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PECULIARITIES OF THE OBLIGATION DARE UNDER BULGARIAN LEGISLATION AND IN COMPARATIVE ASPECT

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Abstract

This scientific paper discusses the features of one of the most common legal obligations – the transfer of property (dare). It is regulated in all legislations throughout the world. The subject of research envelops its peculiarities, according to the two major continental families – the Roman and the German, compared with those of the Anglo-Saxon legal system. Some distinctions of the obligation to transfer property under Bulgarian law, which manifest deviations from its reception via French through Italian law, have been thoroughly reviewed.

Keywords: obligation, transfer of property, dare, French Civil Code, Italian Civil Code

1. A COMPARATIVE REVIEW

Roman law makes a strict distinction between the obligation to transfer ownership and the transfer itself in fulfillment of the obligation. The latter was done with a separate legal act - an acquisition method (modus acquirendi). In classical law, three such methods are known - transfer by bronze and scales (mancipatio), by "judicial assignment with the participation of public authority" (in iure cessio), the so-called. an apparent process of ownership and with a simple transfer of possession (traditio). All of them are abstract transactions - their validity is not presupposed by the validity of the legal basis in view of which the transfer is made, ie. of the contract giving rise to the obligation to give. Of these three acts in the postclassical period remains only the most liberal - tradition. Late Roman law also knows a special means of transferring possession - the so-called constitutum possesorum, in which the transferor agrees with the person to whom he must tradition the thing, to continue to exercise de facto power over this thing, but no longer for himself. si, and for the acquirer. Under this agreement, the previous owner becomes the holder. In this way, although the thing is not actually handed over, by virtue of the possessory constitution clause, the tradition is considered completed.

With the reception of Roman law in Western Europe, this clause was regularly included in treaties creating an obligation to transfer property - so often that it began to be considered negotiated, even without it being enshrined in the treaty. Influenced by this practice, the founders of the FGC, contrary to Roman rule, established (albeit

insufficiently perfect as an expression) the permission that the property is transferred by the very agreement of the obligation to transfer - the consent to assume the obligation to transfer and the consent to perform the transfer itself are merged. As a result, the legal fact that gave rise to the obligation to give - the contract, is sufficient for its implementation, without the need for a separate legal act for the transfer of the right in the patrimony of the creditor. In other words, with the conclusion of a contract giving rise to an obligation for dare, the latter not only arises but is automatically fulfilled. Nevertheless, the rule of the need for tradition remains in force, but it has already been modified with the stipulation of a change of owner. The Napoleon Code, finding this "distorted" understanding of tradition, accepted that no separate property law was needed and the treaty was completely sufficient. Thus, for the first time, a text appeared, regulating the obligatory-real effect of the civil contract, albeit in a very complicated form. In the same way, the text of Article 30 of Bulgarian Law of Obligations (repealed) is not very clear, according to which contracts that have as their object the transfer of property or another right, the property or the right are transferred by lawful consent and the property remains the risk of the acquirer, even if its transfer has not taken place. Today this wording is close to that of Art. 24, para 1 of the current Bulgarian Law of Obligations.

This effect is also referred to as the obligatory-real effect of the translational contracts and is also accepted in the law of the other states of the Roman legal circle - e.g. Belgium and Italy. However, everywhere this rule is dispositive and the parties can agree on the transfer of property at a later time, and also suffers exceptions arising from peculiarities in the subject of the debt (eg in case of generic or alternatively defined benefits). Which makes it possible to distinguish the so-called "Non-essential" obligation for dare from the so-called "Genuine", which requires additional action to fulfill the obligation.

This is not the case under German law, where the contract only promises the transfer of ownership, and then the movable property must be handed over or entered in the land books (if it is real estate), ie. registration has a constitutive effect, unlike our system.

A particularly important and distinctive element in the system of the German Civil Code is the principle of abstraction (in German legal terminology "Abstraktionsprinzip"), which has a significant impact on the whole code and is extremely important for understanding the way the law treats transfers of rights, e.g. . - the contractual rights under the contracts, e.g. the abstractness of cession. Thus, according to the law, the right of ownership is not transferred by the contract of sale, as in most other legislations. Instead, the contract only obliges the seller to transfer ownership of the sold item to the buyer, while the buyer is obliged to pay the agreed price. As the buyer in this case does not automatically acquire ownership under the contract and the seller does not automatically acquire "ownership" of the money, and to transfer ownership of the property, according to the law, requires its actual transfer

from the seller to the buyer. § 433 BGB clearly indicates this obligation of the seller as well as the obligation of the buyer to pay the agreed price. Consequently, the seller and the buyer, by virtue of the conclusion of the contract, made only counter-declarations of intent as intentions for sale, but did not fictitiously enter into a contract. Another contract referred to in § 929 BGB et seq. Is required for the transfer of ownership. For the simple transfer of goods to be paid immediately in cash, German civil law governs their transfer in three contracts:

– the sales contract itself, obliging the seller to transfer ownership of the product and, accordingly, the buyer to pay the price;
– a contract transferring ownership of the product to the buyer (in fulfillment of the seller's obligation);
– a contract that transfers ownership of the money (banknotes and coins) from the buyer to the seller (in fulfillment of the buyer's obligation).

The transfer of ownership in the German legal system requires a new property law contract, which, although it can be concluded and executed simultaneously with the first, is not identical to it. The property law contract includes two elements - consent for the transfer of ownership and transfer of movable property, respectively. entry in the land books (Grunbuch) for real estate.

The consent for the transfer of ownership may not be explicitly expressed upon the transfer of the thing, due to the fact that the existence of the same can be judged precisely by the actions for the transfer of the actual power. However, in all cases it is an element of the new property law contract and differs from the consent, the source of the contract with which the obligation to give is assumed. Therefore, if the transferor becomes incapable after the conclusion of the contract, the ownership will not be able to be transferred, despite the transfer of the property, due to lack of valid consent for the transfer itself.

The moment in which the property is transferred marks the end of the tradition, ie. the moment in which the possession passes over the buyer, in accordance with the current regime - until then the thing can be transferred to another purchaser and this transfer is non-attainable, as is performed by the owner. German law explicitly distinguishes between the moment when the activity of the transferor ends, ensuring the actual receipt of the thing from the moment when the tradition ends by accepting the possession by the buyer, using different terms for both cases.

It should be mentioned that the contract for the transfer of ownership under German law is different from the preliminary contract settled in Bulgarian law. This is because the preliminary contracts for transfer of real estate, not declared final, do not have a real-transfer effect, regardless of whether at their conclusion or later the agreed price is paid by the buyer. The subject of the preliminary contract is the promise to conclude a final one, but it neither replaces nor has the effect of the contract, the conclusion of which aims. In addition, the payment and, accordingly, the transfer of possession are not related to the emergence of the legal relationship under the contract

of sale. They are elements of its content and are due to the execution of a transaction that is consensual - the ownership is transferred by reaching an agreement between the counterparties for the sale. The payment, resp. the transfer of the thing under the preliminary contract are anticipated performance under the future final contract. This is explicitly regulated in Art. 30 of the BG LOof 1892, and, of course, this consent must be in the form prescribed by law ("legally stated").

The treaties under Austrian law also have a purely binding effect. But while under the GGZ the property transfer contracts, like their Roman prototype, are abstract and their validity does not depend on the validity of the contract giving rise to the dare obligation, under Austrian law the property law is causally bound by the contract which constitutes its basis and in the event of invalidity. the latter the transfer agreement is also invalid. Swiss and Greek law, also belonging to the German legal family, distinguish the contract of obligation from the order of transfer which transfers the property. And the laws of other countries of the same legal family know the possibility of the will of the parties to pass the property not with the transfer of the thing, but in a subsequent moment, but otherwise the moment of transfer of ownership is not affected by the subject of the obligation.

In English and American law, the transfer of ownership is determined primarily by the express will of the parties. If there is no agreement, the rule is that the ownership of an individually determined item passes with the conclusion of the contract, and on a generically determined one - after its individualization, but even in this case the presumed will of the parties is always taken into account. . Based on the presumed will of the parties, special rules have been established regarding the moment the property is transferred, depending on whether the transferor has to do something before handing over the thing (eg weighing it, measuring it, testing it for quality). , whether a thing is transferred under construction, whether a security is issued, materializing rights over the thing, etc.

2. THE REGULATION UNDER BULGARIAN LEGISLATION

The Bulgarian legislator already in Bulgarian Law of Obligations (BG OL - repealed) adopts the model of the legislations from the Roman legal system. Despite its not very precise wording in Art. 30 of the BG OL (revoked), the dominant opinion in the doctrine understands the text as an expression of the principle of the real effect of the bond contract. In the old literature only Prof. L. Dikov, under the influence of the German doctrine, accepts that Art. 30 of the BG OL (repealed) follows the German, not the French permit. However, this understanding remains isolated.

In the recent literature, an attempt is made to argue this view in the context of the problem of transfer of securities, assuming that the actual composition of the transfer of bearer securities includes, in addition to the transfer of possession of the security, also a contract. between the transferor and the transferee, thus seeking symmetry with

the German model. Other authors argue that the actual composition of the transfer of bearer shares includes a contract and a transfer of shares. I do not think such a view can be shared, because it is valid only for shares - and it is registered, and apart from that it does not take into account the distinction between the rights over and on a security (argued by art. 317, para. 1, art. 471, para. 1 and 2 Commercial Law; art. 560 and Article 561, item 2, Article 566 of the Civil Procedure Code), when it comes to a bearer security.

I think that the disposal of bearer securities and the right materialized in them is done by simply handing over (serving) the document. Moreover, the rights of the subsequent bearer of the security do not depend on the rights of the previous bearer. For the transfer, pledge or transfer of bearer securities for safekeeping at the creditor's delay, similar to ordinary movables, only their simple physical transfer to the acquirer is sufficient (argued by Art. 185, para. 1 and Art. 204, para. 5 Commercial Law Article 119, paragraph 3 of the Naval Commercial Code; Article 97, paragraph 1, second sentence of BG LO, Article 180, in connection with Article 181, paragraph 1 of the Commercial Code). Unlike registered and promissory notes, bearer securities do not require any additional legal action other than their physical transfer (for example, no assignment under Article 99 of the BG LO or a giro under Articles 316-317, 466 is required) et seq., Article 578, etc. Of the Commercial Code, or entry in a certain book in view of the opposition of the disposal of the security with respect to the issuer, argued by Article 185, paragraph 2, Article 578, paragraph 3, para. third and fourth of the Commercial Code, etc.).

Bearer securities are exercised with the right of retention as on any other movable property (argued by art. 315 of the Commercial Code). When seizing them, they are subject - like movables, to seizure by the bailiff, who puts them in a bank (argument of Article 515, paragraph 1 of the Civil Procedure Code). In all these cases, there is a physical expression of the transfer of possession (possession) over them, which exhausts the factual composition of the order. Excluding the provision of Art. 78, para. 1, assoc. first, the the Property Act, which speaks of the acquisition of bearer securities for consideration "on legal grounds", the current regulation of the transfer of bearer securities is completely disinterested in the legal act that serves as a legal basis for this transfer (eg contract). it can also be justified by the fact that in the case of bearer securities, in contrast to registered or promissory notes, the possession of possession of the security is a sufficient sign to determine the person entitled to exercise the rights under it.

This principle is enshrined in the current BG LO, whose Art. 24, para. 1 stipulates that in the contracts for transfer of ownership and for establishment or transfer of another real right over a certain thing, the transfer or establishment occurs by virtue of the contract itself, without the need to transfer the thing. Outside the scope of art. 24, para. 1 of the BG LO are the preliminary contracts for sale, for exchange, for transfer of property against an obligation for maintenance and care, etc., as they

do not transfer or establish real rights, but only create an obligation in the future to conclude a final contract, giving rise to an obligation for this transfer, resp. for the establishment of the right.

Choosing the French model, Bulgarian law perceives both the advantages and disadvantages of the real effect of the contracts themselves in comparison with the system of tradition. The main advantage of this permission is in the certainty that once the debtor has unconditionally agreed to make the transfer, the occurrence of this result will no longer depend on his will, resp. to be influenced by changes in his intention, as it occurs automatically. The main disadvantage of the adopted and applied in our country French model, however, is that the transfer remains hidden from third parties, as for them an indication of the right of ownership is the actual power over the thing.

As a corrective to this inconvenience, cases have been identified in which the real action may be wavered for the protection of the interests of those acquirers who did not know that they were acquiring from a non-owner. Although it manifests itself between the parties, it is irresistible to bona fide persons who have acquired de facto power in the transfer of movable property for remuneration (Article 78 of the Law of Property) or legitimized by the registration of their rights in the transfer of immovable property (Article 113 of the Law of Property). This is so because the real effect of the contract is limited between the parties, as legitimacy for rights opposed to third parties the acquirer acquires by handing over the property (Art. 78 Law of Property), respectively by entering in a special register (Art. 113 Law of Property, Art. 23, para 2 of the Naval Commercial Code, Article 47, paragraph 1 of the BG LO). Therefore, the differences between the two systems are not as drastic as it seems at first glance. As some authors aptly point out, in view of the legitimacy vis-à-vis third parties, the real effect of consensus is the contradiction between the relative effect of the contract and the absolute nature of the rights transferred.