

DETERMINATION OF THE ACQUIREMENT MOMENT OF THE PROPERTY RIGHT THROUGH ARTIFICIAL REAL ESTATE ACCESSION

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Abstract. *The issue of determining the moment when the owner of the real estate acquires, through accession, the property right over the works executed, represented a controversial subject in the legal doctrine. The new regulation of the accession also leaves room for certain divergent opinions expressed on this subject. Subsequently, we considered necessary to comparatively approach the two regulations, in an attempt to determine the moment when the owner acquires the property right over the works executed, according to the hypotheses regulated by the Civil Code: the owner of the real estate executed the works with the materials of another individual and the works with sustainable character were executed by a third party over another individual's real estate. When analyzing the second hypothesis, we took into consideration the solutions suggested according to the categories of works provided by the law: autonomous works and added works. Inevitably, we also made reference to the incidence of the regulations on the acquirement of the property right over the real estates through registration in the Real Estate Register.*

Key words. *Artificial real estate accession, works with sustainable character, autonomous works, added works, necessary works, useful works, voluptyary works.*

1. A controversial issue

The regulation means of the artificial real estate accession in the former regulation, respectively in the Civil Code from 1864, raised many doctrinaire controversies and difficulties in solving various litigations which the law courts were dealing with. One on the issues experienced by the jurisprudence and debated by the doctrine was the determination of the moment when the accession grounds is acquired, the property right over the works, especially over the works executed by a third party over another individual's real estate.

The legal grounds for acquiring the property right were, within the former regulation, article 493 and article 494.

According to the interpretation given to the legal provisions, the doctrine and jurisprudence provided different solutions regarding the moment when the property right over the works executed on a real estate, considered main goods, in acquired, based on the accession.¹

These opinions can be divided into two categories: the ones according to which the property right over the works is acquired through accession since the owner of the land

¹For the presentation *in extenso* of the opinions formulated and their versions, see *L. Pop, L.M. Harosa, Drept civil. Drepturile reale principale*, Ed. Universul Juridic, București, 2006, p. 278-281.

only exercises a possession, which is fit to lead to the acquirement of the property right through *usucapio*.¹⁰

The constructor only acquires a debt right, which extinguishes through the impossibility to fulfill the suspensive condition, determine either by the intervention of *usucapio*, to his benefit, or by the request to lift the work, in the event of bad faith.¹¹

We adhered to the opinion according to which the owner of the land acquires the property right over the construction built by a third party, since the moment when the materials are incorporated into the ground. We argued that any other solution would lead to the conclusion, unacceptable, that up to the moment when the owner of the land expresses his will to acquire the property over the construction, the constructor would acquire a superficies right, a property right over a construction without the existence of a real right over the land on which it is situated being unconceivable.¹²

The presentation of the opinion expressed based on the former regulation presents a double interest: on one hand, it will continue to apply for the cases resulted before the enforcement of the new Civil Code¹³, on the other hand, some of them can be found, into a more or less amended form, in the doctrine consecrated to the analysis of the provisions corresponding to the current Civil Code.

2. The new regulation of the artificial real estate accession

Similar to the former regulation, the Civil Code enforced on October 1, 2011 makes the difference between the property right over the works executed by the owner of the real estate with the materials of another individual and the acquirement of the property right over the works executed by a third party on the real estate property of another individual. The new provision is the regulation of the case when an individual executes works on the real estate of another individual, use materials which are the property of a third party (article 594 Civil Code.)

The basic notions used by the legislator are “real estate” and “works”.

Real estate means, as applicable, either the land, or a construction existing before the works.¹⁴

The term *works* indicates, as applicable, the constructions, plantations or other real estate goods built on the land or at its basement or the additions brought to a construction.

These notions are firstly used by the provisions of article 577 paragraph (1) Civil Code, according to which “The constructions, plantations and any other works executed over a real estate, hereinafter called *works*, are assigned to the owner of such real estate unless otherwise provided by law or legal document”.

The legislation, through article 578 Civil Code, also established a classification of the works, of the aspects with incidence over the cases and means where the artificial real estate accession operates.

Thus, the works can be *autonomous* or *added* and, at their turn, each of these works can have *durable* or *temporary* character.

¹⁰L. Pop, L.M. Harosa, op. cit., p. 281.

¹¹I. Dogaru, S. Cercel, Drept civil. Teoria generală a drepturilor reale, Ed. All Beck, 2003, p.268

¹² See E. Chelaru, Drept civil. Drepturile reale principale, ed. 3, Ed. C.H. Beck, București, 2009, p. 358.

¹³ According to article 58 from the Law no. 7/2011, for the enforcement of the Law no. 287/2009 regarding the Civil Code, “In all cases when the artificial real estate accession implies the exercise of an option right by the owner of the real estate, the effects of the accession are regulated by the law in force when the work stated”.

¹⁴ See V. Stoica, Drept civil. Drepturile reale principale, ed. 2, Ed. C.H. Beck, București, 2013, p. 346; C. Bîrsan, Drept civil. Drepturile reale principale, în reglementarea noului Cod civil, Ed. Hamangiu, București, 2013, p. 368.

The autonomous works on a real estate are the works with independent character. *Exempli gratia*, the legislator mentions that the constructions and plantations are autonomous works, and then he adds that they have other works with independent character also benefit from this character [article 578 paragraph (2) Civil Code].

The added works are the works which do not have an independent character. As mentioned by their name, these works do nothing but add to a preexisting work. They are divided into *necessary works, useful works and voluptuary works*.

Are exempted through law from the rules of the accession the temporary works (article 588 Civil Code) which their author built in good faith before the restitution of the real estate towards the owner or the cases when the owner chooses to bind the one who executed them when purchasing the real estate [article 581 paragraph (1) letter b) and article 582 paragraph (1) letter c) Civil code]. The rules of the accession are also not applicable within the reports between the co-owners, when one of them builds on the land joint property.

The rules of the artificial real estate accession are eliminated by law for the establishment of a superficies right.¹⁵

3. The acquirement of the property right over the works executed by the owner of the real estate with the materials of another individual

According to article 580 paragraph (1) Civil Code, the owner of the real estate who executed the work with the materials of another individual also becomes the owner of this work.

Actually, through accession, the owner of the real estate acquires the property over the materials of another individual, which he incorporated into the work.¹⁶ It does not matter if the work is autonomous or added or if it has durable or temporary character. Subsequently, the constructor owner cannot be forced to disassemble the work or to reconstitute the materials used (article 580 paragraph 1 Civil Code), but he can be forced to pay certain compensations which represent the equivalent value of the materials (article 580 paragraph 2 Civil Code).

The owner of the real estate acquires the property right over the materials progressively as they are incorporated into the work.

3. The acquirement of the property right with object the autonomous works with sustainable character over the real estate of another individual

3.1. The case of good faith author

According to article 581 Civil Code, “If the author of the autonomous works with sustainable character over the real estate of another individual acts with good faith, the owner of the real estate is entitled:

a) to ask the court his registration in the Real estate register as the owner of the work, paying, at his choice, to the author of the work either the equivalent value of the materials and labor, or the value increase added to the real estate through the execution of the work; or

b) to ask to force the author of the work to purchase the real estate at the real estate average value which would have had if the work had not been executed”.

¹⁵C.S.J., Civil Section, decision no. 893/1994, Law no. 12/1994, p. 62; Supreme Court, Civil Section, decision no. 720/1989, Law no. 1-2/1990, p. 125. Article 579 paragraph (2) Civil Code adopted this solution.

¹⁶ See *E. Chelaru*, Drept civil. Drepturile reale principale, în reglementarea noului Cod civil, ed. 4, Ed. C.H. Beck, București, 2013, p. 412.

Unlike the former regulation, which did not provide any option to the owner who wanted to recover his real estate, being forced to keep the construction built by the third party, with the obligation to compensate him, the Civil Code allows him to choose between also becoming the owner of the autonomous work executed by a third party and forcing the later to purchase the real estate where the executed the work.

We can only talk about *accession* if the owner of the real estate chooses to register himself in the Real estate register as the owner of the work.

By developing an opinion already expressed under the former regulation, the legal literature made the difference between accession, as means to acquire the property right over the work and the accession right of the owner of the real estate, potestative right which would result since the execution of the work, whenever the law recognizes this right of option.¹⁷

On the same line of thought, it was stated that “The owner of the real estate becomes the owner of the work only if he expressly manifests his will to this end, through the positive exercise of this right of option, which has the legal nature of a potestative right”.¹⁸

We do not consider useful this distinction, as long as the issue of acquiring the property right over the work is clearly regulated by the legislator. Thus, the legislator took into consideration the standard situation, where the work was executed over a real estate registered in the Real Estate Register. The owner of the work himself is registered in the Real estate register as owner of the property right over the real estate, this being one of the conditions for being considered as acting in good faith. This is why the actual owner of the real estate will be able to acquire the property right over the real estate only through his registration in the Real estate register, which also assume the rectification of the respective register.

This result can be reached either by formulating an action for recovery of possession, or by promoting an action in dissolution of the title of the author of the work (cancellation or resolution).

The provisions of article 589 Civil Code will also be applicable, namely when the acquirement of the property right, exclusive or based on shares, over the works is conditioned by the registration in the Real estate register, the registration is made based on the convention of the parties, concluded under authentic form or, as applicable, on the legal decision.

According to article 56 paragraph 1 from the Law no. 71/2011 for the enforcement of the Law no. 287/2009 regarding the Civil Code (L.P.A.), the provisions of the Civil Code regarding the acquirement of the real estate rights through the effect of their registration in the Real estate register is only applied after the conclusion of the land register for each administrative – territorial unit and the opening, at request or ex-officio, of the real estate registries for the respective real estates, according to the provisions of the special law. For the works executed over certain real estates which are not registered in the Real estate registries regulated by the Civil Code or over certain real estates registered in the Real estate registries, but located in administrative – territorial units where the land register works were not finalized and all the Real estate registries were not opened, the provisions of article 58 from L.P.A. will be applicable. Namely, whenever the owner of the real estate has a right of option, he acquires the property right over the work started after the

¹⁷ See *V. Stoica*, op. cit., p. 342-345.

¹⁸ I. Sferdian, *Observații asupra accesunii imobiliare artificiale*, în *reglementarea Noului Cod civil, Dreptul nr.2/2011*, p.13.

enforcement of the Civil Code from the date of the summons to court through which he requested the recognition of his property right over the work, if the action was admitted.

The provisions of article 58 from L.P.A. will also be applicable if the works were executed over a real estate acquired by their author through an acquirement means which is not subject to the registration in the Real estate register.

The owner of the real estate exercises his right of option either through the summons to court formulated against the author of the work, or by concluding a convention with the author of the work.¹⁹

3.2. The case of bad faith author

From the interpretation *per a contrario* of the provisions of article 586 Civil Code it results that the bad faith author is the author who executed the work over a real estate registered in the Real estate register based on a title whose faults were known to him or over a real estate he acquired based on an acquirement means which is not subject to the registration in the Real estate register, knowing the fact that the individual from whom he acquired it was not the actual owner of the real estate.

The *Precarious Possessor* and the one who builds in the absence of or with the lack of observance of the building permit are assimilated to the bad faith author (article 582 paragraph 2 and article 597 Civil Code).

For the execution of the work by a bad faith author, article 582 paragraph 1 Civil Code provides the owner of the real estate with three options: to ask the court to order his registration in the Real estate register as the owner of the work; to ask to force the author of the work to dissolve it; to ask to force the author of the work to purchase the real estate at the real estate average value which it would have had if the work had not been executed.

If the owner of the real estate chooses to acquire the property right over the work, the moment when he will effectively acquire this right would be his registration in the Real estate register. In this case the legal provisions we mentioned when we analyzed the good faith constructor will apply *mutatis mutandis*.

Unlike the case of the good faith constructor, the bad faith constructor will be able to obtain a compensation with a lower value. When the owner of the real estate chooses to keep the work, he has to pay to its author either half the value of the materials and labor, or half the value increases added to the real estate.

In our opinion, this manner to compensate the bad faith constructor is not equitable, because it leads to an unjustified enrichment of the owner of the real estate. Selecting to acquire the work, the owner of the real estate considers it useful and will use all the benefits from its exploitation. If he would consider himself prejudiced, he will be able to select other solutions provided by the legislator, namely to ask the building of the works at the constructor's expense and his obligation to reset the real estate in its initial state or to force him to purchase the real estate, paying the price it would have if the works had not been executed.

If the owner of the land requires forcing the author of the work to dissolve it, we can no longer talk about acquiring the property right. The constructor, if he built the work with his materials, will keep his property right over the construction materials. If the works were executed with the materials of another individual, in order to determine the property right over these material it is necessary to establish whether the legal provisions regarding

¹⁹See E. Chelaru, în *Fl.A. Baias*, E. Chelaru, R. Constantinovici, I. Macovei, *Noul Cod civil. Comentariu pe articole*, ediție revizuită, Ed. C.H.Beck., București, 2012, p. 644.

the acquirement of the property right over the movables based on the good faith possession are applicable, regulated through article 937 Civil Code.

4. The acquirement of the property right with object the added works with sustainable character over the real estate of another individual

The moment when the property right over the added works with sustainable character is determined according to their type: necessary, useful, voluptuary.

4.1. Necessary works

The *necessary works* are the works in the absence of which the real estate would perish or it would deteriorate [article 578 paragraph (3) letter a) Civil Code]. Because the scope of the necessary works is to preserve the real estate and should be executed even by its owner, the legislator does not grant him the possibility to select from several solutions and he forces him to keep them, regardless if the author of the works was acting in good faith or in bad faith.

The owner of the real estate will acquire the property right over the necessary works, according to article 583 paragraph 1 Civil Code, from their execution, thus without being necessary to register them in the Real estate register.

The legal treatment of the good faith constructor and of the bad faith constructor is only differentiated under the determination means of the compensations due. Thus, the owner of the real estate has to pay the good faith author the reasonable expenses he incurred. For the bad faith constructor, this amount can be reduced with the value of the benefits of the real estate, out of which he can deduce the costs necessary to obtain them.

4.2. Useful works

The useful works are the works which increase the economic value of the real estate [article 578 paragraph 1 Civil Code]. For the useful works, the legislator established in a different manner the moment when the property right is acquired, according to the good or bad faith of the author of the work.

When the works are executed by a good faith author, the owner of the real estate cannot ask their building and he acquires them under property from their execution (article 584 paragraph 1 Civil Code). However, the owner of the real estate will have the obligation to pay to the author of the work a compensation which will be calculated, based on the option of the first, either according to the value of the materials and labor, or according to the value increase added to the real estate.

If the value of the work is considerable, the owner of the real estate does not have to keep it and he can ask to force the author of the work to purchase the real estate at the real estate average value it would have had if the work had not been executed.

When the useful works are executed by a bad faith author, the owner of the real estate can select to keep them, to request to force the author of the work to dissolve it, and to reset the real estate in its previous state and to pay compensatory damages, and when the value of the work is considerable, to ask the author of the work to purchase the real estate at the real estate average value it would have had if the work had not been executed.

According to article 584 paragraph 2, letter a) Civil Code, the owner of the real estate can become the owner of the work, “according to its regime, with or without registration in the Real estate register”.

The criterion used by the legislator in order to determine the works over which the property is acquired without registration in the Real estate register and the works for which the acquirement of this right is conditioned by the registration in the Real estate register is quite vague (“...according to its regime...”). The legal literature indicated that the

property right over the useful added works executed by an bad faith author is acquired through registration in the Real estate register when it lead to the modification of the extension of the real estate²⁰ or when it was individualized in the Real estate register²¹.

If the acquirement of the property right over the useful work can take place without the registration in the Real estate register, the acquirement moment coincides with the execution of the work, while, in the other cases, the owner of the real estate would also become the owner of the useful works since the registration date of his property right in the Real estate register [article 890 paragraph (1) Civil Code].

We can notice that the issue of the moment of acquirement of the property right over the work was treated by the legislator in a different manner, according to the good or bad faith of its author, only in the later case establishing the difference between the acquirement conditioned by the registration in the Real estate register and the one which is not conditioned by this formality. However, this differentiated legal treatment is not justified as long as the essential element is not the subjective position of the author, but the extent to which the work modifies the real estate.

The owner of the estate who kept the useful work is forced to pay a compensation to the bad faith author. However, he will have an option in terms of the calculation of the compensation due to the author, namely to pay him half the value of the materials and labor or half of the value increase added to the real estate.

Similar to the sustainable autonomous works, we think that the determination manner of the compensation for the author of the works is inequitable. While the grounds for awarding the compensations are represented by the avoidance of enrichment without fair cause of the real estate owner, the subjective attitude of the author of the work is irrelevant.

4.3. Voluntary works

According to article 578 paragraph 3, letter c) Civil Code, the voluntary works are the ones executed for the simple pleasure of the one who made them, without increasing the economic value of the real estate. Because they do not bring any value increase, the owner of the real estate will not have the obligation to compensate the author if he has to keep them or if he selects to keep them.

The owner of the real estate will be forced to keep the work if the author was a good faith author. If there was a bad faith author, the owner of the real estate can keep the work or he can ask to force the author to dissolve it, to reset the real estate in its previous state and to be paid compensatory damages, if a prejudice was inflicted.

Regardless of the good or bad faith of the author of the work, the owner of the real estate is entitled to become its owner, without registration in the Real estate register [article 585 paragraph (1) letter a) Civil Code]. Subsequently, the moment when the property right is acquired is the moment when the work is executed.

However, as a new provision, the legislator allows the good faith author to build the work before the restitution of the real estate towards the owner, provided that he resets the real estate in its initial condition (article 585 paragraph 2 Civil Code). Yet, we do not understand why the legislator establish this difference between the good faith constructor and the bad faith constructor since article 590 Civil Code admits this possibility for the author of the work, without differentiating between the good faith constructor and the bad faith constructor or between the various categories of works.

²⁰See *V. Stoica*, op. cit., p. 347.

²¹*I. Sferdian*, loc. cit., p. 33.

5. The acquirement of the property right with object the works partially executed over the real estate of the author

The case of building certain constructions partially located on the land under the property of the constructor and partially on the land under the property of a neighbor was not regulated by the former Civil Code, subsequently its resolution represented a controversy subject in the doctrine. From the solutions proposed²², the legislator selected the one which includes the establishment of a joint property right according to shares of the two neighbors over the real estate resulted, either through the agreement of the parties, or through legal means.

Thus, according to article 587 Civil Code, “For the works with sustainable character executed with good faith partially over the real estate of the author and partially on the land property of a neighbor, the latter can ask the registration into a new Real estate register of a co-property right of the neighbors over the real estate resulted, including the afferent land, reported to the value of their individual contribution”.

In this case, we no longer encounter the standard situation in terms of accession, which means the acquirement of the property right over the accessory estate which is united with a main estate, because the joint property right will be acquired by the owner of the real estate on whose land the construction was partially built by a neighbor not just over the part of construction which is located on his field, but over the entire construction and even over the land under the property of the neighbor, to the extent where this is afferent to the construction. Moreover, the share of the property right assigned to the constructor also includes the part of the neighbor’s field that he partially occupied with his construction.

Thus, we can state that in such cases, the accession represents a manner to acquire the co-property both by the owner of the real estate and by the author of the work.

The owner of the land partially occupied by the construction built in good faith by his neighbor is not forced to acquire the “co-property right” referred to by the legislation, but he will not be able to request the dissolution of such part of the construction. Subsequently, if he does not request the registration in the land register of the joint property right, he will have to tolerate the occupation of such part of his land.

If there was a bad faith author, the owner of the neighboring land will be able to choose between acquiring the joint property right based on shares over the entire real estate (which is determined in the same manner as the good faith constructor), through the registration of this right in the Real estate register and requesting the bad faith author to build the work, with the payment of compensatory damages. If he will select to acquire the joint property right based on shares, the establishment of the contribution of the bad faith author and the share of the property right assigned to him will take into consideration only half the value of his land, affected by the work, of the value of the materials and labor used.

Regardless if the author was good faith or bad faith author, the joint property right over the real estate is only acquired when it is registered into a new Real estate register.

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²²For the presentation of these solutions, see *O. Ungureanu, C. Munteanu*, op. cit., p. 626-629.

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