nations Organization, on 11 April 1980 it was signed in Vienna

the Convention on Contracts for the International Sale of Goods (CSIG) which entered into force as a multilateral treaty on 1 January 1988, after being ratified by 11 countries.

On the other hand, the EU grounded from the first treaty on the "four freedoms". There is no need to explain that at least the free movement of goods needs a uniform regulation.

Some may say that the CSIG could be a modern regulation which would foster the economic exchanges between EU states but also between EU states and other states. However, even most of the European states ratified it in the 1990s, the parties – having expressly this option – prefer many times to avoid the application of the CSIG to their agreement.

A new attempt to create a uniform sales law was the "Proposal for a Regulation on a Common European Sales Law"[50].

Unfortunately, in some main points this project seems to be rather a compromise between great legal systems than coherent regulation.

At this moment we risk being in a real paradox – if the project would be adopted – and to have three regulations: the international, the European and the national one.

More, finding a compromise solution will lead to extensive, difficult, and perhaps contradictory regulation.

Even the sale agreement is the most complex contract its regulation is far from being similar in EU states.

Unfortunately – as we shall point to –, the successive codifications tried to solve old issues, but these only leaded to diversified rules. The scientific research was focused mainly on the Roman law even this law was not codified until Justinian.

This paper tries to discuss some key issues of the sale regulation by focusing on the social and economic interaction between the parties rather than reinterpreting the Roman law.

[50] See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011PC0635

2. The Modern Sale Regulation. Unsolved Issues

2.1. The Contradictions of the *Code civil*

As we know, at the climax of his power, Napoleon Bonaparte, first consul of the French republic, enacted the civil code which had to be the main and general regulation of the contracts. The code was applied not only in the territory of the actual France, but in all the territories annexed by the republic, and later the Napoleonic Empire. It is not hazardous to affirm that in that decades there was an uniform civil law – at least in Western Europe – compared to the present diversity.

Returning to our topic, we remember that dealing with the sale[51] the code recognised the effects of the mere consent of the parties in art.1583: "Elle est parfaite entre les parties, et *la propriété est acquise de droit à l'acheteur à l'égard du vendeur, dès qu'on est convenu de la chose et du prix*, quoique la chose n'ait pas encore été livrée ni le prix payé".

According to the art. 1603 of the French Civil Code, the seller has two distinct obligations: that of delivering and that of warranting the thing which he sales [Il a deux obligations principales, celle de délivrer et celle de garantir la chose qu'il vend].

Delivery was defined by the art.1604 as the transferring the thing sold into "the power and possession of the purchaser" [la délivrance est le transport de la chose vendue en la puissance et possession de l'acheteur] meanwhile the warranty regulated by art.1625 took into account "the peaceable possession of the thing sold" and the absence of defects [la garantie que le vendeur doit à l'acquéreur a deux objets : le premier est la possession paisible de la chose vendue ; le second, les défauts cachés de cette chose ou les vices rédhibitoires].

However, despite the apparent accuracy there are some aspects which can be considered as contradictory.

Even the mere consent of the parties generated the ownership transfer on immoveable property a law of the First Republic[52] did not permit this transfer if the parties had not

[51] Art. 1582 (1): La vente est une convention par laquelle l'un s'oblige à livrer une chose, et l'autre à la payer.
[52] The Law of 11 Brumaire Year VII.

registered the agreement. The rule was stated again by a law as of 23 march 1855[53]. In other words, the seller could sign agreements with two different buyers, and if the second would be the first to register his agreement he would be recognised as the owner. In that specific case, the question raised would be: Which is the effect of the art.1583? And what does the second buyer register if the ownership was transferred according to the same article? For sure, there is no possibility to generate two ownership transfers.

Secondly, if the mere consent of the parties generated the ownership transfer why the seller has to warrant the buyer? If the seller was not the owner when the agreement was concluded he had nothing to transfer so he will be liable only for breaking his promise. If the seller was the owner why he has to warrant for his successive *factum*. In fact, the buyer became the new owner. More, if the thing had occult defects did the agreement generate effects? It's obviously that a defect good was not that the buyer wanted so the ownership transfer had no ground.

2.2. From Unity to Diversity

The regulation promoted by the *Code civil* was received literally by some civil codes of the nineteenth century. E.g. the rules we observed above were maintained in the civil code of new Italian Kingdom entered into force in 1865[54].

Despite this trend, some French authors did not agree with concept promoted by the code. Even they admitted the existence of a warranty against eviction, referring to the article 1641 they sustained that in fact there was no warranty, but a simple liability of the seller[55].

In other states, the rules were changed without modifying the sale mechanism as it was provided by the *Code civil*. For instance, the authors of the Romanian civil code from 1864 went further and modified the definition of the sale. According to the art. 1294, the sale supposed the ownership transfer [vânzarea este o convenţie prin care două părţi se obligă între sine, una a transmite celeilalte proprietatea unui lucru şi aceasta a plăti celei dintâi preţul lui].

[53] See Rivière, *Explication de la loi du 23 mars 1855 sur la transcription en matière*, p. 2 et seq.
[54] See artt.1447, 1462, 1481-2, 1498.
[55] See Aubry, Rau, *Cours de droit civil français : d'après l'ouvrage allemande de C.S. Zachariae*, p. 273.

More, the art.1603 of the *Code civil* was modified so the art.1313 of the Romanian Code did not retain the notion of warranty. In fact, on one hand, the seller had to deliver the thing, and on other hand, he is liable for it [vânzătorul are două obligaţii principale, a preda lucrul şi a răspunde de dânsul]. In other words, they extended the observations of Aubry and Rau to both warranties.

Obviously, this liability which emerged in case of eviction or for occult defects was conceived in a similar way to the warranties regulated by the *Code civil*[56].

The Spanish civil code – enacted in 1889 – maintained the traditional definition of the sale in art. 1445: "Por el contrato de compra y venta uno de los contratantes se obliga a entregar una cosa determinada y el otro a pagar por ella un precio cierto, en dinero o signo que lo represente".

Despite this, its authors removed also the notion of warranty. The art.1461 stated that "el vendedor está obligado a la entrega y *saneamiento* de la cosa objeto de la venta" while according to art.1474 "en virtud del *saneamiento* a que se refiere el artículo 1.461, el vendedor responderá al comprador:

- De la posesión legal y pacífica de la cosa vendida.
- De los vicios o defectos ocultos que tuviere".

The next European codifications oscillated between traditional views and innovation. On one hand, the German civil code – *Bürgerliches Gesetzbuch* (BGB) – did not permit the ownership transfer by mere consent, but imposed to the seller two obligation considered essential: *to deliver* the thing and *to transfer the ownership* to the buyer (§433).

The idea of a warranty was mentioned also (e.g.§459).

On the other hand, the *codice civile* – enacted in 1942 – which was supposed to modernize the civil and commercial regulation maintained the sellers's warranties even the definition of the sale was improved so art. 1470 stated that "la vendita è il contratto che ha per oggetto *il trasferimento della proprietà* di una cosa o il trasferimento di un altro diritto verso il corrispettivo di un prezzo".

Therefore, according to art. 1476 "le obbligazioni principali del venditore sono:

1) quella di consegnare la cosa al compratore;

[56] See artt.1336, 1352.

2) quella di fargli acquistare la proprietà della cosa o il diritto, se l'acquisto non è effetto immediato del contratto;

3) quella di garantire il compratore dall'evizione e dai vizi della cosa".

3. Returning to the Roman Law

The Napoleonic Code was often marked by the Roman law, whose study contributed essentially to the foundation of the Western medieval universities.

For this reason, many times the nineteenth century commentators felt compelled to resort to the study of the Roman law in order to understand better the reasons beyond the rules that they tried to interpret in the modern age.

We shall do the same thing even compared to the medieval scholars we have some hesitations in considering the Roman law as a strong and mandatory influential source of private law given the fact that the Roman law suffered many transformations between different ages and because it was probably altered by the contacts with numerous different cultures exactly at the when its main concepts were definitized.

As we all know it was generally admitted by the scholars that *emptio venditio* (the Roman sale) was possible under three forms: *mancipatio*, *in jure cessio* and *traditio*. The first two were formal institutions of the *ius civile*[57] while the latter was part of the *ius gentium*.

Learning exactly the content of the seller's obligation has been for long time a complex issue in the studies of *emptio venditio*. It was traditionally held that the Roman sale had no translative effect but to generate obligations[58].

The first two forms, the *mancipatio* and *in jure cessio* decayed in practice while *traditio* became the most used form for it was easier (by *vacuum possessionem tradere*) than the others; it was accessible even to the people which had not the Roman citizenship, it permitted to transfer a Roman goods and the seller had not a duty of *dare*[59].

[57] Mousourakis, Roman law and the origins of the civil law tradition, p.129-131.
[58] Girard, Manuel elementaire de droit romain, p. 527.
[59] Girard, p. 523.

A great impediment in this research was that the sources used by scholars have had a dual and contradictory nature many times[60].

Despite these features, the traditional interpretation of the Roman sources was that the vendor does not transfer the *dominium* or the ownership but "the peaceable possession of the thing sold". According to the definition provided by the art.1582 of the French "la vente est une convention par laquelle l'un s'oblige à *livrer* une chose, et l'autre à la payer" and as we have noted earlier "la délivrance est le transport de la chose vendue *en la puissance et possession de l'acheteur*".

Therefore, both articles made us think that the authors of the civil code were outlining the modern sale agreement as it was perceived by the medieval and renaissance Roman law commentators.

In other words, the vendor is obliged to *possessionem tradere* on one hand, and on other hand the same has to assure the *habere licere* intended as assuring a peaceful possession[61].

If the traditional interpretation of the *emptio venditio* was leading to an opposition between the sale as contract and the ownership transfer[62], the contradictoriality seemed to be harmful in the regulation provided by the French code.

On one hand, the sale agreement generated the seller s duty to deliver the thing sold, and on the other hand the same regulation (art. 1583) admitted that the ownership is transferred automatically by mere consent : Elle *est parfaite* entre les parties, *et la propriété est acquise de droit à l'acheteur* à l'égard du vendeur, *dès qu'on est convenu de la chose et du prix*, quoique la chose n'ait pas encore été livrée ni le prix payé.

Therefore, despite the sale definition and the enumeration of the seller s substantial obligations the ownership transfer occurred by mere consent (of course, we exclude the sale which concerns *genera* and required individualization).

Recent studies on the *emptio venditio* have argued that the sources belonging to the classic age must be interpreted again. The revisionist research has sustained that there is a

[60] Cristaldi, Il contenuto dell'obbligazione del venditore nel pensiero dei giuristi dell'età imperiale, p. 1
[61] Cristaldi, p. 1-5.
[62] Cristaldi, p. 10.

link between the *emptio venditio* and the *alienatio*[63]. In fact, through the *habere licere*, the ancient formalism was transcended, and by *habere* the ownership transfer occurred[64].

4. Finding a solution

Unfortunately, reinterpreting the Roman law is not the solution to the key issues we have mentioned above.

The history indicated us that the diversity was created by the different interpretation of various scholars which were for sure romanists.

It could be better, in our opinion, to focus on the social and economic interaction between the parties rather than reinterpreting the Roman law.

At the end, the sale agreement has as main purpose to transfer the ownership and the good to the buyer. In fact, the latter wants to enter into the possession of the thing in order to use it and to be owner in order to have the exclusivity on the thing or to make capital out of the goods.

Therefore, the German regulation could be criticised because it states two essential obligations (§433). If the sale agreement generates the duty to transfer ownership only by *traditio* or by registration why the delivery must be considered an essential obligation?

If the sold object is moveable the ownership transfer is generated only by *traditio*; according to the §929 **Einigung und Übergabe** "zur Übertragung des Eigentums an einer beweglichen Sache ist erforderlich, dass der Eigentümer die Sache dem Erwerber übergibt und beide darüber einig sind, dass das Eigentum übergehen soll. Ist der Erwerber im Besitz der Sache, so genügt die Einigung über den Übergang des Eigentums".

If the goods is an immoveable the ownership passes from seller to buyer or by registering the (second) agreement.

According to the §873 **Erwerb durch Einigung und Eintragung:**

(1) Zur Übertragung des Eigentums an einem Grundstück, zur Belastung eines Grundstücks mit einem Recht sowie zur Übertragung oder Belastung eines solchen Rechts ist die Einigung des Berechtigten und des anderen Teils über den Eintritt der

[63] Cristaldi, p. 74.
[64] Cristaldi, p. 277, 279-280.

Rechtsänderung und die Eintragung der Rechtsänderung in das Grundbuch erforderlich, soweit nicht das Gesetz ein anderes vorschreibt.

(2) Vor der Eintragung sind die Beteiligten an die Einigung nur gebunden, wenn die Erklärungen notariell beurkundet oder vor dem Grundbuchamt abgegeben oder bei diesem eingereicht sind oder wenn der Berechtigte dem anderen Teil eine den Vorschriften der Grundbuchordnung entsprechende Eintragungsbewilligung ausgehändigt hat.

Practically, the buyer became owner when the thing was delivered or registered and both need another agreement.

If the seller was not the owner or the thing had defects that means the agreement did not produce legal effects, but the seller is liable for breaking the contract.

In a closer sense to *Bürgerliches Gesetzbuch* –I would say softly –, according to art.184 from the Swiss Code of obligations "La vente est un contrat par lequel le vendeur s'oblige à livrer la chose vendue à l'acheteur et à lui en transférer la propriété, moyennant un prix que l'acheteur s'engage à lui payer".

Sauf usage ou convention contraire, le vendeur et l'acheteur sont tenus de s'acquitter simultanément de leurs obligations.

The ownership trasnfer is regulated by the Swiss Civil Code which state that "la mise en possession est nécessaire pour le transfert de la propriété mobilière" (art. 714).

"L'inscription au registre foncier est nécessaire pour l'acquisition de la propriété foncière" (art.656). In both cases, there is no need of a new agreement.

The sale agreement is the *titulus adquirendi* while the delivery or the registration is the *modus adquirendi*.

The French regulation could be criticised because it permits an ownership transfer even the seller had in fact transferred the ownership to the first buyer who did not register it or did not take into possession the thing.

5. Conclusions

It seems to me that a logical reconstruction of the sale regulation can be develop from these considerations.

Therefore, it would be better to renounce to the ownership transfer by consensus principle as the BGB did, just because it protects better the third party or the first buyer.

Secondly, if after the transfer the court declares another person as the original owner that means the agreement was broken by the seller whose duty was to transfer the ownership so he will be liable and he will return the price and pay damages to the buyer.

If the thing is defected in order "to restructure" the agreement – *saneamiento* in the Spanish code – the seller is liable to repair or to replace the good – if possible and agreed by the buyer – or to return the price and to pay damages to the buyer.

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