SPECIFIC FEATURES OF THE SALE OF REAL ESTATE BY A TRADER

Associate Professor, Dr. Bisserka Marinova,
Univercity of Architecture, Civil Engineering and Geodesy, Bulgaria

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Summary: *The study is focused on the two features of the transactions concerned for sale: object – real estate, and subject – trader. Listed are the conditions a transaction to be subject to the legal regime of commercial law and differences in comparison with the legal Institute of the sale by the General rules of contract law. Follow the specifications relating to the conclusion, nullity, failure to comply with these agreements, including those related to the representative power. Particular attention is given to the risks of the buyer arising from the commercial quality of the seller, as emphasis is placed on any specific risks arising from the legal status of the trader which does not exist in the world of real estate, carried out by citizens-the exceptions claim which may be made by the trustee in bankruptcy proceedings against a trader; the stakes of the whole undertaking of the individual asset (immovable property) or on company share; nullity of the transaction in the presence of the public obligations of the seller.*

Keywords: *Real Estate; Risk; Sale; Trader*

JEL code: *K15 Civil Law; Common Law*

INTRODUCTION

In order to clarify the peculiarities of the sale of real estate by a seller - trader, the main features of the exhibition are related to: the legal status of the trader; the differences in the commercial sale from the general sales regime under the contract law - in terms of their conclusion, content, termination and invalidity. A special focus in the study are the specific risks that should be considered when buying a property from a trader (related to insolvency proceedings, special pledges of an enterprise or shareholding). The special procedure for resolving trade disputes, which has a simplified procedure, is mentioned. The ashievements of the legal doctrine has been used and the binding mandatory practice of the Supreme Court of Cassation, as well as the latest legislative amendments have been taken into account.

1. THE QUALITY "MERCHANT" FOR SALE OF REAL ESTATES

There are a number of peculiarities in commercial transactions that distinguish them from the general legal regime under the law of contract. It is important to note that, under Art. 287 of the Commerce Act, it is sufficient for one of the parties to have the status of a "trader" or to fulfill the requirements of a commercial transaction in order to treat the contract as commercial in the relations between the two parties. The trade transaction within the meaning of Art. 286, para. 1 of the Commerce Act introduces the rebuttable presumption that any transaction concluded by a trader is one related to his profession and is under the regulatory field of commercial law. This group of contractual relations includes all transactions referred

to as commercial in Art. 1, para. 1 of the Commerce Act, irrespective of the legal quality of the person performing them - Art. 286, para. 2 of the Commerce Act. Among the explicitly listed as commercial transactions are: purchase, construction or furnishing of real estate for sale (Art. 1, para. 1, item 14 of the Commerce Act).

When the object of the sale is a a separate object that has not yet been built, the real estate market has acquired the term "new construction", althought that it is not legal. Most often it is used in the relationships between a buyer and a seller of a right in rem on buildings that does not have a permission for use or Act 16. The clarification made is necessary in order not to mix with "unfinished construction" in the sense of lack at the stage reached "rough construction", as well as with the first sale by the builder. This meaning differs significantly from the definition of "new building" contained in § 1, item 5 of the Supplementary Provisions of the Law on Value Added Tax.

Art. 163, para. 1 of the Spatial Development Act does not require that the builder has to be a trader but merely states that such a person may be a natural or legal person comprising natural persons with the necessary technical competence in accordance with the specialty acquired and an educational qualification degree which, under a written contract with the assignor, performs the construction in accordance with the issued construction papers. An obligatory condition for carrying out a construction activity is the registration of the builder in the Central Professional Register of Builders. Art. 3, para. 1 of the Chamber of Builders Act requires the applicant for registration in that register to have his registration as a trader first made. Entry as a builder is condition on the admissibility of the construction activity, as well as a prerequisite for the opening of a construction site and the definition of a building line and level, as well as for the certification of the order book (Article 157, para. 2 of the Spatial Development Act.

2. SPECIFICATIONS FOR THE CONCLUSION, CONTENT AND VALIDITY OF TRADE DEALS FOR SALE OF REAL ESTATE

The customary, but not mandatory practice is that the notarial deal for the sale of a property should be preceded by the conclusion of a preliminary contract. It has no substantive effect, but only creates a contractual obligation for the parties to conclude the final transaction under the agreed terms, since subsequently there is no agreement of the buyer and the seller to change them.

The specificity of ***commercial preliminary sales contracts*** is that for a written form. It is a condition of reality where the subject matter is real rights over immovable property, but pursuant to Art. 293, para. (4) of the Commerce Act, the statements by fax or telex are accepted as written form as well. It will be enough to have two opposite volleys, which have the same content, even if they are not materialized on paper, in order to consider the preliminary sales contract as concluded.

Pre-payment of a price in commercial sales of a real estate also has the legal meaning of a deposit, also called a deposit, under Art. 334 of the Commerce Act, if this is agreed in the contract - otherwise the amount paid by the buyer is an advance part of the price and the legal consequences of Art. 93 of the Obligations and Contracts Act shall not come into effect.

Specific for commercial sales only is the legal institute "***payback"***, which according to Art. 308 of the Commerce Act entitles the party that gave it to renounce the contract and the other party has the right to withhold the sum received as compensation.

An important issue when entering into transactions is ***the representation of the trader***. In commercial transactions by analogy with Art. 42, para. (2) of the Obligations and Contracts Act, there is a pending denial in the absence of representative power, but it is only available until the moment when the trader on whose behalf a transaction without representative authority has been aware about the deal and has not immediately opposed, which is

concerned as a confirmation (Article 301 of the Commerce Act). This rule of law - when silence is assumed to be the presumed consent of the representative - is rare in civil law. Especially in real estate transactions, the following questions are fairly posed: 1) Which moment should be accepted as knowledge by the trader? and (2) Does it reflect the validity of the transaction by going beyond the given authority with decisions of the trader's management bodies?

Characteristically, under the terms of Art. 301 of the Commerce Act is not applicable the requirement for notification of the transaction under Art. 43 of the Commerce Act. Among other possible ways, it should be assumed that knowledge is made when there is an entry in a public register - registration of acts transferring a right of ownership or establishing, transferring, modifying or terminating another property right / art. 112, b. "a" of the Property Act and Art. 4, b. "a" of the Entry Rules. In this sense is also the mandatory case law of the Supreme Court of Cassation, for example Decision No 202 of 06.02.2012, No 87/2011, TK, IIT of the SCC, issued under Art. 290 of the CCP; Decision No. 782 of 27 May 2011, dated 1865/2009, GK, I GC of the Supreme Court of Cassation, ordered under Art. 290 of the Code of Civil Procedure, delivered on a partition. When there is no decision at the general meeting of a company, which body should have decided to acquire and expropriate real estate, the Supreme Court of Cassation has ruled that the presumption of Art. 301 of the Commerce Act will exclude the nullity due to lack of consent under Art. 26, para. 1 of the Obligations and Contracts Act.

A specific and distinct from the general bond law regime is the legal regime of ***the sale with a buy-back arrangament.***

According to Art. 209 of the Obligations and Contracts Act, a buy-back arrangement, is forbidden, but the commercial sale allows such an arrangement - Art. 333 of the Commerce Act. By its legal nature, the redemption clause in the case of a commercial sale makes the transaction concluded under a termination clause. In this case, the buyer becomes the owner, but the seller may exercise his right of redemption within the set time. The case law assumes that the redemption clause is null and void, since there is no term for the redemption, and the will of the parties can not be replaced by imperative regulations, which is why Art. 26, para. (4) of the Obligations and Contracts Act.

Differences are also observed with regard to the commercial pledge under Art. 310, para. 1, items 1 and 2 of the Commerce Act, where the chattle may remain in the creditor's possession, as opposed to the pledge under Art. 150, para. 1 of the Obligations and Contracts Act . With regard to the sale of real estate by a trader, the trade pledge as an element of the contractual relationship could be important in order to provide guarantee for covering the creditor's damages in case of non- performance of the seller's /builder's obligations.

3. SPECIFICATIONS ON THE PERFORMANCE AND NON-PERFORMANCE OF THE SALE OF A REAL ESTATE BY A MERCHANT.

A distinctive feature of the requirements with respect to the trader-seller in the performance of the contract for the sale of a property is to manifest the stipulated in Art. 302 of the Commerce Act ***"Care of the Good Trader"***. The content of this term is wider than the requirement the obligations to be fulfilled with due diligence according to Art. 63, para. 2 of the . Obligations and Contracts Act

Large differences are observed regarding the ***non-fulfillment of the commercial sale*** of real estate.

The issue of ***objective impossibility*** of fullfilment of the obligation is particularly relevant in the so-called sale of a future property in an unfinished building, but may also raise disputes over other sales by a merchant.

The cases of objective impossibility should be distinguished from those of the initial impossibility of default which leads to the nullity of the contract of sale due to an impossible subject – Art. 26, para. 2 of the Obligations and Contracts Act.

The general principle of Art. 81, para. (1) of the Obligations and Contracts Act exempts the debtor from liability when the impossibility of enforcement is due to a reason that can not be attributed to him in guilt. The content of the term "accidental event" under Art. 196, para. (1) of the Obligations and Contracts Act, according to the legal doctrine and the case law, includes the elements: an insurmountable, unforeseeable and unpredictable event or action in which the debtor's culpable behavior is absent and there is a failure to fulfill; a causal link between the event or the action and the impossibility. "Force Majeure" within the meaning of Art. 306 of the Commerce Act is "unforeseen or unavoidable extraordinary event occurring after the conclusion of the contract".

There are different scientific arguments about the volume and content of the term "accidental" and "force majeure" and do they have to be coincidental. In the case of force majeure, apart from the fact that it did not exist at the time of the conclusion of the contract and accordingly - the debtor can not be expected in the bond arrangement to predict it, there is no way to overcome it upon its occurrence, and this is an objective condition independent of the willingness and ability of the particular party to the contract. A legal opinion has been also expressed - that from the content of the definition of Art. 306 (2) of the Commerce Act should be eliminated the elements of unpredictability and extraordinaryness (Kalaydjiev, 2001, p. 279).

From the objective impossibility, ***economic intolerance*** should be distinguished. It is an institute specific to commercial transactions only, which is regulated by Art. 307 of the Commerce Act . The provision of Art. 26, para. 1, item 3 of the Obligations and Contracts Act provides that the rules for the nullity of the contracts due to their contradiction with the good morals will find application also in the commercial sales of real estates under according to Art. 288 of the Commerce Act. In relation to the general rules of sale, the party which has concluded the transaction under clearly unfavorable conditions and in the conditions of extreme necessity may invoke Art. 33 of the Obligations and Contracts Act and request its destruction. The Commerce Act in Art. 297 expressly prohibits this in the case of contracts concluded between traders. The unfitness of a commercial transaction is not a ground for its invalidity.

Essential to the practice are questions about ***the amount of the agreed penalty*** (Marinova, 2009, p. 87):

- in which cases its excess creates an opportunity to be reduced?
- are there hypotheses in which the penalty clause will be null and void?
- who can request a "revision" of the amount of the pre-determined compensation in case of non-compliance?

The general legal regime of the contracts in Art. 92 para. 2 of the Obligations and Contracts Act provides for the possibility to request by court a reduction of the agreed amount of the penalty due to its excess. As for the commercial transactions, which also include the sale of real estate, according to Art. 309 of the Commerce Act the reduction is inadmissible on the ground of the excessive amount of the damages due on a commercial transaction concluded only when both parties are traders.

In connection with the characteristics of construction units as long-term assets, it is necessary to determine the buyer's rights to the seller-trader related to ***liability for deficiencies***. A specific obligation of the buyer is referred to in Art. 324 of the Commerce Act under which the buyer must review the object of the deal and, if it does not meet the requirements, notify the seller immediately. Otherwise, the property is deemed to have been approved as complying with the requirements except for hidden defects, in so far as review

and notification is required for fear of losing rights. The major difference is in the wider scope of the Commerce Act, which does not refer to shortcomings, but to non-compliance (statutory or contractual). Therefore, while the Obligations and Contracts Act leaves room for discussion as to whether the liability rules for deficiencies can be applied in implementation with such a significant deviation from the stipulated that it is something different, it is undisputed that the text of Art. 324 of the Commerce Act will also apply in this case. It should be emphasized that each buyer has the legal capacity to pursue the responsibility only from the seller who has transferred ownership of the real estate. The legal regime of the ***builder's warranty liability*** is quite different. It is based on Art. 163, para. 3 of the Spaciel Planning Act and Ordinance № 2 of 31.07.2003 for commissioning of the construction works in the Republic of Bulgaria and the minimum terms of guarantee for the construction works and construction works (hereinafter referred to as "Ordinance No. 2 of 2003"). The warranty right itself includes several alternative rights - to demand real enforcement or the right to terminate the contract. (Kalaidzhiev, 2001, p. 301). Not all deviations in quality can lead to warranty liability, but only those that has as a result to the disability for normal use and operation of the construction unit. (Popova, 2012, p. 215).

Non-payment of part of the negotiated selling price as grounds for termination of the contract due to non-fulfillment is a matter under Art. 87, para. (3) of the Obligations and Contracts Act. In Art. 335, para. (2) by analogy, the Commerce Act also states that the non-payment of a part of the price which does not exceed one-fifth of it, is not a reason for cancellation of the transaction.

Relevant topical issue in commercial sale of a real estate is the question of the ***legal relationship between a buyer and a seller - builder when the established building right by the owner of the land is extinguished due to non - exercise in time***. Enourmous value for the convergence of the justice practices has The Interpretative Decision No. 1 dated 04.05.2012 on Case No 1/2011,of the General Assembly of the Council of The Cilil College. In this regard the quoted decission states that the rights of third parties (which may possess the right to build or ownership of property, depending on the stage of construction), acquired by the builder before the filing of the claim, are retained on the grounds of Art. 88 para. 2 of the Obligations and Contracts Act. On this basis, it is concluded that beyond this hypothesis, the rules of the rebellion under Art. 92 of the Ownership Act are to be in force. In a result, the builder is granted with the rights of art. 72 of the Ownership Act as a bona fide possessor and he will have the right to receive the increased value of the property. When the rights of third parties with which the builder has contracted have an advantage over those of the owner of the land, the latter will not be able to get back into his patrimony the right to construct on these units. The claim of the owner of the land in such a case may include only the monetary equivalent of the right of construction for the particular object created for the benefit of the builder (Kozhuharov, 2002, p. 386). In the hypothesis considered, the built will not have the character of improvement that is a subject to compensation, because the rule of Art. 88 para. 2 of the Obligations and Contracts Act will prevent the effect of Art. 92 of the Ownership Act. It should be emphasized that the subject matter of the legal relations concerning the termination of a contract between the landowner and the builder is different from the one regarding the extinction of the right to build due to non-exercise within the five-year term under Art. 67 of the Ownership Act.

When one of the parties of real estate deal is a trader, ***special claims procedure*** may be applicable. Condition for appliance of this much faster and simpler order according to Art. 365 of the Code of Civil Procedure is the price of the claim to be over BGN 25 000 and the object may be the conclusion, interpretation, validity, performance, failure or termination of the sale contract, including the consequences of its termination or gaps in the commercial transaction or adaptation to new circumstances.

4. SPECIFIC RISKS FOR THE BUYER OF A REAL ESTATE IN THE PURCHASE FROM A TRADER

Except the presence of a restricting order on a particular immovable property imposed by the court as a precautionary measure or in the course of an enforcement proceeding under the general provisions of the Civil Procedure Code, the seller-trader' equity may have a ***foreclosure under the Special Pledges Act for a whole enterprise ora preservation order upon a company share of a partner in the company***. Against the particular creditor who has requested the entry of the restricting order, the transaction with immovable property will have no effect. There is also a specificity with regard to the special pledge applicable to traders. The amendments to the Special Pledges Act, promulgated in State Gazette, no. 105 of 30.12.2016, which come into force on September 1, 2018, provide for a substantial change in the regime of the keeping of the Central Registry of Special Pledges and the procedure for entering it. The buyer of a property by a trader will be deemed to be informed and the pledge will be opposed to him at the time of the entry, which confers a constitutive legal effect on that act. Disposing of pledged property outside the scope of the ordinary activity of the pledge creditor will require the explicit consent of the pledge creditor, which will also be subject to registration. In the absence of consent, the acquirer acquires the status of pledgee, which was also available under the previous regulatory framework. However, this situation is already extended to any subsequent acquirer unless he finds that he has been conscientious. The registered special pledge on a commercial enterprise is already opposed to third parties acquiring rights over individual assets of the enterprise without the need for such assets to be individualized in the contract.

Uncertainty about the buyer's rights may create ***the insolvency proceedings of the seller-trader*** under Chapter XXXIV of the Commercial Act, according to which there are some Nullity Claims. Those revocation actions may result in the declaration of invalidity of a concluded transaction for the sale of immovable property made by the trader.

This may be in accordance with Art. 647, p. (2), item 4 of the Commercial Act for sale carried out in the so-called "Suspicious period" - between the date of insolvency and the date of the opening of insolvency proceedings, where the amount given by the seller vendor significantly exceeds the value received if the transaction is carried out within two years, but not earlier than the date of insolvency / over-indebtednessth. It is possible that the buyer's interests may also be affected by "transactions that have the effect of damaging creditors due to a net decrease in the bankruptcy estate or the transformation of assets (for example, real estate in money)". The restoration of the damaged bankruptcy mass shall be effected through the special claims under Art. 647, para. (1) and Art. 649, para. (1) and (4) of the Commercial Act as a manifestation of the general rules on the law of contract - etc. The claim under Art. 135 of the Obligations and Contracts Act, as well as the revocation claim under Art. 647, para. (1), item 6 of the Commercial Act. (Stefanov, S., Topchieva, R., Miteva, D., Nikolova, B., 2013, pp. 263-264).

From the point of view of the transactions on the real estate market and the transferring effect of the deal with real estate, influence may have the existence of ***public obligations of the seller***, mainly based on obligations for taxes and obligatory insurance contributions. The practice shows that merchants are more often and for larger amounts debtors of the National Rwvwnue Agency. In the presence of public obligations of the seller within the meaning of Art. 162, para. (2) of the Tax and Social Insurance Procedure Code, the disposition of the debtor's property (in certain hypotheses - by means of repayable transactions and in others - by gratuitous ones) may be subject to the revocative claims under Article 216 . 1 of the Tax and Social Insurance Procedure Code. Under the principle ”Resoluto iure dantis, resolvitur ius accipents”, in the absence of an analogous text in that legal norm, even if the filing of the

application does not take place, not only the right of the previous acquirer of the contested act should be stipulated, but also the subsequent transfers or foundations will be retroactively withdrawn from the claim of the public creditor. In case of outstanding obligations, the signed declaration from the seller under Art. 264 of the Tax and Social Insurance Procedure Code with false information shall not exclude the existence of relative invalidity and may serve as evidence of intent to harm (Pavlova, 2002, p. 523).

5. CONCLUSIONS

It appears at first glance that due dilligance on a property deal held by a trader are less and more limited and easier. The arguments for such a conclusion may be grounded on the facts, that there will be no need for clarification of the family legal status, and the family home, or require heirs or permission from the district judge to sell a property owned by a minor. However, there are other circumstances that are specific to commercial transactions only and deserve serious consideration due to the risks they may create for the rights acquired by the buyer are significant. The overview of the peculiarities of the transactions for the sale of real estate by trader leads to the conclusion that for further protection of the buyer it is advisable to investigate additional circumstances in view of the legal status of the seller. The requirements of notaries in such transactions have also increased, as the scope of their professional responsibility for verifying ownership of the rights transferred has been expanded through their direct access to a large number of databases under Instruction No. I-1 of 14.04.2016 for access to the information system under Art. Article 28b of the Law on Notaries and Notarial Activities on the grounds of Art. 2a, para. 1 of Ordinance No. 32 of 1997 on the official archives of notaries (issued by the Minister of Justice, promulgated, State Gazette, issue 31 of 19.04.2016, amended and supplemented, issue 25 of 24.03 .2017, in force from 24.03.2017). It is necessary to emphasize that the interests of the buyer will be better protected if the references and certificates related to both the property and the status of the merchant are done not only at the date of conclusion of the notary transaction, but also upon signing of the preliminary contract. It is advisable that the buyer attempts to negotiate payments not only by bank transfer and only in cases where the total selling price is over BGN 10,000, as required by the Cash Limitation Act, but also by using the so- called ”escrow accounts” or a special account opened by a Notary. The agreements shouid be signed by the two parties of the deal and the bank or the Notary, when the account is made by the lattest. Great attension has to be paid on the release of the amounts paid by the buyer. It is recommended to negotiate that the merchant-seller will receive the price only after submitting a certifiCommerce Act te of weights showing that during the period between the notary transaction and its entry there are not other entries in The Property Register which may lead to total or partial invalidity or limit the extent of the rights exercised by the buyer (disposal transactions with which the ownership is transferred; formation of limited property rights; mortgages; leases or agricultural tenancy transactions).

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