SOME LEGAL CONSIDERATIONS ON THE RELATIONSHIP BETWEEN THE CONSTRUCTOR AND THE BENEFICIARY OF THE CONSTRUCTION IN THE CONTEXT OF THE COVID-19 PANDEMIC

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Abstract

The recent SARS-CoV-2 virus installed worldwide triggered several consequences in the economic, social, health, environment, etc. In legislative field, the effects of the COVID-19[2] pandemic and of the legislative measures taken to limit its spread also affect the construction sector. Both constructors and beneficiaries of the constructions works have faced/ are facing various technical, financial and legal difficulties generated by the current situation. Thus, it is expected that the appearance of legal and factual issues between the constructor and the beneficiary of the construction works will continue to be high in the next period. The main causes may be the potential impossibility of the construction beneficiary to pay the price for the construction works performed, respectively the situation in which the constructor does not execute and hands over on time the building/construction works. The current work is aimed to detail some measures that the parties may use in order to defend their rights and recover/diminish any potential damage.

Keywords: *SARS-CoV-2, construction law, legal mortgage, legal remedies.*

JEL Classification: K25, K32

1. The beneficiary's default for paying the price of the performed works. The legal mortgage of the constructor

One of the remedies that the constructor may resort in case the construction beneficiary can't pay anymore the price for the construction works performed, are (i) the enforcement of the guarantees offered by the beneficiary (i.e. letter of guarantee of bank, promissory notes, cash collateral, etc.), or (ii) the registration of the right of legal mortgage on the erected construction with the land book. In the latter case, the topic regards the legal mortgage of the constructor for the guarantee of the payment of the agreed price for the built construction, which was rebuilt or for the repairs/improvements brought to an existing building, mainly provided by the provisions of art. 1869[3] and art. 2386 point 6[4] of the Civil Code.

Thus, when exercising such right, the constructor may register with the land book, a legal mortgage on the building that is subject to the construction works he undertook to perform, based on the original document proving the agreement concluded with the owner registered with the land book (art. 37 paragraph 16[5] of Law no. 7/1996 of cadaster and real estate formalities). Please note that, although there is no express provision, we do not exclude a practice of the land book registrars for requesting invoices issued until the date of registration, in the case of natural or legal persons subject to the invoicing obligation (i.e. legal entity type company, enterprise individual, family business, authorized natural person, leader of an association without legal personality, etc.).

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[2] According to https://www.cdt-babes.ro/articole/coronavirus-infectia-COVID-19.php, *"coronaviruses are a large family of viruses that can cause disease in animals or humans. In humans, it causes respiratory infections, from the ordinary cold to more severe diseases such as Middle East Respiratory Syndrome (MERS) and Severe Acute Respiratory Syndrome (SARS). The latest coronavirus discovered causes COVID-19 coronavirus disease. COVID-19 is an infectious disease caused by the most recently discovered coronavirus. This new virus and disease were not known before the outbreak in Wuhan, China, in December 2019".*

[3] Art. 1869 of the Civil Code: *"In order to guarantee the payment of the price due for the work, the constructor benefits from a legal mortgage on the work, constituted and preserved in accordance with the law"*. According to the previous regulation (art. 1737 point 4, art. 1742 of the Civil Code of 1864), the payment of the price due by the client to the constructor is guaranteed with a real estate privilege.

[4] Art. 2386 point 6 of the Civil Code: *"Apart from other cases provided by law, the following benefit from a legal mortgage: (...) architects and constructors who have agreed with the owner to build, rebuild or repair a building, on the building, in order to guarantee the amounts due to them, but only within the limit of the value increase achieved".*

[5] Article 37 para. 16 Law no. 7/1996: *"Architects and constructors will be able to request, based on the original document proving the agreement concluded with the owner registered in the land book, the registration of a legal mortgage on the building that is the object of the works they were obliged to do, to guarantee the price of these works".*

The legal mortgage can be registered with the land book based on the document attesting the secured debt, in the form required by law for the validity of such document, provided in original form or certified copy (art. 158 paragraph 3 of the Regulation of 09.07.2014 of endorsement, reception and registration in the records of cadaster and land book, approved by Order 700/2014).

Considering that the law does not require the obligation to conclude the construction agreement in authentic form as a condition *ad validitatem*, our opinion is that such agreement can be concluded under private signature (such opinion is also provided under the doctrine[6] and jurisprudence).

The legal mortgage will be registered for the amount provided by the construction agreement[7], and if the receivable is not determined in the construction agreement, for the maximum amount provided in the application, as well as the amount of interest.

The law does not provide a deadline for the registration of the constructor's legal mortgage. However, as this is a guarantee of payment of the price, the constructor's legal mortgage can be registered as long as the limitation period for the claim for the payment of the price has not expired, provided that the debtor is still registered with the land book as owner of the ownership right of the real estate[8].

Basically, as long as the legal mortgage is a right arising under the law, as the conditions for its registration with the land book are met, one may consider that the beneficiary of the legal mortgage can request its registration starting with the signing date of the construction agreement. Of course, provided that that agreement is not subject to various terms and conditions and lead to legal consequences at a subsequent date to its signing. Our opinion is that such legal mortgage right is transferred together with the assignment of the construction agreement, in accordance with the provisions of art. 1315 - 1320 of the Civil Code, i.e. with the consent of the assigned constructor[9].

The constructor may register with the land book his right of legal mortgage only with the observance of certain limits, such as:

- the constructor's legal mortgage can be registered exclusively on the building, and not on the land plot related to the building; in accordance with the provisions of art. 1869 of the Civil Code. In practice, there have been numerous controversies regarding the right of the constructor to register his legal mortgage on the land related to the building. In this regard, our opinion is that the legislator's intention was to establish the constructor's legal mortgage exclusively on the building[10]. Therefore, by corroborating art. 1869 and art. 2386 point 6 of the Civil Code, it appears that the mortgage encumbers only the work (the erected building or the building on which repairs, improvements, and so on, were performed), and not the entire real estate (the land plot and the building located on such

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[6] The enterprise is a consensual agreement, because it is validly concluded by the simple agreement of the parties (no need to comply with any solemn form). Even if the good on which the enterprise work is performed is handed over to the constructor, the agreement remains consensual, because the transmission of the good has only the factual significance of the delivery (such as sale-purchase). See Fl. Moțiu, *Contracte speciale*, Universul Juridic Publishing House, Bucharest, 2015, pp. 204.

[7] To this extend please see Civil sentence no. 2879 of 11.04.2016, pronounced by the Botoșani District Court, Civil Section, by which the court noted the following: *"proved that the payment of part of the price or non-performance of the agreement by y or that the value increase achieved is xxxxx euro According to the provisions of Article 37, paragraph (17) of Law No. 7/1996: In the cases provided in paragraphs (15) and (16), the land book registrar will approve the provisional registration of the legal mortgage for the amount provided in the division document or in the agreement provided in paragraph (16), and in the absence, for a maximum amount, provided in the registration application In the latter case, the owner registered in the land book will be able to request directly, by complaint, to the competent court according to Article 31 paragraph (4) the reduction of the maximum amount. The legal provisions regarding the land book do not require an expertises for determining the value of the mortgage right, but obliges the tabulation of this right on the basis of the original document proving the agreement concluded with the owner registered in the land book".*

[8] To this extend please see Sferdian Irina, *Registration in the land book of the right to a legal mortgage. Rule, exceptions (II)*, Universul Juridic no. 11 of November 3, 2015.

[9] For details on the conditions of the assignment of the agreement, see L. Pop, I. Popa, S. Vidu, *Civil Law Course. Obligations*, Universul Juridic Publishing House, Bucharest, 2015, p. 494 - 508.

[10] To this extend please see Civil sentence no. 2879 of 11.04.2016, pronounced by the Botoșani District Court, Civil Section, having as object the complaint formulated by petitioner x against the conclusion of the re-examination dated 14.10.2015 and the conclusion dated 10.09.2015 issued by the Land Book, by which it was ordered tabulation, in favor of y, of the legal mortgage on the land and construction owned by the petitioner x. In the motivation, the court held that according to the provisions of art. 2386 points 6 and 1869 of the Civil Code, the constructor has a right to a legal mortgage on the work. For this reason, the court will order the partial annulment of the conclusion dated 10.09.2015 regarding the tabulation by y of the legal mortgage on the land in quota of 2537/xxxxx, registered in the Land Book no. xxxxx of ATU B, property of x.

land plot).

- the amounts due to the constructor can be guaranteed only within the value increase achieved (generally the amount agreed by the parties in the construction agreement). According with art. 2386 point 6 of the Civil Code, constructors who have agreed with the owner to build, rebuild or repair a building, benefit from a legal mortgage on the building, to guarantee the amounts due to them, but only within the value increase achieved. In practice, the issue of establishing the value increase achieved by the building as a result of the construction works/repairs performed was raised. Unlike the previous Civil Code, which provided in art. 1737 point 4 that the equivalent of the value increase brought by the performed works had to be established by expertise[11], the current regulations have eliminated this requirement of performing the expertise, limiting the guarantee of the price of the performed works to the amount agreed by the parties in the agreement. We agree with the new amendments brought by the new Civil Code, namely that the maximum amount provided in the construction agreement (including the additional amounts agreed by the parties for additional works) to be considered as the added value. Of course, in case of the enforcement of the legal mortgage, the beneficiary and/or the constructor will be able to prove the effective performed level and implicitly the value increase. We consider that in the absence of extremely rigorous documents regarding the situations of works agreed by the beneficiary, the exact proof of the value increase will be able to be made the last ratio within an opposition to the enforcement procedure and based on an evaluation report. Therefore, the beneficiary of the construction works must pay the price provided under the agreement[12] and cannot request a price decrease, arguing that the construction works required less work or generated lower costs than expected. Moreover, the beneficiary of the construction works will bear a possible price increase only insofar as it will result from the construction works that could not be provided by the constructor at the concluding date of the construction agreement. Of course, the intention of the parties and the clearest possible regulation of the construction works and their price (i.e. setting a price for completed work "turnkey", performing the construction works by establishing a hourly/daily/weekly rate, setting the price of the construction works by type of work/stage of construction, etc.) is to prevent a series of disputes and misunderstandings between the parties. As soon as the beneficiary is notified by the constructor in relation with the finalization of the construction works, the beneficiary has the obligation to verify within a reasonable time, whether the construction works performed by the constructor comply or not with the conditions set out in the agreement. In case the beneficiary finds deficiencies, such deficiencies must be communicated to the constructor by the report that will be concluded in this respect, also providing the eventual remediation terms. The constructor will be liable for any damages (i.e. delay penalties, unrealized profit, etc.) created to the beneficiary for non-delivery of the construction works/the building on time. In case that, without "*reasonable grounds*", the beneficiary does not appear at the date set in the notice or communicate without delay to the constructor the result of the verification of the construction works performed, such construction works are considered received without complaints, and the beneficiary who received the work as such is no longer entitled to invoke apparent defects of work or apparent absence of the agreed qualities[13] (art. 1862 paragraph 2 of the Civil Code). Please note that,

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[11] I.C.C.J. held that the conditions for establishing the privilege of the builder are not met if the amount mentioned for its establishment is not attested by a real estate expertise or any other title, the recognition of the claim by the debtors is not sufficient for its establishment, given the provisions of art. 1737 point 4 of the Civil Code 1864 (correspondent of art. 2386 point 6 of the Civil Code), which require an expertise to be performed by an expert appointed by the court within 6 months from the completion of the works (ICCJ, s. II civ., Dec. No. 3099/2013, www.scj.ro).

[12] To this extend please see art. 1864 of the Civil Code. From the content of this article results a last obligation of the beneficiary, that of payment of the price of the executed work. In the case of the enterprise, the payment is portable and is made on the date and place where the final acceptance of the entire work is made, unless otherwise provided by law or agreement (paragraph 1). Paragraph 2 of this article represents a resumption of the provisions of art. 1860 Civil Code on liability for the loss or damage of the work depending on the fault of the parties in the execution of the work and the one who purchased the materials. (Adrian Georgescu-Banc, Adriana-Florentina Dobre, Alexandru Dimitriu a.o., *New Civil Code. Notes. Correlations. Explanations*, 1st edition, C. H. Beck Publishing House, 2011, ISBN 978-973-115-945-4).

[13] In return, the client is responsible for the non-execution of the obligation to receive and receive the executed work, by paying damages, for storage and conservation expenses. The court, at the request of the constructor, may find the execution of the work and

it can be very difficult for the beneficiary to proof the "*reasonable grounds*" for which he did not communicate the deficiencies/ defects or did not appear within the term established by notification in order to receive the construction work performed. Of course, in the absence of criteria indicated by the legislator in this regard in the Civil Code, there is no legal limitation imposed to the parties to defining such "*reasonable grounds*" in the construction agreement or subsequently by concluding an addendum to the agreement. Therefore, in the absence of such agreements or established practices between the parties, the burden of proving the good cause lies with the beneficiary.

- subcontractors do not benefit from the right of legal mortgage[14] (such right being provided by law exclusively in favor of the constructors), even if the subcontractors would actually perform the construction works entirety. Moreover, our opinion is that subcontractors cannot benefit from this right even if the beneficiary has recommended/chosen/confirmed/imposed[15] to the constructor/architect, etc. one, several or all subcontractors to carry out the construction works partially or totally.
- according to the legal provisions, the architects, constructors and in general any person who entered into agreement directly with the owner for performing the building or the constructions works benefits of the legal mortgage. The wording related to the architects and entrepreneurs, provided by the Civil Code, is a limiting one, and has as a premise the usual legal relations that arise between the parties. Therefore, subcontractors and workers employed by the architect or the main constructor will not enjoy this legal mortgage because they did not entered into agreement directly with the owner/beneficiary. However, the working subcontractors can enjoy a direct claim against the beneficiary of the work, respectively the subrogatory (oblique) action (in Romanian *actiune subrogatorie/ oblica*), formulated in accordance with art. 1856 of the Civil Code. Although the wording of art. 1856 of the Civil Code is perfectible, we consider that the legislator provides a satisfactory indication by using the notion of workers. Thus, we consider that there is a sufficiently unequivocal ground to consider that the application of this article is limited to workers, natural persons. Of course, we cannot rule out a contrary interpretation in the doctrine and judicial practice in this matter. In any case, *de lege ferenda* it is necessary to clarify this aspect in order to avoid dual interpretations and non-unitary practice. If we look back at the substance of the art. 1856 of the Civil Code, it is necessary to emphasize that such a direct claim is possible, for example, when the main constructor neglects to submit an action against the beneficiary of the construction works for obtaining the payment of the price for the construction work performed. Therefore, the subcontractor may exercise this right with or without submitting an action, indirectly, obliquely, on behalf of the constructor. We mention, however, that this action/claim involves certain difficulties, respectively the subcontractors will be in competition with the other creditors of the constructor (for example, suppliers of materials), which means that they should also bear the consequences of a possible insolvency or bankruptcy of the beneficiary. In relation with the workers used by the main constructor to carry out the construction, we emphasize that the law provides to the persons who, based on an agreement concluded with the constructor, carried out an activity for services or execution of contracted work, to submit a direct claim against the beneficiary, up to the amount that the latter owes to the constructor at the time of submitting such claim (art. 1856 of the Civil Code).
- the constructor's legal mortgage cannot be registered in relation with a construction which is part of the public property. Considering the legal characteristics of the public property right, they are

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its compliance with the agreement, and the admission of the request has as a consequence the taking over of risks by the client and the obligation to pay the price (Monna-Lisa Belu Magdo, *Raspunderea civila contractuala in noul Cod civil*, Hamangiu Publishing House, Bucharest, 2017, p. 25).

[14] To this extend please see Civil sentence no. 2240 of 12.04.2016, pronounced by the Bucharest Tribunal - Civil Section VI, by which the court ruled as follows: *"This is also the situation in the present case, where the applicant is a subcontractor and requests the price of the work carried out by him for the benefit of the defendant. As he is not a worker within the meaning of art. 1856 of the Civil Code, means that it has no direct action against the beneficiary based on the provisions of this article of law, reason for which it does not have active procedural capacity. In conclusion, it will reject the application as being submitted by a person without standing to bring proceedings".*

[15] *Particular attention must be paid to this aspect of the imposition of certain subcontractors. From the perspective of competition law, the action of imposing some collaborators may represent an anti-competitive practice and a prohibited and discriminatory agreement provided in the Competition Law no. 21/1996, republished in the Official Gazette. part IV, no. 153/2016.*

inalienable, imprescriptible and unattachable[16] (art. 861 paragraph 1 of the Civil Code), in order to guarantee the payment of the price due for the construction works, the constructor cannot benefit from the legal mortgage provided by art. 1869 and art. 2386 point 6 of the Civil Code. If the contrary were admitted, we will be in the case that, following the non-payment of the price due by the beneficiary of the construction works (respectively the state or the administrative-territorial unit), the constructor will execute his legal mortgage and thus the real estate to be subject of the enforcement procedure and removed from the public property, which is inadmissible taking into consideration that the cases in which the public property right shall terminate are limited by law. To this extend, article 864 of the Civil Code provides for two cases of termination of the public property right, namely: (i) the destruction of the real estate, and (ii) the transfer of the property right from the public property of the state/the territorial administrative unit, to the private property of such owners, in case the use of the real estate is no longer of public interest. Therefore, to the extent that the use or public interest has not ceased, the immovable good cannot be removed from the public domain. The inalienability of the real estate in mandatory as long as the real estate is part of the public property[17]. However, if, under the law, the real estate is transferred from the public property to the private property of the state/the territorial administrative unit, then it can be transferred under the conditions provided by law, and therefore the constructor can register his legal mortgage on the real estate for the construction works he performed.

2. Legal remedies of the beneficiary of the construction works in case of possible abuses of the constructor in exercising the right of legal mortgage

In practice, there may be cases in which the constructor does not exercise his right of legal mortgage within the legal limits. In such case, the beneficiary of the construction works has at his disposal certain solutions to protect himself against constructor's potential abuses[18].

First of all, **the beneficiary can challenge the proof of registration issued by the land book** by which the application for registration of the legal mortgage was admitted (according to the provisions of art. 31 of Law no. 7/1996 on cadastre and real estate formalities).

The proof attesting the registration of the constructor's legal mortgage issued by the land book, shall be communicated to the person who submitted such registration, as well as to other interested persons, within 15 days from its pronouncement, but not later than 30 days from the submission date. Interested parties may submit a request for re-examination of the registration, within 15 days they received the registration proof. The re-examination request shall be solved within 20 days by decision of the competent chief registrar, namely the chief registrar of the territorial office where the building is located. Against the decision issued by the chief registrar, the owner of the building registered in the land book may submit a claim, within 15 days from the communication of such decision.

The request for re-examination and the claim against the decision are submitted to the territorial land book office and are registered ex officio in the land book. The territorial office is obliged to submit the claim with the court in whose territorial jurisdiction the building is located, providing also the court with the relevant file and a copy of the land book.

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[16] The right of public property is inalienable, so the goods that are part of the public domain cannot be transferred, under the sanction of absolute nullity of such transfer. The goods that are part of public property, cannot be subject to dismemberments of the property right (such as the rights of usufruct, use, dwelling, servitude or superficies). Also, the public property goods cannot be acquired by the one who exercises possession over them by usufruct, nor as an effect of the possession of good faith in the conditions that result from art. 937 par. (1) of the Civil Code. The right of public property is imprescriptible, which means not only that it is not extinguished by disuse, but also that a claim having as object the ownership right of a good public property can be exercised at any time, not being subject to statute of limitations even in those exceptional situations in which the claim having as object the ownership right of a good private property is subject to a statute of limitations or a time limit. The right of public property is unattachable, so the goods that are part of the public domain cannot be subject to the enforcement procedure initiated by the creditors of the owners of such goods (i.e. by the creditors of the state or of the administrative-territorial unit). (Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *Civil law course. Main rights in rem*. 2nd edition revised and added, Hamangiu Publishing House, Bucharest, 2016, p. 60).

[17] To this extend please see Gabriel Boroi, Carla Alexandra Anghelescu, Bogdan Nazat, *op. cit.*, p. 60-61.

[18] According to art. 15 of the Civil Code, *"No right may be exercised for the purpose of injuring or harming another excessively and unreasonably, contrary to good faith"*. For the conditions of the existence of abuse of law, see, Fl. Baias, E. Chelaru, R. Constantinovici, I. Macovei, *The New Civil Code, commentary on articles*, 2nd edition, C.H. Beck Publishing House, 2014 edition.

The claim against the decision can be also submitted directly to the court in whose territorial jurisdiction the building is located by the interested parties or the public notary. In such case the court will request (ex officio) to the land book, to provide him with the relevant file and a copy of the land book, as well as the proof of the registration of the claim with the land book.

In case (i) the beneficiary pays the price of the works performed by the constructor or, (ii) the proof attesting the registration of the constructor's legal mortgage issued by the land book is revoked, we emphasize that, in real estate field, the causes of termination of the mortgage produce their extinctive effect only **by de-registration[19] of such mortgage from the land book**. In this respect, the owner of the building will have to submit a series of documents with the land registry office where the real estate encumbered by the legal mortgage is located. The de-registration term provided by law is 4 working days, and 2 working days as a matter of urgency.

3. What solutions does the beneficiary of the construction works have, in case the constructor does not execute and hand over the construction on time?

If, as a result of the COVID-19 pandemic, the constructor encounters difficulties in completing and delivering the construction works within the deadlines provided in the agreement (either due to lack of staff, or due to the impossibility or delay in the timely delivery of materials by his subcontractors, and so on), the question of the legal remedies available to the beneficiary of the construction works arises.

If the constructor does not execute the construction works on time[20], thus breaching the contractual obligations[21], the beneficiary has the right, without any justification, to obtain the termination of the construction agreement. In addition, the beneficiary is also entitled to compensation for damage[22] suffered as a result of non-execution of the construction on time.

In such case, the beneficiary has the right to terminate the construction agreement[23] either by

[19] Art. 885 of the Civil Code: *"(2) The rights in rem shall be lost or extinguished only by their deregistration from the land book, with the consent of the owner, provided by a notarial deed. This consent is not necessary if the right is extinguished by fulfilling the term shown in the registration or by the death or, as the case may be, by the termination of the legal existence of the owner, if he was a legal person. (...) (4) The final court decision or, in the cases provided by law, the act of the administrative authority shall replace the agreement of will or, as the case may be, the consent of the owner"*. To this extend please see the provisions of art. 172 of the Regulation of July 9, 2014 for approval, reception and registration in the cadastral and land book records; as well as those of art. 24 para. (4) and art. 37 para. (13) of Law no. 7 of March 13, 1996 of the cadastre and real estate formalities.

[20] The constructor has the obligation to deliver the work performed within the deadline set by the parties to the agreement. There are situations in which the constructor either refuses, without reason, to hand over the work performed to the client, or this delivery is no longer possible. In the first case, the client can obtain in court the forced execution of the obligation from the constructor who unreasonably refuses to hand over the work. In case of impossibility to hand over on time the construction work, the issue of risks arises. In the construction agreement there is the problem of bearing the risks of the materials and bearing the risk of the agreement. Regarding the risk of accidental loss of materials that are subject to the construction agreement, the general rule is that the risk is borne by the owner (*res perit domino*). If the materials were purchased by the constructor, in such case the constructor will be considered the owner of the materials until the actual delivery to the customer. If the materials were purchased by the customer, in such case the customer will be considered owner during the execution of the work, thus bearing the risk of their loss. In the latter case, since the materials are in the possession of the constructor, who is obliged to take all necessary measures to keep them in good condition, he is required to prove that the loss occurred through no fault of his own, being presumed to be at fault. Regarding the risk of non-performance of the agreement, the rule is that the risk of the agreement is borne by the debtor of the obligation impossible to perform (*res perit debtori*), respectively the constructor, because he undertook his risk according to art. 1851 of the Civil Code. The constructor, as a contractual debtor, is presumed to be in fault, being required to prove that the loss of the work is not due to him, but to a foreign cause - fortuitous case, force majeure, the act of a third party. (Ion Dogaru, Edmond Gabriel Olteanu, Lucian Bernd Săuleanu, *The Basics of Civil Law*, Vol. IV. *Special Contracts*. Bucharest 2009, p. 620).

[21] The main obligation of the constructor is to perform the work on time. This obligation of the constructor is considered an obligation of result, being without a doubt that the parties agreed to obtain a result: the client wants the promised work to be executed, for example, for a construction to be executed according to the plans. At the same time, the constructor promises not only the execution of the work but an execution that complies with the provisions of the agreement or in accordance with the customs or professional rules, which correspond to the quality of a work performed by a constructor of same category. If the construction work is of inferior quality, wasn't properly performed, the constructor has not fulfilled his obligation. (Ion Dogaru, Edmond Gabriel Olteanu, Lucian Bernd Săuleanu, *op. cit.*, p. 618).

[22] The obligation of the constructor being considered a result one, if it is not fulfilled, the constructor is liable to the client according to the common law (criminal clause, damages, comminatory damages). Penalties are due only if there is a contractual clause in this regard or if they are provided by law. (Ion Dogaru, Edmond Gabriel Olteanu, Lucian Bernd Săuleanu, *op. cit.*, p. 619).

[23] To this extend please see: (i) art. 1553 of the Civil Code regarding the commissoria lex; and (ii) G. Boroi, L. Stănciulescu, *Civil law institutions*, Hamangiu Publishing House, Bucharest, 2012, p.184).

putting the constructor in default (by sending him a written notification or by submitting a court case), or, if the agreement expressly provides so, without a delay notification or any other prior formalities, except for sending to the constructor a prior written termination notice.

We emphasize that, regardless the cause of termination of the construction agreement, the constructor has the obligation to vacate the site within the term provided in the construction agreement, and in case the agreement does not provide such term, within the term provided by the termination notice. Also, in case the notification does not provide for a term, the constructor may vacate the site within a reasonable term, calculated from the date he receive the notice.

If the constructor does not voluntarily vacate the site within the term provided by the termination notice (as there is no legal provision expressly providing the removal procedure of the constructor from the site following the termination of the construction agreement), our opinion is that the actual removal of the constructor from the site can be made only on the basis of an eviction court decision (the construction agreement is not considered an enforceable title under the Code of Civil Procedure in order to initiate directly the enforcement procedure). Such opinion was also provided by the minutes of the National Institute of Magistracy, dated 5-6 March 2020 (Timișoara), which states that by providing a legal mortgage right in favor of the constructor based on art. 1869 and art. 2386 point 6 of the Civil Code, does not have also the significance of considering the construction agreement an enforceable title in order to initiate the enforcement procedure of the mortgage.

Regarding the evacuation procedure, the beneficiary has two alternative options regarding the submission of the court claim, namely (i) the special urgent evacuation procedure, regulated by art. 1034 end seq. of the Code of Civil Procedure (the eviction decision pronounced in the first court is an enforceable title), or (ii) the ordinary evacuation procedure (the eviction decision pronounced by the first court is not enforceable title and the beneficiary must obtain a final decision to this extend). In addition, if the constructor does not submit the construction work on time, the beneficiary may also invoke the exception of non-performance[24] of the agreement and may refuse to pay the price requested by the constructor.

4. Waiving the right of legal mortgage

The beneficiary of such right may waive of the mortgage right, which means that, according with art. 2428 of Civil Code, the mortgage will be considered extinguished and the mortgage creditor will no longer be able to benefit from the advantage offered by the legal provisions to this extend. According to art. 161 of the Regulation of 09.07.2014 for approval, reception and registration in the cadastral and land book records, approved by Order 700/2014, the waiver may be given either unilaterally (through issuance of a statement in notarized form) or bilaterally (within the parties' agreement).

In order for the waiver of the legal mortgage to be valid and efficient, such action must be expressly stipulated as indicated in the provisions of art. 13 of the Civil Code which state that the waiver of a right cannot be legally presumed.

Regarding the form of the document acknowledging such waiver (i.e. document in authentic form or under private signature), we underline the following opinion:

a) in case the constructor waives the right to a legal mortgage by a unilateral and independent document, from the above-mentioned legal provisions, it results undoubtfully that the statement should be issued in authentic form.

b) in the event that the constructor waives the right to a legal mortgage by choosing to include a corresponding waiver statement clause in the construction agreement - as the law does not provide

[24] To this extend please see art. 1556 of the Civil Code regarding the exception of non-execution. The exception of non-execution operates as a modality of private justice, not being necessary a request addressed to the court nor the delay of the other contracting party (I. Urs, S. Angheni, *Civil Law*, vol. II, Ed. Oscar Print, Bucharest, 1997, p. 223 ff.). Such exception produces its specific effects by simply opposing the party requesting the performance of the agreement. This is the difference between the exception of non-execution and the termination of the agreement, which, as a rule, is pronounced by the court (V. Stoica, *Unilateral Declaration of Resolution*, in „Dreptul" no. 8/2006, p. 36-67).

for the obligation to conclude such agreement in authentic form (the constructor may register with the land book his legal mortgage right based on the construction agreement conclude under private signature). Therefore, it could be interpreted that, even in such a hypothesis it would not be necessary to conclude the construction agreement in authentic form. However, nothing prohibits the parties to voluntarily choose such authentic form.

However, on the opposite side, according to the legal provisions applicable to real estate register formalities[25], for the deregistration of the rights *in rem* from the land book, the waiver of the ownership right, it seems that it is necessary the will of the holder of such right, provided through (i) a deed in authenticated form, (ii) the final court decision or, (iii) in the cases provided by law, the act of the administrative authority that will replace the agreement of will or, as the case may be, the consent of the holder of the right.

Thus, in order to avoid a wrong interpretation, we consider that a distinction must be made between two distinct cases. The first case concerns the waiver of a legal mortgage right that was never registered with the land book. Therefore, the provisions applicable to the deregistration of the rights in rem from the land book shall not apply in this situation. Only in the case the constructor submit with the land book an application for register its legal mortgage right, the beneficiary of the real estate can challenge such action of the constructor by invoking the contrary provisions of the construction agreement concluded between them (including any addendum to such agreement by which the constructor has waived its right of legal mortgage). This second hypothesis concerns the waiver of a legal mortgage right that was registered with the land book in the absence of an express contractual clause, respectively in the absence of an authentic statement of waiver of this right. Our opinion is that in this hypothesis art. 885 paragraph 2 of the Civil Code which imposes the authentic form of the document, shall apply.

Waiver of the formality of registering the right of legal mortgage with the land book. In relation with the waiver of the formality of registering the right to a legal mortgage with the land book, we emphasize that there are also certain discrepancies between the applicable legal provisions. Thus, art. 19 paragraph (3) of the Civil Code, provides that *"any waiver or restriction of the right to perform a publicity formality, as well as any penalty clause or other sanction stipulated to prevent the exercise of this right are deemed unwritten"*.

On the other hand, art. 37 paragraph 6 of Law no. 7/1996 of the cadaster and real estate formalities, provides that *"In all cases where a real estate privilege or a legal mortgage is granted by law to guarantee any right or claims, they shall be registered ex officio in the land book, except for the situation in which the parties expressly waive this benefit"*.

Therefore, we can observe the incompatibility of the waiving at the registration formality provided by the special law with the imperative norms of the opposability of the tabular rights provided by the Civil Code.

In notarial practice, the situation of waiving the registration of the seller's legal mortgage (i.e. sales agreements concluded by obtaining a real estate loan, in order to ensure an exclusive guarantee of the bank creditor) is frequently encountered.

In case the parties would insert in their agreement a clause by which they would waive only to the fulfillment of the land book formalities, according to the rule provided by art. 19 paragraph (3) of the Civil Code, such clause will be considered by the courts as unwritten and therefore will be null and void.

Therefore, the doctrine[26] stated that *"the court seized to rule on such a clause considered unwritten, will have to interpret the act of waiver as a waiver of the mortgage right, and not as a waiver of its registration with the land book. Therefore, the issue will be decided depending on how the court will understand whether or not to admit the superiority of the principle of publicity provided by art. 19 paragraph (3) of Civil Code in relation to the exception from the ex officio registration*

[25] Provided by the Regulation dated 09.07.2014 for approval, reception and registration in the cadastral and land book records, approved by Order 700/2014 (i.e. art. 172, art. 211); the Civil Code (i.e. art. 885); the Law no. 7/1996 of the cadastre and real estate formalities (i.e. art. 37 paragraph 13); etc.

[26] To this extend please see Sferdian Irina, *op. cit.* (2015).

regulated by the special law. The solutions of the courts could be contradictory as long as our legislator himself amended the provisions of Law no. 7/1996 in this manner, subsequent to the entry into force of the Civil Code, when the norms provided by art. 19 para. (3) of the Civil Code and those of art. 230 lit. bb) of Law no. 71/2011[27] *were already applicable".*

We consider that interpretation of the waiver of the benefit of the registration of the legal mortgage right is correct only of it equals to the waiver of the legal mortgage right itself. As the legal provisions are not very clear and leave room for several interpretation, we recommend that this important issues should be in the future clarified and aligned with the current legal doctrine to which we agree with. Thus, the lege ferenda, the legislator should expressly provide that by waiving the legal mortgage, it is implicitly presumed to include also the deregistration of this right. This would clarify the incompatibility of waiving the registration formality provided by the special law with the imperative norms of the opposability of the tabular rights provided by the Civil Code.

5. Conclusion

The dynamics of the relationship between the constructor and the beneficiary of the construction works will continue to undergo adjustments in the next period, insofar as the effects of the COVID-19 pandemic will be reflected on their patrimonial situation, to which can be added the uncertainties, the incoherence of the measures in the political and sanitary environment. In this context, an increase of the disputes in this area it's expected. And, as the volume of construction works in the first quarter of 2020 reached a record level for a similar period of the last five years (according to data provided by the National Institute of Statistics), the incidence of disputes between constructors and beneficiaries is expected to increase.

The ideal way to resolve these disputes is, of course, the dialogue. However, when the parties fail to reach an agreement, the law provides for both, the constructors and the beneficiaries of the construction works, certain mechanisms through which they can defend or recover any damage. Understanding these options and choosing the optimal solution to follow can make a noticeable difference in terms of settlement time and results.

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[27] Corresponding to art. 37 paragraph 6 of Law no. 7/1996 of the cadastre and of the real estate formalities, in the form applicable at the date of this article.