

THE CREATION OF A FUTURE REAL ESTATE OBJECT, PROBLEMS AND JUDICIAL PRACTICES

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Abstract

The Albanian citizens with the legislation of the year after 1990's were entitled to be subject to new legal relations, relations which for a long time were excluded from civil circulation and legal regulation. Significant changes underwent the urbanization field focusing on real estate property, but these developments encountered uncertainty and confusion regarding the legal regulation of civil law, which made it difficult to determine these relations legal.

What is important in fact is the problem of enterprises in the field of construction, which in most cases is difficult to discern whether the supremacy belongs to the created item itself, or to the activity that is exerted for its creation. When a land owner transfers this to the builder, who undertakes to pass in his possession a certain area of construction, at first glance it seems that we are before an exchange of an object that already exists with an object that will be created in the future. But in another case the same situation that emphasizes the above exchange can be associated with elements that belong specifically to enterprise contract.

Such situations lead to difficulties in the fact that which norms will be applied to resolve potential conflicts. In our practice such cases are frequent. Difficulties have been encountered even in distinguishing whether in such cases we are dealing with a sales contract or enterprise, which has great practical and legal significance because for these two contracts are completely different the principles governing the transfer of risk, responsibility for defects of the property and its transfer. But in fact, irrespective of the name of the problem that plagues both sides is the fact of gaining ownership of the newly created object and the legal consequences that arise for the parties.

Introduction

Albania's picture of not many years ago is very different from the one that it presented to us today. Urbanization, especially real estate construction experienced an immediate development, developments leading to uncertainty and confusion regarding the legal regulation of civil law, which made it difficult to determine these relations and carried legal problems in practice. Which rules would be applied to resolve potential conflicts first require determining in which cases we had to deal with sale contract, order placement contract, exchange contract or venture contract, which differences are the main objective of this paper.

One should have in mind a fundamental principle of the obligations, which is freedom of contracting¹. Each party considers its interests and freely decides whether he wants to sign or not a particular contract, the sponsor chooses the recipient, the content of the contract is set freely, its forms, the consequences in case of failure to comply with obligations are determined and cases of contract termination. However, although the parties are free to decide on the basis of their willingness autonomy, freedom of contracting must be within constitutional rules, legal and in accordance with social moral, hence freedom of contract is not unlimited. In real estate construction contracts, the person who is undertaking an object construction and the requester must forecast the price, the object with all its features, deadline for construction, quality of work, risk. Nevertheless, the consequences for the parties in case of partial or complete failure of the contract, the transfer moment of ownership of the property, risk transfer is determined by law and is specific to individual contracts.

The situation is clear in cases where one party undertakes an action related to the creation of an immovable object and the other party is obliged to pay compensation. In this case, the provisions relating to enterprise contract apply. Starting with Roman Law there was the fact that some people due to the qualities, skills or special knowledge that

they possess are able to perform, in a specialized manner, a certain type of work that others cannot perform or even if they could, the cost would be too high and not of desirable quality. Thus, people who have these qualities, skills or knowledge put them at the service of other entities in need that from their part have to pay appropriate compensation. On the Civil Code, which was approved in 1994 was also included the enterprise contract, which had also been predicted by the Civil Code 1929. Not that enterprise contract was absent during the period when the Civil Code of 1981 was acted, though of a less similar nature to what we consider today; it was provided in two forms: Processing Contracts and Basic Construction Contract. It is widely understood that the entrepreneurs (i.e. the ordering party and the investor), considering the nature of the economic relations of the time, could be none other than a state-owned enterprise. While the ones ordering, in the first case could be individuals, in the second one as commissioning party was again a state enterprise. In the today's legal sense of venture contract with object the construction of real estate, in construction undertakings, the enterprise constructing real estate takes responsibility of building the object with the characteristics described in the contract. Hence, it is his obligation the construction (creation) of an object and its submission to the requester in due time, when part of the terms of the contract may be the due date. Therefore, as it can be seen the entrepreneurs liability, is not simply a set of actions that are needed for the realization of the work, but also a certain result that needs to be achieved by performing such works or services, new object. Most of the cases in practice are those which in one side stand the entrepreneur building, who on the land, of which he is the owner constructs a building and takes under responsibility, to build an apartment according to the terms agreed beforehand, for the one ordering. The entrepreneur is obliged to fulfill the contract and to construct the building according to the requirements of the other party and hand it out according to the specified conditions. In this case, the ordering party does not have the ownership rights directly from the enterprise contract. Thus the entrepreneur in addition to

¹ Luciano Ciafardini, Fausto Izzo, Cometary of the Civil Code, 2008, pg 1322

the obligation "to do" has the obligation "to give". This obligation "to give" which is part of the venture contract has as subject the above-mentioned items, which in most cases pass to the ordering party as a result of the fulfillment of the enterprise contract. Henceforth, two components are created, depending on whose domination; it is discussed whether the rapport generated between the parties is enterprise or sale. Whether it is a sale or an enterprise contract, has a big practical, but also legal significance because the two contracts above are quite different from each other, and the principles regulating such important issues as: the transfer of risk, responsibility for the shortcomings of the object and its transfer. We can mention here some of the specific norms acting on the entrepreneurship contract that make it completely different from other types of contracts that provides the Civil Code as Section 866 dealing with the ten year responsibility of entrepreneurs or section 868 that relates to an "unusual" right of parties, thus with the order party right to withdraw from the contract at any time and without any justification. For enterprises in the construction sector, in most practical cases it is difficult to determine whether the supremacy belongs to the build object itself, or to the activity that is exerted for its creation.

When going through Section 1643 of the Civil Code of 1929 the legislator has tried to establish distinctiveness between venturing and sales when creating a new item through the fact of belonging to the materials. Specifically the article in question states: "the Contract, which has as its object an item to be created with the entrepreneurs materials is sale, unless the contractors have given priority is to the work rather than the materials needed for construction."

Although at first glance it looks like an artificial division excluding venture contract in principle, all cases in which the material is provided by the undertaking party, the fact that in other cases where more important than the materials is considered the work that is needed to create the item, shows that the main element in a venture contract is the activity that is needed to create the item.

For this reason we can say that if the activity or working activity are significantly predominant for the parties intention, we are dealing with a venture contract. In contrast when its supremacy fades by the presence of other elements the issue must be resolved on a case-by-case basis, consequently it is sometimes difficult to admit that we are dealing with a typical venture contract and not dealership of a future object, regardless of how the parties named it, unless all its elements are studied².

It is especially very important to distinguish if it is a sale contract³ or a venture contract for the fact that the responsibility term of the builders for the significant defects of the building in a venture contract is ten years (art 866), while in a sale contract, for any kind of defects, this term is five years (art 756). So, even when the seller is the constructor of the building, he will respond as a simple seller. The sale of future objects may be "a hoped" selling

(emptio spei) or "a hoped object" selling (emptio rei speratae). The first case means a uncertain contract in which the buyer must pay the price or if he has already paid it, he can't get it back if the object will not be materialized, for example the building can't be created without the building permission. The second case is a bilateral contract that doesn't have any effect if the object will not be created. In both cases, the seller is obliged to commit any necessary action in order to realize the future object⁴.

From the enterprise contract the requester receives the delivery of the item. In order to give him the ownership, that is in fact the ultimate reason of the ordering party, needs to be compiled a sale contract for the apartment. In practice this sale is achieved by relying on a prior obligation undertaken by the entrepreneurs that can be a special clause included in the enterprise contract.

Law does not stipulate any particular form for that contract, it is an informal contract, however in Italian Civil Code commentaries is stated that even though the enterprise contract is an informal one, there is a case in which it must be written, otherwise it has no effects. It is the case when the requester takes both the land and the construction with derived title from the entrepreneur⁵. So the written form even the notarized act, are both used in practice to realize agreements between the constructor parties and ordering parties. Although the law does not mention any special form of compilation, always in such cases, contracts are used in written form. The reason is, inter alia, that because such relationship have high economic value, the written form gives more confidence to the parties for the fulfillment of the relevant obligations.

In our practice happens that the requester colligate at the notary a order request contract in order to book a future real estate object that will be built at a future time and then they colligate a sale contract that will ensure the ownership of this object. This happens because there is confusion between the request contract and the enterprise contract based on the fact that the activity of one party, for both contracts, is based on the orders and requirements of the other party. But the essential difference between them lies in their object, on the fact that in the case of an enterprise contract the entrepreneur activity is physical or intellectual, while in the case of a request contract the undertaken activity is only of an intellectual nature. Furthermore the result of this intellectual activity, unlike enterprise intellectual activity is a unique and well-defined type. It consists in performing one or more legal actions, but are included even other lawful actions.⁶ Another reason that could have brought this confusion in that Albanian reality is that although the Albanian Civil Code provisions for the contracts are borrowed from the Italian Civil Code, there is a substantial difference between the request contract on

² Luciano Ciafardini, Fausto Izzo, Comentario of the Civil Code, 2008, pg 1655

³ Luciano Ciafardini, Fausto Izzo, Comentario of the Civil Code, 2008, pg 1523

⁴ Francesco Galgano "Private law" publication of the year 1999, pg. 527.

⁵ Giuseppe Mirabelli "Commentario del Codice Civile" Dei singoli contratti

⁶ Ardian Nuni, "Lectures of the civil law", Tirana 2004, pg. 73. Other legal actions are those actions of people judicially known but are not judicial.

What is characteristiv about these actions is that judicial consequences do not depend on the will of those performing the actions but are defined by law.

both legislations. This fact was also explained by Francesco Galgano who in the comparison made between the enterprise contract and the request one, mentions that the main distinctive criterion is the fact that the first contract regulates large and medium enterprises, while the second contract regulates small artisanal enterprises, so the request contract by the Italian Civil Law has the same structure as an enterprise contract: the agent as well as the entrepreneur is obliged to perform, for a fee, a job or a service. However, it differs from the entrepreneur to the fact that performs work or services primarily through his work. For this reason, if the undertaking is a contract through which operates the large and medium entrepreneur, the request contract is a contract used by the small entrepreneur, especially by the crafts (for example the carpenter who makes furniture or the barber exercising the service of hair cutting).⁷ The Italian Civil Code regulates our request contracts under the title term contract. *In the decision no. 1705 dated 23.10.2003, the Civil Division of the Supreme Court stated about the difference between request from undertaking contracts. Expressly it provides that: "For legal precision must be admitted that the contract for the amount of 19.100.000 lire is not an undertaking contract, as the plaintiff alleged, but a request contract, which is regulated by Articles 913-934 of the Civil Code. The defendant received the mentioned amount from the plaintiff F in order to do a job and legal actions that has been charged under his guidance (sections 913 and 916 of the Civil Code). The work to be performed was to brought on behalf of the plaintiffs F the corresponding quantity of goods and for doing this, he(the agent), according to him, would conduct legal transactions with third parties (sales contracts, transportation, etc.) in order to fulfill the request. To carry out the request of the defendant in these legal actions he would act in his name, earning rights and assuming his obligations (Article 915/I Civil Code).*

Another difference is that the undertaking contract has as a distinctive feature the existence of risk that weighs on the entrepreneur.⁸ The risk is related with the possibility of the no materialization and weaknesses of the work. In the request contract there is a particular type of risk. The risk for non-compliance by the third parties that falls on the sponsor. He is required, regardless from the achievement or not the purpose of the request, to carry out all the actions committed by the agent, to pay the compensation, and where appropriate to pay even all the expenses he has done. The agent is not responsible for the execution from the third party person of the legal action (example when he realizes a sale contract with reservation of ownership, he will not be liable for the installments of each payment). His work ends with the performance of the legal action. However, both parties by an agreement may provide the responsibility of the agent for the failure of the third person. While the risk as an element of the enterprise contract lies in two main directions: a) The entrepreneur assumes the realization of a job, a project or service for which there is a risk not to be materialized and b) The risk to damage the

life and the health of the people involved in its implementation and the damage that can be caused to the property and assets of other persons, an evident risk especially in entrepreneurship contract in the construction area.

However the character as a "dangerous" contract does not only burdens on the entrepreneur. Practical cases have shown that there have been entrepreneurs who not implementing the imposed liabilities they have put at risk the position of the ordering party. The risk element is not viewed only in the problems of physical performance of the work or economic loss of entrepreneurs, but also other situations pose danger to such as: - the risk of increasing the cost of the work (the entrepreneur does not have the right to ask for increased cost price if the increase does not affect more than one-tenth of a general certain price increase, but at the same analogous position is found even the ordering party); - the risk of difficulty emergence of geological character (the entrepreneur can benefit only if he proves that the difficulties have been unexpected and that have made his task much more difficult); -^{*} risk of project change burdens on entrepreneurs when the designated project is changed by the requester or it is necessary for the sustainability of the work, but in practice in most cases it is the entrepreneurs who change projects without approval of requesters risking and sacrificing so illegally and unfairly the rights the requesters expect to gain at the time of the creation of the object, that is why it has been anticipated that in such cases the parties should turn to the court. *Under the decision of the Supreme Court, No.31, dated on 12.01.2006 it has been analyzed a case in which it is reported that between litigants there has been formed a entrepreneurial contract in which the plaintiff has been in the role of the ordering party while the defendant entrepreneur and investor. With this contract the plaintiff has made available to the defendant a land with an area of 480 m2, on which the latter will build a 10-story block of flat and would gain from it 10 flats on the first and second floor well as three stores with an area of 70 m2 in total on the ground floor. At the time of compiling the contract there has been approved only the construction site for the construction of a block of flat with 10 floors (with a decision dated on 05.15.2001), while the other actions for taking the building permit would be made by the defendant which had to prepare and to submit to the competent organ all necessary documentation.*

There was predicted in the contract the deadline for completion of the works, which would be 24 months from the date of commencement of works. Even though the defendant's actions for the completion of the procedures and the start of works have been immediate, KRT (The Council of Territory Regulation) has delayed the construction permit. Initially it was not approved because of some complaints related to border distances, which has forced the defendant to develop a new project to preserve the urban distances. Finally the defendant could get the building permit and immediately started work for the construction of the object.

The claiming party in its lawsuit asked for the cancellation of this contract, claiming that all the deadlines for the

⁷ Francesco Galgano "Private law"

⁸ Article 850 of Civil Code

completion of the building set forth in the contract have been broken and that this contract cannot be made applicable since with the new project, there are not available in this building 10 flats in the first and second floor. The Civil College of the Supreme Court concluded that "... that by signing the contract, both parties have been clear that they did not possess proper documentation so that it could be become feasible. So it was clear that a necessary condition for the start of works has been the getting of a building permit from the competent authority, and this is reflected in the first point of the contract entitled "The object of the contract" in the last paragraph of which it is stated :"... This area is made available by the owner of the land for building a block of flats with 10 floors under permit construction." This permission has not existed at the time of the formation of the contract and perhaps this was the reason that the parties have not provided in more detail which would be these 10 flats, their surface and other necessary data regarding the object that it had.

Referring above it means that the plaintiff, just as district court states, has undertaken the risk in fulfilling it... "Very worthwhile for the study is even the opinion of the minority who supports the reasoning that" ... the plaintiff has claimed that his duty was to submit the land free and without burdens, e.i with no claims of ownership by other people. The duty of the defendant was to build on that land a building according to the desire and requirements set forth by the plaintiff, requests that have been accepted by the defendant and are regulated in the contract. The legal nature of this contract is such that the risk is presumed by the defendant (he should construct a work with his tools undertaking the risk).

In this respect the Collage was wrong requiring the burden of proof from the plaintiff and stated that he has not tried to fulfill it (the contract). If it would have been true that the construction permit was not approved, should the defendant enter as a party to the contract and take over the obligation to fulfill the order. So, the College was wrong even in determining whose is the burden of proof on the claims ... "

The danger lies on the entrepreneur even when the requester withdraws from the contract, even after the beginning of its execution. In the decision of the Civil College of Supreme Court no. 475, dated on 27.10.2011 was analyzed the case when the requesting party, by making available the property thereof, enters into an agreement with the entrepreneur in order to start the procedure of obtaining a building permit for a residential building. Based on this agreement the entrepreneur reaches to get a construction permit. On the other hand, the requesting party has entered into another agreement with another entrepreneur for the same object. Even the second entrepreneur gets a construction permit. The first entrepreneur asks the court to compensate for the expenses incurred and loss of profit.

The duty assumed by the entrepreneur is not such that is subject only to the development of an activity, but the most important thing is to achieve a result. The entrepreneur is not fulfilling if he does not realize the work, or fails the outcome sought by the requester, so the realized work

varies from the project to which the parties have agreed, or if he presents drawbacks.

Possible damages that may result from drawbacks are: total demolition, partial demolition, risk of collapse and severe defects (defects that have to do with the essential elements of construction, or that affect the operation of the work, not allowing its normal enjoyment such as moisture infiltration due to lack of insulation layer, external plastering defects, defects of materials used in the separation of floors, sewage pipe defects, water infiltration in the inner walls of the building, gas discharge tubes defects, etc.). Responsibility for such defects lasts up to ten years, and not only against the ordering party, but also against parties who have acquired rights from him. This type of responsibility has also public character, because apart from protecting interests that is the subject of private agreements protects the public safety of the citizens.

In terms of current legal enterprise contract is a contract in which, as we said above, one party undertakes to carry out a work or a service, while the other party is obliged to pay the price to get work or service provided. However, even Roman lawyers predicted as a second case the relationship in which "tenant" returns a different item from what the "landlord" gave at the beginning of the contract, for example, has given metal and has taken ornaments, but also, may have given the land and get a house. There comes an uncertainty, what legal form will be attributed to the agreement of the parties where there is lack of the element of reward. There are frequent cases when the person requesting an enterprise construction contract is the owner of the land on which the construction will take place, who agrees to make it available initially and later a property of the builder entrepreneur in exchange for his benefit, an area of the construction set when the object is completed. In such cases, at first glance it seems that we are facing an exchange⁹ of an item that already exists with an item that will be created in the future, but in another cases the same situation, with the above mentioned exchange, can be associated with elements that belong specifically to the enterprise contract. Thus we can say that we given contract which we cannot decide whether it is an exchange or an undertaking because this relationship contains elements from both of these contracts. In our practice such cases are frequent. Construction entrepreneurs sign a contract with the owners of the land by which they gain the right to use the land and undertake the obligation to construct a building, an area of which shall pass to the owner of the land in exchange for the ownership of the land.

In the Supreme Court, under decision no. 2 of 2012, so last year there was judged a matter reflecting again this problem. The administered acts in the court file showed that the plaintiff and key intermediaries are owners in two land areas of 500 m² on the beach of Durres. By a contract dated on 13.10.2002, these entities have agreed for this area to become available to the defendant, in order for the latter to build a residential area, not few than 5 floors. In the

⁹ Luciano Ciafardini, Fausto Izzo, Comentary of the Civil Code, 2008, pg 1552

construction to be carried out the claiming party would benefit 20% from the residential area and other facilities.

Finally, it turns out that on the surface of this land there have been built two 8-story buildings and the exchanging contracts have been formed, while registration at ZVRPP Durrës had been taken over by the defendant. When the claiming party went to be interested at ZVRPP for proof of ownership, it results that the respectively owned parts in the Offices of Property Registration Durrës were not registered under the terms of the contract signed between the parties, but as a general exchange contract, which appeared some of the other co-owners but they were not the plaintiff and the key intermediaries for the parts that had been agreed.

Furthermore, the construction contractor undertakes the obligation that as soon as they are provided with a construction permission from the local authorities, to sign another contract, which should specify: specific facilities which will be made available for the owners, floors of these facilities, the quality of the construction, different equipments used, installations etc.

These types of contracts may be regarded as "preliminary venture contract." But in fact, despite this name of the contract, the parties undertake to carry out the exchange between land that is a thing that exists and apartments to be built that can consider the following or future items. But also the obligation to sign another contract which will determine the position of the apartments, the quality and equipment and their types is a preliminary contract. The following contract which is signed later based on this obligation provides all the technical details on the basis of the request and what the constructor offers. But it cannot

be considered an enterprise contract under the article 850, which under enterprise definition determines that the obligation of the one who orders is to pay the price.

"In such cases instead of paying the price it is provided another obligation in return, these contracts cannot be included in the scheme of enterprise contracts, but its dispositions are still applied by analogy since the obligation of the entrepreneur is the accomplish of a construction or a service ."

Conclusions

Venture contract regulates a wide range of relationships between the parties, we may even say that in the legislations of the neighbor states, these types of relationships are disciplined by at least two, but even three types of contracts.

As we have seen during the elaboration of the paper, for the adjustment of the above relations, the Italian Civil Code except the enterprise contract provides for two other similar types of contracts. To give a clear understanding of this distinction we will take in consideration some simple examples from the practice. For example, if we ordered a painting according to our requirements, or a furniture from the carpenter, or even an apartment from the constructor, in all these three cases, our relationship will be considered as undertaking contract and the disposition of Civil Code will be applied equally respectively Articles 850 - 876. A possible solution to the above problems I think it could be what legislations of Balkan States and Kosovo are applying, where there is a distinction between enterprise contracts and construction contracts. The last one is a kind of enterprise, but has its legal independence.

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