

CONSIDERATIONS ON THE EFFECTS OF THE DONATION CONTRACT

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Abstract

The study starts from the reality according to which the donation contract belongs to the gratuitous acts (liberalities), on which the law-maker lays special emphasis as compared with the onerous acts. This difference in treatment consists in the fact that liberalities are more susceptible than the onerous acts to produce abuses and to harm the legitimate interests of the person who disposes and of his family. Taking into account all these, the author analyses the rights and the obligations of the parties of the donation contract, as well as the juridical means available to them in the case when the other party does not fulfill, with guilt, his obligations. At the same time, the study presents also the publicity formalities that have to be done in relation with the object of the donation, in the view of providing the opposability of the donated object against the third parties. The article presents viewpoints from doctrine and jurisprudence relative to various juridical situations as concerns the liability of the parties that are guilty for the nonfulfillment of the obligations resulted from the donation contract. Also, the author presents his personal opinions as regards the unregulated and controversial situations in the approached matter.

Keywords: *donation contract, donor's obligations, donee's obligations, obligation of gratitude, obligation to pay the future debts, obligation to pay the charge, publicity formalities.*

1. General considerations. The translative effect of the donation

The donation contract is regulated through the Civil Code in force¹ in the 4th Book ("About inheritance and liberalities"), Title III ("Liberalities"), Chapter II ("Donation"), articles 1011–1033.

According to art. 984 para.(1) Civil Code, the liberality is the juridical act through which a person disposes of his goods totally or partially, gratuitously, in the favour of another person.

At the same time, in compliance with para. (2) of the same text of law, the liberalities can be done only through donation or legacy included in the testament. Thus, the liberalities can be done through documents between living persons (*inter*

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¹ The Civil Code in force was adopted through the Law no. 287/2009 (published in the Official Journal of Romania, part I, no.511 on 24 July 2009) and applied through Law no. 71/2011 (published in the Official Journal of Romania, part I, no.409 on 10 June 2011).

vivos) – as in the case of donations – and through acts for death cause (*mortis causa*) – such as legacy².

As concerns donations, both the person who disposes and the rewarded person, but also the third parties should know, interpret and correctly apply the norms regarding the donation effects. This is the reason why we analyze this subject whose base resides in art. 1017-1019 of the Civil Code.

As the donation contract is translative of rights, its main effect is represented by the transmission of the property or of another real right or of debt from donor la donee.

The transfer of the real right or of debt takes place automatically, from the moment when the donation is concluded, as for the sales contract. If it is the case of the real estate rights, their obtainment by the donee is done by recording the donation in the real estate register (art. 885 Civil Code).

When the donation contract has as object a right of debt, this represents a cession of debt gratuitously³ and the rules specific to this juridical institution apply⁴.

The donation can have as effect the extinguishment of a right and of the relative obligation (debt remittance).

As regards the transfer of property, we should point out the fact that in the case of such goods, the donee does not become immediately owner as a consequence of the will agreement, but later, at the moment of the individualization of the goods by weighing, measuring, counting or submission⁵.

The transfer of right (real or of debt) from the donor's patrimony in that of the donee is an effect of the donation contract, and not an obligation that emerges from the contract, effect which is not susceptible of non execution. The donation contract produces effects both between parties and towards the third parties.

2. The effects of the donation contract between parties

The donation is in principle a unilateral contract and consequently it creates obligations only for one contracting party, i.e the donor.

² See Fr. Deak, L. Mihai, R. Popescu, *Tratat de drept civil. Contracte speciale, Vol.III (Treatise of Civil Law. Special Contracts)*, Universul Juridic Publishing House, Bucharest, 2007, p. 180; D.N. Teohari, *Liberalități afectate de termen, condiție și sarcină (Liberalities Affected by Term, Condition and Charge)*, Hamangiu Publishing House, Bucharest, 2009; L. Stănculescu, *Curs de drept civil. Contracte (Course of Civil Law. Contracts)*, Hamangiu Publishing House, Bucharest, 2012, p. 204; G.C. Frențiu, *Comentariile Codului civil. Liberalitățile. Testamentul. Rezerva succesorală. Reducțiunea liberalităților excesive (Comments on the Civil Code. Liberalities. Testament. Forced Heirship. Reduction of Excessive Liberalities)*, Hamangiu Publishing House, Bucharest, 2013, p. 1.

³ See S. Neculaescu, L. Mocanu, Gh. Gheorghiu, I. Genoiu, A. Țuțuianu, *Instituții de drept civil. Curs selectiv pentru licență (Institutions of Civil Law. Selective Course for the Bachelor Degree)*, Universul Juridic Publishing House, Bucharest, 2013, p. 388.

⁴ See M. Costin, M. Mureșan, V. Ursa, *Dicționar de drept civil (Dictionary of Civil Law)*, Științifică și Enciclopedică Publishing House, Bucharest, 1980, p. 81-82.

⁵ See B. Florea, *Drept civil. Contractele speciale (Civil Law. Special Contracts)*, Universul Juridic Publishing House, Bucharest, 2013, p. 58.

By exception, the donation contract can lead to some obligations for the donee, as it is the case of the donation with charges.

As an effect of the donation, the right that represents the object of the convention is transferred from the donor's patrimony to that of the donee. Sometimes the donation can have as effect the extinguishment of a right and of the relative obligation, as in the case of debt remittance⁶.

The object of the donation contract is represented in most of the cases by a real right.

2.1. The donor's obligations

As a liberality, the donation, unlike the sales makes the donor's obligations more attenuated than those of the seller, even if it is also the case, in general, of a transfer of property.

The donor's obligations are:

- obligation to transmit the donated good;
- obligation to submit the donated good;
- obligation of guarantee against the eviction;
- obligation of guarantee against hidden vices.

The obligation to transmit the donated good was above mentioned. We should act the fact that in the case of the manual gifts, the transfer of the right of property takes place simply by submission of the good, the donation being a real right.

The obligation to submit the donated good is an obligation to do something. It has the meaning of the material transmission of the good and it could take place after the donation is concluded, according to the contractual clauses.

In the field of the manual gift, the fulfillment of the obligation to submit the good is a condition for the validity of the donation.

Neither in the Civil Code in force, nor in the previous one the donor's obligation to submit was an express regulation. This is the reason why *we consider* that it should be analyzed and interpreted having as a model the seller's obligation to submit the good, with the adaptations specific for the gratuitous acts.

By this analogy we can state that the fulfillment of the obligation to submit the donated good can be required both by the donee, and by his heirs and creditors.

The donated good has to be submitted on the whole, in the state it was at the moment when the donation was accepted, together with its fruits, accessories and everything necessary for the use of the good according to its destination.

We consider that the donee cannot ask the donor to submit another good instead of that for which the donation was made.

In the doctrine⁷ many authors tried to answer the question if the donor can be forced to *pay damages and interests* in the case of the non execution or of the delayed execution of the obligation to submit the good. The answer was that the donor can be obliged to pay damages and interests for the unfulfillment of the obligation to submit

⁶ See Fr. Deak, L. Mihai, R. Popescu, *op. cit.*, 2007, p. 238.

⁷ See M. Planiol, G. Ripert, *Traité pratique de droit civil français*, Vol. V, L.G.D.J., Paris, 1957, vol. V, p. 598.

the donated good, except for the case when the donor proves that this was provoked by a non imputable cause, such as the case of the chase event or force majeure.

It was justly considered⁸ that the donor will answer for the loss or for the deterioration of the good, if the parties established that this *should be kept by the donor* and if its loss or deterioration happened because of his guilt.

Undoubtedly, if the donated good is a manual gift, the donor will always bear the risk of loss of the good in his capacity of owner.

The obligation of guarantee against the eviction occurs to the donor only if he expressly committed in this regard through the donation contract or if the eviction is due to his deed or to a known risk of eviction that he did not communicate to the donee at the conclusion of the donation.

The known risk of eviction has to affect the transmitted right at the very moment of the conclusion of the contract.

In the field of the donation with charges, it is applied the regime of the guarantee against eviction stipulated in the case of the sales contract (art. 1695-1706 Civil Code), as, in the limit of the charges, the donation becomes a synallagmatic onerous contract.

The donor does not have the obligation of guarantee against the eviction derived from a third party. Yet, the evicted donee can initiate a guarantee action that the donor himself could have directed against his authors if he had been evicted⁹.

The reason for this juridical possibility derives from the circumstance that, together with the good, the donee is also transmitted all the accessory rights connected to that good ("*cum omni causa*")¹⁰.

The obligation of guarantee against hidden vices occurs to the donor only under certain circumstances. Thus, the donor answers for the hidden vices if he knew them and he did not let the donee know about them at the moment when the donation is concluded, when the donee accepts fully aware the donation and not at the moment when the good is submitted and the donee has to receive it¹¹.

Also, the donor answers for the hidden vices of the donated good, like the seller, within the limit of the onerous character of the donation charge.

In order to make the donor liable in the above mentioned situations, the donee has the possibility to choose, either in an redhibitory action for the revocation of the donation contract (*actio redhibitoria*), or in an estimation action for the proportional reduction of the value of the charge object (*actio aestimatoria* or *quanti minoris*¹²).

⁸ See I. Zinveliu, *Contracte civile. Instrumente de satisfacere a intereselor cetățenilor (Civil Contracts. Instruments for Satisfying the Citizens' Interests)*, Dacia Publishing House, Cluj-Napoca, 1978, p. 159; G. Boroș, L. Stănculescu, *Instituții de drept civil în reglementarea noului Cod civil (Civil Law Institutions in the Regulation of the New Civil Code)*, Hamangiu Publishing House, Bucharest, 2012, p. 423.

⁹ See D. Alexandresco, *Explicațiunea teoretică și practică a dreptului civil român (Theoretical and Practical Explanation of the Romanian Civil Law)*, tome IV, part I, Atelierele Grafice Socec, Bucharest, 1913, p. 335.

¹⁰ "Under any reason" – see L. Cârjan, *Dicționar de cultură juridică latină (Dictionary of Latin Juridical Culture)*, Universitară Publishing House, Bucharest, 2013, p. 63.

¹¹ See R. Constantinovici, *Donația (Donation)*, in the collective work, eds. Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod civil. Comentariu pe articole (The New Civil Code. Comments on Articles)*, C.H. Beck Publishing House, Bucharest, 2012, p. 1065.

¹² "All the less; equally less", see L. Cârjan, *op. cit.*, p. 160.

In compliance with art. 1017 Civil Code, in the execution of the donation, the donor is liable only for misleading conduct and serious guilt.

2.2. Donee's obligations

The donee has no obligation to the donor as the donation contract is in general unilateral.

Although, under certain circumstances, the donee has also some obligations to the donor, such as:

- obligation of gratitude;
- obligation to pay the donor's future debts;
- obligation to pay the charge assumed in the contract.

*The donee's obligation of gratitude to the donor was considered at most an imperfect (moral) obligation*¹³.

Yet, *we consider* that the obligation of gratitude to donor does not have a moral character, but a legal nature, as long as its unfulfillment is sanctioned with the possibility of donation revocation due to ingratitude, in compliance with the law (art. 1023 Civil Code)¹⁴.

From the analysis of the cases of donation revocation due to ingratitude it can be revealed the content of the obligation of gratitude. This consists of the following behaviour of the donee (art. 1023 Civil Code):

- he should not attempt on the donor's life or on one of his intimates;
- he should let the donor know about the intentions of certain person to attempt on the donor's life or on one of his intimates;
- he should not commit criminal deeds, cruelties or serious offences to the donor;
- he should not refuse, unjustifiably, to supply food to the donor in need, in the limit of the current value of the donated good.

The donee's obligation to pay the donor's future debts results from the analysis of the provisions of art. 1015 para.(2), lett.b) Civil Code¹⁵.

Interpreted *per a contrario*, the evoked text of law imposes to the donee the obligation to pay the donor's future debts, if these are stipulated in the donation contract and have a maximum established value.

If there is not such a stipulation, the donee cannot be obliged to pay the donor's future debts, such a donation being of absolute nullity.

This means the application of the principle according to which no particular successor is bound by the debts of his author.

¹³ See G. Boroï, L. Stănculescu, *op. cit.*, p. 424; T. Prescure, *Curs de contracte civile (Course of Civil contracts)*, Hamangiu Publishing House, Bucharest, 2012, p. 215.

¹⁴ In the primitive societies, the donee's obligation of gratitude was done through returning the gift (counter-gift). The counter-gift should have a higher value than the initial gift. For more information as regards the functions of the gift in the archaic societies see M. Mauss, *Eseu despre dar (Essay on the Gift)*, Institutul European, Iași, 1993.

¹⁵ Art.1015 alin. (2), lit.b) Civil Code stipulates: "*Thus, it becomes of absolute nullity the donation that imposes to the donee to pay the debts that the donor would contract in the future, if their maxim value is not established through the donation contract*".

In the case when the donation increased or caused the donor's insolvability, his creditors can challenge it in court, through revocation action, without being necessary to be proved the donee's complicity to the fraud of the debtor donor. Each of the two persons fight for different purposes: the claimer creditor to avoid a damage ("*certat de damno vitando*"¹⁶), and the donee to defend a gratuitous patrimonial advantage ("*certat de lucro captando*"¹⁷).

In the literature¹⁸ it was shown that in the situation when the donee of a mortgaged buiding is forced to pay the debt contracted by the donor and guaranteed by mortgage, the donee is bound *propter rem*¹⁹ and consequently is not obliged personally to pay. Moreover, the donee can make use of regress action against the donor, through which it can be claimed the restitution of the amount of money paid for the extinguishment of the mortgage²⁰.

The obligation to pay the charge assumed in the contract binds the donee like any other debtor, part in a synallagmatic contract, such as the donation with charge (*sub modo*²¹).

In the case of the non execution of the charge by the donee, the donor can choose between the forced execution or the donation revocation²².

3. The effects of the donation contract on the third parties

As a translative act of property, the donation produces full effects only between the contracting parties. Yet, in order that the donated right be opposable to the third parties, and the donation produces the effects to the third parties, it is necessary that the donation of some goods or real rights in general be subject to certain publicity formalities stipulated by law.

The publicity formalities differ in realtion with the nature of the donated good²³.

Thus, if the donated good is a *movable asset*, the opposability to the third parties is done through *the transmission of the possession* of that good (art. 916 and art. 919 Civil Code).

If the donor donates a movable asset to more persons and none of them took possession over the good, the owner of the good will be the first donee²⁴. When this will take possession over the movable asset, it is ensured also the opposability to the third parties.

¹⁶ "Fighting for avoiding a damage" – see L. Cârjan, *op. cit.*, p. 51.

¹⁷ "Fighting for obtaining a thing" – see L. Cârjan, *op. cit.*, p. 51.

¹⁸ See C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român (Treatise of Romanian Civil Law)*, vol. III, All Publishing House, Bucharest, 1998, p. 490.

¹⁹ "In considering the thing" – see L. Cârjan, *op. cit.*, p. 157.

²⁰ See M.M. Oprescu, *Contractul de donație (The Donation Contract)*, Hamangiu Publishing House, Bucharest, 2010, p. 287.

²¹ "Under a qualification" – see L. Cârjan, *op. cit.*, p. 187.

²² See D. Macavei, I.E. Cadariu, *Drept civil. Succesiuni (Civil Law. Successions)*, Junimea Publishing House, Iași, 2005, p. 139-140.

²³ See G. Boroi, L. Stănciulescu, *op. cit.*, p. 424.

²⁴ See E. Safta-Romano, *Contracte civile (Civil Contracts)*, vol. I, Graphix Publishing House, Iași, 1995, p. 198.

In the case when the donation object is a *right of debt*, the opposability to the third parties takes place through the *notificarea of the cession* by the debtor cedent or through its *acceptance* through an authenticated act by the latter (art. 1578 Civil Code).

If the cedent donates the debt to more donors, it is created a conflict between the subsequent and successive donors of the donation, a conflict which will be solved according to the principle "*qui prior tempore, potior iure*"²⁵. Thus, between more cessionaries, that who notifies the first the debtor cedent or obtains his agreement in an authenticated act, will become a third party to the others cessionaries²⁶.

The publicity formalities in the case of the cession of a *universality of debt*, current or future, are done through *registering the cession in the archive* (art. 1579 Civil Code).

Eventually, in the case when the object of the donation is a *real estate*, the donation becomes opposable to the third parties together with *the registration of the real estate right* in the real estate register (art. 885 Civil Code).

The registration in the real estate register can be requested either by the donor, or by his trustee, tutor, ascendants of the minor donor or even by the donor²⁷.

4. Conclusions

The correct interpretation of the norms regarding the effects of the donation contract, especially their best application, represents a major issue for eliminating the abuses that can be produced in the studied area. Knowing the rights and the obligations emerged from the donation contract makes the parties pay more attention to the analysis of the conditions at the moment when they express their consent to conclude such a contract. This is also the reason for which the research of the jurists should reach a new dimension in the approach of the donation contract as regards the above mentioned aspect.

²⁵See I.Adam, *Teoria generală a obligațiilor (General Theory of Obligations)*, All Beck Publishing House, Bucharest, 2004, p. 501.

²⁶See M. Rudăreanu, *Obligații. Responsabilitatea (Obligations. Responsibility)*, "România de Măine" Foundation Publishing House, 2007, p. 108.

²⁷See G. Boroș, L. Stănculescu, *op. cit.*, p. 424.