Superficies in the form of the right to superpose

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Abstract

The purpose of this paper is to present the current legal framework related to the superficies right in the form of the right to superpose, and especially to draw the attention and put certain question marks regarding the actuality or even the urgency of the need for regulation regarding the right to superpose. First, as a preliminary aspect, in order to emphasize the historical evolution of the superficies right, we will briefly present the development of this concept starting from the Roman law up to the present date. Second, by analysing the relevant legislation, the doctrine and the jurisprudence, the authors set themselves to present the main methods for constituting the superficies right. Third, the characteristics related to the right to superpose will be correlatively laid out. Fourth, the possibility to obtain a building permit on the basis of the right to superpose will also be analysed. Fifth, the recently entered-into-force legislative framework regarding the registration of the right to superpose and of the building thus erected is presented. Last but not least, the conclusions of this paper are presented, highlighting the necessity for more clearly defined rules regulating the legal status of the right to superpose, in order to avoid any confusions and inconsistencies in practice.

Keywords: *superficies right, right to superpose, registration of superficies right, registration of right to superpose, notarised deed*

JEL Classification: K11

1. Introduction

This paper aims to analyse the characteristics of **the superficies right in the form of the right to superpose**. Thus, the following aspects will be mainly taken into consideration: (i) the methods for constituting this right, (ii) the legal relationships derived from its existence, (iii) the possibility to obtain a building permit for a construction that aims to be erected on the basis of this right, as well as (iv) the formalities related to the registration with the Land Book of the new construction thus erected.

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Viewed under the form of the right to superpose, the superficies consists of the right of a person to erect a new construction on top of another construction, on a land which is owned by another person.

The approach of the topic related to the superficies in the form of the right to superpose is based on its actuality and practical applications, taking into consideration the lack of urban space and that the extension of the cities is forecasted to take place in the city planning not only horizontally, but also vertically.[3] In this respect, more and more frequently the topic of the right to superpose and of the loft conversions applied on buildings already existing is discussed. Also, we note the increasing interest of investors to develop "rooftop"-type renewable energy projects (mainly solar energy), which must also be based on a superficies right in the form of the right to superpose.

Given the fact that there are no express legal provisions related to the procedure to be observed in order to obtain a building permit or the legality of the execution of this type of building, we will analyse to what extent such an approach may be encompassed in the current legal framework, taking into account also the fact that the doctrine and the jurisprudence are so far insufficiently developed on this matter.

2. Considerations related to the evolution of the superficies right

The first mentions regarding the existence of the superficies right can be identified in the system of the Roman law, where it was recognised through judicial channels. In the Roman law, the superficies right was not regarded as a reunion of the ownership right on the building with the right of use on the land, but as a right of use on both the land and the building.[4] This was sanctioned at the end of the 2nd century B.C., under the circumstances of a crisis of houses, when the state allowed the particulars to build on green fields.[5] But this situation came in contradiction with the norms imposed by *ius civile*, according to which *superficies solo cedit* (the surface belongs to the land), which would have resulted in the state ownership over the buildings erected on the green fields, thus discouraging the private persons. In order to solve this problem, the state granted the superficiary the right to use the building on an unlimited period, with the condition of paying an annual amount, called *solarium*. The superficiary had the possibility to transfer the building to his/her heirs, he/she could alienate it by onerous or gratuitous deeds, and he/she could encumber it. Also, the superficies right benefited from protection in the form of the interdict *de superficiebus*, as well as on the form of the real (*in rem*) action (*utilis in rem actio*).

The Civil Code from 1864 contained no legal definition of the superficies right, this circumstance leading to the challenge of the existence of such right.

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[3] Irina Sferdian, *Discuții referitoare la dreptul de superficie*, "Dreptul" magazine no. 6/2006, Bucharest, p. 77.

[4] Valeriu Stoica, *Drept civil. Drepturile reale principale 1*, Humanitas, Bucharest, 2004, p. 553.

[5] Emil Molcut, *Drept privat roman*, Universul Juridic, Bucharest, 2007, p. 145.

Afterwards, the existence of the superficies right was recognised by the legislators in article 11 of Decree-Law no. 115 dated 27 April 1938 for the unification of the provisions regarding land books and in art. 21 of Law no. 7 dated 13 March 1996 for cadastre and real estate publicity (in the form valid at its entry into force), mentioning the superficies right among the real estate rights that must be registered with the land book. The superficies right is recalled also in art. 22 from the Decree no. 167 dated 10 April 1958 on the statute of limitations (in the form valid at its entrance into force). Although none of the above mentioned legal texts included a definition of the superficies right, it was defined by the jurisprudence and the doctrine as a dismemberment of the private ownership right consisting of the ownership right that a person called superficiary holds over the constructions, plantations or other works situated on a surface of land belonging to another person than the superficiary and on which the superficiary has a right of use.

A specific definition of the right of use over the land owned by another person is offered by the Romanian legislator in article 693 of the new Civil Code[6] ("**Civil Code**"), as being *the right to own or to erect a building on the land owned by another person, over the land or in its subsoil, on which the superficiary acquires a right of use.* The superficies right represents a derogation from article 559 paragraph (1) of the Civil Code, according to which the ownership over the land extends also to the subsoil and the space above the land, over which the owner could make, in the absence of this derogation, any kind of works, with the exceptions provided by the law, and could consequently take advantage of all the benefits brought by these works.[7]

The definition proposed by article 693 of the Civil Code indicates also the legal characteristics of the superficies right, as follows:

(i) the superficies right is a real estate right regarding a land surface;

(ii) it has a temporary character, as it can be constituted for a period of maximum 99 years, according to article 694 of the Civil Code, with the possibility of renewal at the completion of the term. We note that in this new regulation the perpetual character of the superficies right was abandoned;

(iii) it is not subject to the statute of limitations, as the possibility to introduce a superficies confessory claim exists against any person, even against the owner of the land;

(iv) it is impossible for it to cease through partitioning, since the ownership right of the superficiary and the right of the land owner are not in a severalty status, but are two distinct rights.

The introduction in the present Civil Code of the definition of the superficies right, of its characters, acquiring methods, duration, possibility of extension, as well as the methods of exercising and ceasing it are justified by the necessity to avoid the different interpretations and the erratic jurisprudence.

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[6] Law no. 287/2009 on the Civil Code, as further amended and completed, published in the Romanian Official Gazette, Part I, no. 505 from 15 July 2011, in force since 1 October 2011.

[7] In this respect, see also Gabriel Boroi, Carla-Alexandra Anghelescu & Bogdan Nazat, *Curs de drept civil. Drepturile reale principale*, Hamangiu, Bucharest, 2013, p. 132.

3. Methods for constituting the superficies right

As provided in article 693 paragraph (2) of the Civil Code, the superficies right can be constituted through legal acts, through acquisitive prescription and other methods provided by the law. The legal act can be concluded in the form of an onerous or gratuitous agreement, as well as through will.[8]

The agreement through which the superficies right is constituted must be concluded in notarised form, under the sanction of absolute nullity, taking into account the fact that, being a real estate right, it will be registered with the Land Book. This triggers the applicability of article 1244 of the Civil Code, which provides the obligation to constitute a real right through a notarised act, otherwise it being absolutely null and void.

Hereinafter we propose an analysis of the possibility to obtain the superficies right through *inter vivos* (amongst living persons) legal acts, this being the most frequently met in the practice case.

As a consequence, the superficies right can originate from the conclusion of an agreement between the owner of the land and the person that will build, plant or execute another work on the respective land. The ownership right on the construction, plantation or any other kind of work performed on the respective land is constituted by incorporation of the materials in the construction. On the other hand, the right of use over the land is obtained at the moment when the agreement is validly concluded with the owner of the land, moment when the superficies right is acquired.

Apart from the method of constituting the superficies right by agreement concluded in notarised form, article 693 paragraphs (3) and (4) of the Civil Code offers other additional possibilities through which this real right can be constituted, namely:

- The owner of a real estate asset consisting of land and construction transfers only the ownership right over the construction or transfers both the ownership right on the land, as well as the one on the construction, but to two different persons. In this case, the person acquiring the ownership right over the construction will also obtain the superficies right over the land, even if there is no express provision related to the constitution of the superficies right;
- The owner of the land waives his possibility to claim the accession of the construction on its land, in favour of the constructor who can afterwards register the superficies right;
- The right to claim the accession of the construction is transferred by the owner of the land to a third party, who registers with the Land Book the superficies right after taking over the autonomous works by claiming the accession of the construction.

In our view, the right to claim the accession must be waived by the owner of the land in notarised form. The same applies to the transfer of the right to claim

[8] Gabriel Boroi, Carla-Alexandra Anghelescu & Bogdan Nazat, *cited work*, p. 133.

accession, which must also be executed by the owner in notarised form, these formalities leading, even though indirectly, to the establishment of the superficies right.

The superficies right can be constituted also by *mortis causa* legal acts, in case the testator decides through his will to constitute this main real right in favour of a person. In this hypothesis, the testator, in his capacity as owner of the construction, as well as of the land, establishes two legacies for two different persons: one over the construction, the other over the land.

4. Specific aspects related to the right to superpose

Since in the doctrine only few opinions on this matter have been expressed, and the jurisprudence – also quite limited – does not seem to be unanimous, the possibility of erecting a construction on the top/roof of another construction built on the basis of a superficies right remains, even after the new Civil Code came into force, a controversial issue.

As mentioned above, among the methods for constituting the superficies right we name the conclusion of legal acts, this method having a particular application on the topic of the right to superpose.

4.1 Specific aspects regarding the contracting parties in case of constituting the superficies right as a right to superpose

Regarding **the contracting parties,** we notice that, usually, in order to conclude a legal act for constituting the superficies right, there are two contracting parties, respectively the owner of the land and the future owner of the building.

In relation to the superficies right in the form of the right to superpose, as regards the persons who must express their agreement for the execution of the works by the person interested to become the beneficiary of the right to superpose, we can identify the following situations:

(i) the owner of the land is also the owner of the already erected construction;
(ii) the existing construction has a different owner from the owner of the land, being erected on the basis of a superficies right;
(iii) on the land and on the construction already erected there is a co-ownership right; or
(iv) the existing construction belongs to more co-owners, and the land to a different person.

In order to better illustrate the reason which stands behind the necessity to request the approval of these persons for the erection of a new construction on the top/roof of an already existing construction, we will analyse separately each one of the above mentioned hypotheses:

1. In the first hypothesis, when *the owner of the land is also the owner of the already erected construction,* only one approval will be necessary in order to

build on the roof of the existing construction, due to the fact that there is an identity between the owner of the construction and the owner of the land. The owner benefits from all four prerogatives of the ownership right over the construction, as well as over the land – *ius possidendi, ius utendi, ius fruendi* and *ius abutendi* – so it will be entitled to freely dispose of its goods, taking into consideration the material and legal limits of its ownership right. This way, the owner holds the ownership right not only on the rooftop of the building on which the new construction will be executed, but also on the surface superposed to the land up to the limit of the aerial space, thus being able, if the case, to forbid any person to violate its right superposed to the land.

2. In the second hypothesis, *when the existing construction has a different owner from the owner of the land, being erected on the basis of a superficies right,* it is necessary that both owners, i.e. the owner of the construction, as well as the one of the land, to express their agreement for obtaining the superficies right in the form of the right to superpose. The explanation resides in the fact that, on the one hand the construction which will be erected has the print on the roof of the already existing one, whereas on the other hand the new construction will occupy a part of the surface superposed to the land, the owner of the land still holding its ownership and the right to freely dispose of it.

In other words, the volume of vacuum space on which the right to superpose is constituted does not belong to the owner of the already erected construction, but to the owner of the land. The object of the superficiary's right is only the erected construction, to which corresponds also a right to use the related land or a well-determined portion for the access. Regarding the rest of the surface, including the existing surface above the already erected construction, the ownership right stays with the owner of the land. The conclusion to be drawn from here is that the new construction will be erected on a surface belonging to the owner of the land, which imposes the absolute necessity to obtain the approval of the latter for constituting the superficies right.

There is also an issue related to the necessity to obtain the consent of the superficiary, meaning the person holding the ownership over the already existing construction, given the fact that he/she is not the owner of the vacuum volume where the new construction will be erected. Despite this, we must take into consideration that the new building (the floor, the green energy project or any other type of building that requires a building permit) will be erected on an already existing construction which will sustain it. Practically, if a building is usually erected directly on the land, in the case of building on top of an already existing construction the place of the land will be taken by the roof of the already existing, construction on which the new one will be erected. As a consequence, as the consent of the land's owner is needed in order to develop any construction activities on the land it privately owns, the consent of the owner of the already existing construction must be considered necessary for similar reasons. We mention also the necessity to carry on a technical expertise on the already existing construction, in order to establish its resistance and the possibility for superposing.

For these reasons, we may conclude that it is mandatory to obtain the consent of the owner of the first construction for the superposing or the erection of a new construction on top of the existing one.

3. In the third hypothesis, respectively the one where there is a *co-ownership right over the land and the building*, the approval of all the co-owners will also be necessary, according to art. 641 paragraph (4) of the Civil Code. This way, *a disposition deed regarding a common good can be concluded only with the express agreement of all co-owners*; but, in this case we are in the presence of autonomous, stand-alone works, which represent a disposition deed executed upon the existing building and which does not fall within the category of administration deeds, for which only the approval of the co-owners holding the majority of the quotas is necessary.

4. Last but not least, in the fourth hypothesis, namely the existence of a *co-ownership right on the existing construction and of a different owner of the land*, it is necessary to obtain the agreement of all of the owners. The considerations detailed under paragraphs 2 and 3 from above apply correspondingly.

4.2 Particular aspects related to the object of the superficies right in the form of the right to superpose

As regards the **object of the superficies** right, as shown in article 693 paragraph (1) of the Civil Code, it is established on the land of another person, over the land or in its subsoil. As a consequence, the buildings or other emplacements erected over an existing construction seem at first sight not to be compatible with the object of the superficies right.

However, the existence of the right to superpose benefited from recognition from the courts of justice. One of the early decisions that substantiated its existence was the civil decision no. 319/16.06.1995 pronounced by Brasov Court of Appeal[9] (as review court), through which a decision of an appeal court was annulled. This decision had confirmed the solution of the court of first instance by which the latter rejected a claim of a constructor of a floor to the building that was owned by the defendant, regarding the recognition of a superficies right. The inferior review court had erroneously established that the superficies right can have as object only constructions placed on the soil, that the aggradation of a building does not meet this condition and that the proof of the land's owner's approval for the superposing is not made. Through its annulment decision, the Court of Appeal stated that limiting the possibility to constitute a superficies right to the situation where the construction is adherent to the soil without accepting the hypothesis of building a floor is unacceptable, because the relation between the building and the land exists through the common parts of the building and, therefore, the impediment held by the first court is not applicable. The Court of Appeal showed

[9] Civil Decision no. 319/16.06.1995, Brasov Court of Appeal, published in *Brasov Court of Appeal. Collection of jurisprudence for the year 1995*, Brasov, 1996, pp. 8-9.

that the solution of the inferior courts ignores an essential aspect of the superficies right, resulting from the overlap and the co-existence of the ownership right of the constructor with the right of use over the land where it was built, constituted in favour of another person. In the absence of such overlap, the constructor's right could not be exercised. It was also shown that the approval for superposing expressed by the owner of the land does not refer to the idea of a necessity of an agreement constituting the superficies right between the owner of the land and the constructor, because this agreement can be proved through any type of evidence, including by not issuing any objections to the erection of the building (respectively to its superposing), even if it has not resulted in a written document expressing the consent to the constitution of the right.

It appears from the solution given by the court that there is no impediment in constituting such right with a view to erecting a building on the roof of a construction, even though the foundation of the new building is not placed on the soil, but on another construction. Despite this, unlike the solution pronounced by the Court of Appeal in the aforementioned cause, we emphasise the necessity imposed by the legislation in force to obtain all approvals and to conclude all agreements regarding the superficies right – including in the form of the right to superpose – in notarised form.

In relation to the constitution of the right to superpose and **its subjects**, we note that it finds its applicability even in the field of family relations. Therefore, through decision no. 479/1984 of the Civil Department of the Supreme Court[10], the new buildings erected during the marriage of the spouses on the land held in exclusive ownership by one of them, as well as the structures that are attached, neighbouring or superposed to the old building (such as in the case of superposing), have been considered as common goods, these representing goods acquired during marriage. As a consequence, the spouse that owns the land and the old building stays further in their exclusive ownership, but the new building overlapping the old one represents a common good of both spouses. The spouse that is not the owner of the land acquires, at the same time, as beneficiary of the superficies right, a right of use over the land on which the new building, overlapping the old one, has been erected.

5. Obtaining the building permit on the basis of the right to superpose

In order to begin the building process on the basis of the right to superpose it is necessary for its owner to obtain the building permit for the new construction works, in accordance with the provisions of Law no. 50/1991 *regarding the authorisation of the execution of construction works*[11] ("**Law 50**"). According to the provisions of Law 50, obtaining the building permit can be requested only by

[10] Decision no. 479/1984, Supreme Court, civil department, published in *Collection of decisions of the Supreme Court in the year 1984*, Bucharest, 1985, pp. 50-54.

[11] Published in the Official Gazette, Part I, no, 163 from August 7, 1991, as further amended and supplemented.

the owner of a real right on the real estate – land and/or building – on which the construction works will be executed. Moreover, the issuance of a building permit in lack of a real right on the real estate represents an offence, unless it was executed under such circumstances so as to represent a crime, the sanction being a fine between RON 5,000 and RON 30,000.

This way, theoretically, obtaining the building permit on the basis of the right to superpose should be similar in terms of procedure with the one on the basis of a "classical" superficies right. Nevertheless, in our opinion the possibility that, in practice, the local authorities might put under question the right to erect a building in the way of superposing cannot be excluded, because there is no unitary practice formed until the present in this respect or legislation expressly governing the real right to superpose.

6. Registration with the Land Book of the right to superpose and the registration of the new building

The new regulation for endorsement, reception and inscription in the evidences of cadastre and land book[12] (the "**Cadastre Regulation**") encompasses specific references regarding the possibility to register the construction erected on top of an existing one, designated as "the extension of the condominium through attic conversion" (Romanian *extinderea condominiului prin mansardare*).

This way, unlike the previous legislation that did not include any express regulations regarding the registration with the land book of the attic, the new Cadastre Regulation explicitly provides the steps that must be followed in this respect:

The first stage is called by the new Cadastre Regulation as "**re-division of apartments**" (Romanian *reapartamentare*).

The notion of "re-division of apartments" requires first of all the extraction of the terrace from the common use parts of the building. The prerequisite for this operation is that the general assembly of the owners' association adopts a decision through which the establishment of a new individual unit and the recalculation of the quotas from the common parts are approved, under the conditions of article 658 paragraph (1) of the Civil Code, namely with a majority of two thirds from the number of co-owners of the condominium. Also, it is necessary that the cadastral documentation for the "re-division of apartments" to be prepared by experts in the field of topography, cadastre, geodesy and cartography. This documentation will be later received by the competent Office for Cadastre and Real Estate Publicity, in view of extracting the terrace from the common use parts of the building, establishing this way a new individual unit and recalculating the quotas from the common parts.

[12] Approved by Order no. 700/2014 of the president of the National Agency for Cadastre and Real Estate Publicity, entered into force on 01.09.2014.

Thereafter, the co-owners will conclude a notarised deed by which they will express their approval for the corresponding reduction of the undivided quotas from the condominium.

As a last step of the first stage of the "re-division of apartments", this operation will be registered with the Land Book on the basis of the cadastral documentation endorsed and approved by the competent Office for Cadastre and Real Estate Publicity, and respectively of the notarised deed concluded by the co-owners. Moreover, the construction of the attic will be registered with the Land Book on the basis of the building permit and of the reception minutes upon completion of the works.

The second stage is called by the new Cadastre Regulation "**the attic's subdivision of apartments**" (Romanian *subapartamentarea mansardei*).

During this stage, the documentation for the "attic's subdivision of apartments" will be received by the competent Office for Cadastre and Real Estate Publicity. Afterwards, the owner of the attic concludes the notarised deed for the "attic's subdivision of apartments", and finally the "attic's subdivision of apartments" deed is registered with the Land Book.

Regarding the superficies right in the form of the right to superpose, even though the new Cadastre Regulation does not provide specific rules, we are of the opinion that it will be registered correspondingly with the new Land Book of the attic. This way, in order for the registration to be performed, the owner of the superficies right will have to present to the Land Book registrar a deed notarised by a public notary from Romania, a final or irrevocable court decision, as the case may be, an heir certificate or an administrative deed which, under the conditions provided by the law, produces the effect of constituting or transferring the real estate right. Also, even though it is not expressly mentioned in the Cadastre Regulation, we consider that in view of the registration of the superficies right in the form of the right to superpose, the express approval issued by the owner of the already existing building in notarised form will most probably also be required, in order to establish the right to superpose and respectively to be entitled to erect the new construction, as described above under section III.1 point 2, 3 or 4. Subsequent to the registration, the superficies right will be registered within the third part of the Land Book, part which is also designated by the letter "C".

In our perspective, this procedure for the registration with the Land Book of the attic can be applied *mutatis mutandis* in the case of erecting a "rooftop"-type renewable energy projects, because they represent just another method of vertical extension of the condominium. However, we cannot exclude the possibility that the Romanian competent authorities or courts could interpret this procedure in a (more) restrictive manner and thus not allow its application to other types of projects except for "the extension of the condominium through attic conversion", in the general meaning of this notion.

7. Conclusions

Taking into consideration the aforementioned aspects, we can affirm that the right to superpose is a subject that few addressed in the legal doctrine, but very actual, in the context of the necessity to extend the urban space also vertically and not only horizontally, and respectively of the desire of the Romanian and foreign investors to develop "rooftop"-type renewable energy projects.

Even though it is a form of the superficies right, this right has also some distinct features, which could sometimes make it difficult to understand its connotations and the procedure to be observed in view of its correct establishment, of the registration in the Land Book of the right to superpose and of the building erected on top of an existing building, as well as in respect of the execution of the construction works on its basis.

By way of specific regulation for the right to superpose, especially with regard to the procedure to be observed with respect to its establishment and respectively for the attainment of the building permit on its basis, we are of the view that potential confusions and inconsistencies of the legal regime applied by the various competent authorities from Romania could be easier avoided.

In conclusion, we emphasise the necessity for the Romanian legislator to materialise the topicality of this issue and to expressly determine the legal regime of the right to superpose, as presented in the content of this paper. Such an approach, more precisely passing legislation on these aspects, would be much more efficient and more "accurate" than allowing the jurisprudence and the practice to develop this concept and only afterwards have the major jurisprudential and doctrine opinions codified (as it was the case regarding the superficies right before new Civil Code entered into force on 1 October 2011).

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