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THE RETURN OF THE PROPERTY CLAUSE IN DONATION CONTRACTS – A COMPARATIVE ANALYSIS IN FRENCH AND ROMANIAN LEGAL SYSTEMS

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Abstract: *In both French and Romanian legal systems, the special irrevocability which governs the field of donations presupposes that certain clauses cannot be stipulated in the donation contract. Such clauses, which are prohibited as incompatible with the principle of the irrevocability of donations, would allow the donor to unilaterally revoke the contract. This article is concerned, on the one hand, with the origin and the evolution of the special irrevocability of donations and, on the other hand, with the compatibility of the return of the donated good clause with the principle of irrevocability of donations. The return of the property clause will be analyzed in a comparative manner in French and Romanian legal systems by looking at the provisions of the French Civil Code, 1865 Romanian Civil Code and of the contemporary Romanian Civil Code, in order to put into perspective both similarities and differences between the civil regulations of the two legal systems, but also the changes within the Romanian civil law from the previous Civil Code to the current one.*

Keywords: donation, irrevocability, return of the property clause, donner et retenir ne vaut rien, comparative law

1. Introduction

Both French and Romanian civil codes state the obligatory force of contracts as a general rule: according to the article 1134 (2) of the French Civil Code and to the article 1270 (2) of the Romanian Civil Code, the termination or the modification of a contract can take place only by the agreement of the parties or by causes authorized by law. The obligatory force of the contract implies, therefore, the principle of irrevocability, since the parties cannot unilaterally modify or terminate a contract.

However, in the field of donations, there is provided a special irrevocability, which applies not only to the effects of the contract, like in the case of the general irrevocability, but to the validity of the donation itself. The return of the donated property clause inserted in the donation contract has, therefore, to respect the principle of irrevocability of donations, otherwise the clause breaching the principle would render the entire donation contract null and void. Apparently, since the donor reserves the right to gain the donated property, such a clause would breach the principle of irrevocability of donations. However, both French and Romanian legal systems recognize that the clause is compatible with the principle, in certain conditions.

2. The Origin and the Justifications of the Irrevocability of Donations

The origin of the principle of donation irrevocability is to be found in the French 'Ancien Droit', where it was expressed through the maxim 'donner et retenir ne vaut rien'. This legal apothegm had a double meaning in the ancien droit – on one hand, it indicated the definitive effect of the

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donation with regard to the transfer of property, since donations were made 'in perpetuum', and, on the other hand, it meant that through a donation, the donor would be effectively dispossessed of the donated property, which implied the delivery of the property to the donee [1].

The double meaning of the maxim 'donner et retenir ne vaut rien' is to be found in article 274 of the Custom of Paris, which states that 'It is given and retained when the donor keeps for himself the power to freely dispose of the donated property or when the property remains in his possession until the day of his death' ('C'est donner et retenir, quand le donateur s'est réservé la puissance de disposer librement de la chose par lui donnée, ou qu'il demeure en possession jusques au jour de son décès') [2]. In a similar manner to the Custom of Paris, most of the French customary laws stipulated the maxim 'donner et retenir ne vaut rien', which implied both the impossibility of the donor to retain the right to dispose in the future of the donated property and the effective delivery of the property [3]. The principle provided in Napoleon's Code does not retain the second of the double meaning of the maxim which was to be found in almost all French customary laws, where the irrevocability of the donations also implied the delivery of the good. In the customary laws, the fundamental connection between the delivery of property and the irrevocability of the donation was illustrated in the interpretation of the donation with a reserve of usufruct provided in the customary laws – this type of donation was considered to respect the principle 'donner et retenir ne vaut rien' only because it was considered that such a donation was made also through a delivery, but a fictitious one [4].

Most of the legal scholars of the 'Ancien Droit' justified the connection between irrevocability and delivery by relating to the Roman Law of the Classical Period, where the donation implied only the delivery of the good – since it was not a contract but only a cause for a transfer, the acceptance of the donation by the donee was implied in the act of delivery. Since the transfer was made through delivery, no obligation arose from the donation and, therefore, the donee did not have an action against the donor. Pothier identified a similarity between the donation of the Roman Law of the Classical Period and the donation of the 'Ancien Droit' when the donor had to declare in the act of donation that he gives up his property and that he transfers the ownership in the dominion of the donee. If the effective delivery did not take place, the donee did not have any means to make the donor transfer the promised property [5].

In the contemporary French law, the special irrevocability of the donation, which was called 'second grade irrevocability', is stipulated in the article 894 of the French Civil Code, which states that the inter vivos donation is an act through which the donor disposes, in an actual and irrevocable manner, of a property, in favor of the donee who accepts it, and from the explicit provisions of the articles 944 of the French Civil Law and 985 of the Romanian Civil Code, which states that the donor disposes irrevocably of his property [6]. Similar to the French Civil Code, in the Romanian Civil Code the special irrevocability of donation is stipulated in the article 1015, according to which the donation is not valid when it contains clauses that allow the donor to revoke it by his own will. Therefore, if it is acceptable in other contracts to include a clause where one of the parties reserves the right to unilaterally terminate the contract, the principle of special irrevocability excludes the possibility of such clauses in the donation contract [7].

Regarding the possibility to terminate the contract through mutual agreement, in the French law and in the Romanian law different solutions were adopted. The French judiciary practice accepted the compatibility between the special irrevocability of the donation with a clause that allows that parties to agree to terminate the contract. In the Romanian law,

however, such clauses, even with the consent of the donee, are considered to breach the special irrevocability of the donation. In support of this interpretation, the dispositions of article 1270 (2) of the Romanian Civil Code state that the parties can mutually agree only to modify or terminate the contract, but there is no mention regarding the revocation. There is a legal difference between termination and revocation – unlike termination, which has effects only for the future, the revocation has retroactive effects [8].

The special irrevocability has to be respected for the valid conclusion of the donation, regardless of its form – authentic donation, hand gift, indirect or disguised donations [9]. However, there are certain exceptions from this principle, both in French and in Romanian civil laws – the donations between spouses, which can be revoked by the unilateral will of the donor spouse, and the donations between future spouses. The breach of the special irrevocability renders the contract absolutely null and void [10].

The justification of the special irrevocability is grounded on the consequences that the uncertainty of donated property may have on the donee and on the third parties with whom the donee may have contracted. Therefore, the donee who would otherwise find himself in a situation of exclusively depending on the willingness of the donor in maintaining the validity of the donation is protected from the arbitrariness of the donor. Also, by removing the permanent uncertainty that would affect the right transferred through a donation, the third parties who may enter in legal relations with the donee are protected as well [11].

3. The Return of the Donated Property Clause

The return of the property clause is explicitly provided as compatible with the principle of donation irrevocability in article 951 (1) of the French Civil Code and in article 1016 (1) of the Romanian Civil Code. According to these articles, the clause is allowed only in two hypotheses – the one in which the donee dies before the donor and the one in which both the donee and his descendents die before the donor. In these two hypotheses, the donated property is not a part of the donee's succession, since it is considered that the property had never left the donor's patrimony. The return of the property clause does not breach the special irrevocability of donations since the condition is not exclusively dependent on the donor's will, but causal, since its fulfillment depends on hazard and chance [12].

The origin of the right of returning the donated property is to be found in the Roman Law, when it was applied only to 'propter nuptias' donations. The conventional return of the allowance operated in the favour of the father of the bride who endowed his daughter for marriage, in the hypothesis in which the daughter and her descendents would die before the father. Later, the return of the donated property clause was extended to other types of donations in relation to marriage, made either by the parents of the future spouses or by third parties, benefitting from both the ancestors and from other donors. In the French and Romanian laws, the donation in which such a clause is stipulated has the legal nature of a donation made with the condition subsequent of the predecease of the donee or of the donee and his descendents.

This reserve in the donation contract was interpreted in the French legal clause as an expression of the 'intuitu personae' character of the donation contract – by disposing gratuitously of his property in favour of the donee, the donor's act signifies his preference for another person to his own detriment, since the wellbeing of the donee counts more than the wellbeing of the donor. However, this preference over himself is oriented exclusively towards the person of the donee and does not extend on the descendents of the donee [13]. According to the article 951 (2) of the French Civil Code, the return of the

donated property clause can be stipulated only in the benefit of the donor and, although a similar disposition was to be found in the article 825 (2) of the 1865 Romanian Civil Code, the contemporary Romanian Civil Code does not contain such a disposition. The reason for narrowing the beneficiary of such a clause only to the person of the donor is based on the fact that if other persons had benefitted from the clause, the clause would have been a fidei commissary substitution, explicitly prohibited by the article 896 (1) of the Napoleonic Code and by the article 803 of the 1865 Romanian Civil Code.

Currently, however, as a result of the modifications brought by 'Loi du 23 juin 2006' and by the adoption of the new Romanian Civil Code, the fidei commissary substitutions are allowed in both French and Romanian legal systems, according to the article 1048 of the French Civil Code and 994 (1) of the Romanian Civil Code. Therefore, a clause which stipulates the return of the donated property in the benefit of a person other than the donor in the hypothesis of donee's death or of the death of the donee and his descendents is considered not a return of the property clause, since the property is not returning to the donor, but a fidei commissary substitution, allowed in both legal systems. In the hypothesis in which the object of the donation consists of goods which are subjected to certain formalities, both the right of the donee and the right to get the returning of the property are subjected to those formalities, according to the article 1016 (2) of the Romanian Civil Code.

Therefore, due to the formalities required in the case of the donation of real estate, the acquiring third party will not be able to claim his good faith in order to keep valid the act of acquiring the donated property from the donee. The effects of the return of the property clause are provided in article 952 of the French Civil Code, which states that, eveniente conditione, the donated property or interest goes to the donor, with the dissolution of all the subsequent transactions, free of charges or mortgages. Therefore, the effects of the clause imply the retroactive dissolution of the donation. Pendente conditione, the transfer of the ownership interest on the property takes place once the donation contract is concluded, and the donee will be able to transfer the property under the same subsequent condition, through inter vivos or mortis causa acts. If the donor dies before the donee, the condition cannot be fulfilled and the right of the donee retroactively consolidates from the moment of the conclusion of the donation contract [14].

4. Conclusions

In both French and Romanian legal systems, the return of the property clause stipulated in donation contracts is accepted. Such a legal solution is, however, an exception to the special principle of donations irrevocability as it is explicitly provided in both French and Romanian Civil Codes. The conditions in which such a clause may be stipulated in a donation contract are strictly provided in the laws of both legal systems and only in those particular circumstances the return of the donated property clause may be accepted as compatible to the special principle of donations irrevocability.

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