

SOME CONSIDERATIONS ON THE PERIODIC OWNERSHIP

Lecturer **Ana-Maria LUPULESCU**¹

Abstract

Under the previous legal regulation, periodic ownership had generated long and, most often, controversial discussions in the juridical literature. As a result, the Civil Code currently in force recognizes the existence of periodic ownership as a case of forced co-ownership, while establishing the basis for its creation, the rights and obligations of co-owners, as well as the ways to terminate this form of forced co-ownership (art. 687-692 Civil Code), even if it is regulated, inexplicably, in a separate chapter of the Civil Code, and not in the section dedicated to forced co-ownership. Unlike other cases of forced co-ownership, periodic ownership has a number of specific features, from several points of view, such as the criterion for determining the extent of the right belonging to each co-owner, its legal content or its exercise. For these reasons, we believe that a critical analysis of the applicable legal regulation in the field of periodic ownership could be relevant and useful both for theoreticians of law, but also for practitioners.

Keywords: *periodic ownership, forced co-ownership, juridical nature, particularities.*

JEL Classification: K11, K15

1. Introduction

Under the previous regulation, periodic ownership caused long and, most often, controversial discussions in the juridical literature. Thus, some provisions regarding the use of immovable goods in a time-sharing system were included in Law no. 282/2004 on certain aspects of contracts relating to the acquisition of a right of use of immovable goods for a limited period², which transposed into our law the provisions of Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis³. This law mainly regulated the contract for acquiring a right to use for a limited time of some immovable goods, without establishing the legal nature of the rights transmitted by it, limiting itself to the generic formula, slightly confusing, of „real right or any other right regarding the use”, which gave rise to controversies in the juridical literature⁴. Moreover, the legal regulation contained in Law no. 282/2004 was abrogated as a result of the adoption of the Government Emergency Ordinance no. 14/2011 for the protection of consumers when concluding and performing contracts regarding the acquisition of the right to use for a limited timeframe of one or more accommodation spaces, long-term contracts regarding the acquisition of benefits for holiday products, resale contracts, as well as and exchange contracts⁵. The latter normative act contains a clearer regulation, from the analyzed perspective, in the sense that it expressly refers to the contracts concluded between professionals active in the field of tourism and consumers, having as object “the acquisition of the right to use for a limited timeframe of one or several accommodations spaces” (art. 4 letter a of Government Emergency Ordinance no. 14/2011).

Therefore, in the context of the prior regulation, particularly of the one contained in Law no. 282/2004, the existence of periodic ownership was controversial in the juridical literature. As a matter

¹ Ana-Maria Lupulescu - Faculty of Law, Bucharest University of Economic Studies, Romania, ana.lupulescu@drept.ase.ro.

² Published in the Official Monitor of Romania, Part I, no. 580/30 June 2004.

³ Published in the Official Journal of the European Union no. L280 of 29 October 1994. It was subsequently repealed following the adoption of Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, published in the Official Journal of the European Union no. L33 of 03 February 2009.

⁴ For more details, see T. Sâmbrian, *Proprietatea în sistem "time-sharing" - proprietate periodică - o nouă modalitate a dreptului de proprietate*, in Dreptul no. 5/1997, p. 35; B.C. Stoica, S. Stoica, *Investițiile imobiliare în regim de „time-sharing” între miraj și posibilități de implementare*, in Pandectele Române no. 5/2004, p. 213; I. Popa, *Coproprietatea spatio-temporală*, in Pandectele Române no. 5/2004, p. 227; C. Toader, *Contractul de time-sharing, acum reglementat în România*, in Revista de drept comercial no. 9/2004, p. 152; L. Stanciulescu, *Particularitățile contractelor de locațiune sezonieră, reglementate de Legea nr. 282/2004*, in Revista de drept comercial no. 9/2004, p. 23.

⁵ Published in Official Monitor of Romania, Part I, no. 134/22 February 2011.

of fact, the very denomination of this juridical institution caused numerous discussions, within the doctrine being advanced several options, very different one from the other (ownership in timesharing system, multi-ownership, periodic ownership, spatial-temporal ownership etc.)⁶. Furthermore, even under the conditions of this juridical institution being acknowledged, there have been diverging opinions regarding its juridical nature and the applicable regime. Thus, certain authors have considered periodic ownership as being a distinct modality of the ownership right⁷. On the contrary, some other authors have considered that periodic ownership can be explained only within the concept of co-ownership⁸.

Through the regulation contained in the Civil Code, the current Romanian legislator intends to put an end to these controversies, recognizing the existence of periodic ownership as a case of forced co-ownership. Therefore, in art. 687-692, the Civil Code establishes the basis for the creation of this right, the rights and obligations of the co-owners, as well as the ways of termination of this form of forced co-ownership.

However, in terms of legislative technique, it is quite difficult to understand the reason of the legislator, which does not regulate in the same section, dedicated to forced co-ownership, all its cases, as listed in art. 646 of the Civil Code. Thus, the periodic ownership is regulated in a separate chapter, respectively in Chapter V - Periodic ownership within Title II - Private property of Book III of the Civil Code, and not in the section dedicated to forced co-ownership, contained in Chapter IV within the same title. The same legislative solution was also adopted regarding the goods that constitute family memories, regulated in the matter of inheritance (in Chapter III within Title IV - Transmission and division of inheritance of Book IV of the Civil Code), although these goods also constitute a case of forced co-ownership, expressly stated as such by law.

We consider that the only explanation of this legislative option is the fact that these two cases of forced co-ownership, respectively periodic property and family memories, are fundamentally different from all others, because they do not have the essential characteristic of forced co-ownership, which justifies its creation and its existence, namely the relationship of indispensable dependence, of accessoriness between two categories of goods, in the sense that the goods in forced co-ownership, by their nature or destination, are indispensable to the exercise of the exclusive ownership right over other goods. However, even under these conditions, we consider that the regulation of periodic ownership in a separate chapter from the one dedicated to common ownership only generates new controversies regarding its legal nature.

2. The legal nature and regime of periodic ownership

According to art. 687 of the Civil Code, in the absence of a special regulation, there is periodic ownership whenever several persons exercise successively and repetitively the attribute of use, specific to the ownership right, over a movable or immovable thing, within determined time intervals, equal or unequal. Moreover, in relation to the express provisions contained in art. 647 point 1 of the Civil Code, the periodic property constitutes a case of forced co-ownership and it cannot cease, in principle, by division. Consequently, in this legislative context, we cannot agree with some opinions expressed in the juridical literature, according to which the periodic ownership is in reality a distinct form of common ownership, together with the common ownership on quotas and the joint ownership⁹.

Therefore, from the provisions of art. 687 of the Civil Code, which do not define the periodic ownership itself, but rather outlines the way of exercising this form of co-ownership, results a series of characteristic features thereof. Thus, on the one hand, the attribute of use exercised by the holders of this right is part of the legal content of the ownership right, which is a real right. Moreover, the use

⁶ See L. Uță, *Modalitățile dreptului de proprietate*, in M. Uliescu, coord., *Noul Cod civil. Comentarii*, Universul Juridic Publishing House, Bucharest, 2010, p. 190 and the authors referred to therein.

⁷ T. Sâmbrian, *op. cit.*, p. 36; B.C. Stoica, S. Stoica, *op. cit.*, p. 220.

⁸ V. Stoica, *Drept civil. Drepturile reale principale*, C.H. Beck Publishing House, Bucharest, 2009, p. 284-285; L. Pop, L.M. Harosa, *Drept civil. Drepturile reale principale*, Universul Juridic Publishing House, Bucharest, 2006, p. 219.

⁹ L. Uță, *op. cit.*, p. 168.

is exercised successively and repetitively by several persons, reason for which the periodic ownership appears as a form of common ownership, characterized by the plurality of holders.

In connection with the existence of the plurality of holders, we cannot agree with the opinions expressed in the juridical literature in the sense that this would not characterize, in the hypothesis of periodic ownership, a case of common ownership¹⁰. On the contrary, the exclusive character of the ownership right prevents the coexistence, on the same thing, of two or more ownership rights belonging to different persons. The uniqueness of the thing that forms the object of the ownership right excludes the possibility that it belongs, at the same time, to different exclusive owners.

Instead, in the case of common ownership, there are several divided rights, of the same nature, which belong, at the same time, to several persons, rights that have as object the same thing. Moreover, the fact that the plurality of holders characterizes essentially and exclusively the common ownership clearly results from the provisions of art. 631 of the Civil Code, according to which the legal regulation regarding the common ownership, contained in the Civil Code, “applies whenever, based on a juridical act or other way of acquisition provided by law, the right of private ownership has 2 or more holders”.

At the same time, we cannot accept the idea that, in the case of periodic ownership, each owner is the exclusive holder of the ownership right, but only during the period of time allocated to him/her, because it affects the perpetual character of the ownership right, right whose existence is not limited in time.

Therefore, the periodic ownership is characterized by the fact that on the same thing there is an ownership right that belongs to several persons, and the exercise of the attributes that compose the content of their right is done not depending on the extent of the ownership right of each co-owner (the quota), but depending on the pre-established period of time, during which each co-owner exercises in full and exclusively some of the attributes of the ownership right. In other words, the criterion according to which both the division of the ownership right and the exercise of its attributes is done is no longer the mathematical share (quota) of the right, but a certain period of time. The mathematical, ideal share or quota of the right is replaced by a fraction corresponding to the time interval in which each co-owner exercises the attributes of the ownership right over the common thing.

The object of periodic ownership can consist of both immovable and movable goods. At the same time, considering the particularities of the periodic ownership, determined by the fact that, at the end of the period of time allotted to him, each co-owner must allow the next to exercise the attributes of ownership over the common thing, only non-consumable goods can be the object of periodic ownership. The same conclusion also results from the provisions of art. 690 para. 2 of the Civil Code, according to which the acts of material disposition by which the substance of the thing is consumed can be concluded, exceptionally, only with the consent of all co-owners, because it irreversibly affects their rights over the thing.

As we have shown, in the case of periodic ownership, the ownership right is also divided from an intellectual point of view, this division being the essence of the common ownership, but the extent of these fractions is expressed in time intervals, which can be equal or unequal, but necessarily determined (and not determinable).

According to the regulation dedicated to it, contained in the Civil Code, the right of periodic ownership is created only by contractual means, based on a juridical act (art. 688) and ceases as a result of the acquisition by one person of all quotas (in the form of time intervals) of the right (art. 692), as well as in other ways provided by law.

Taking into account the generality of the regulation contained in the Civil Code regarding the basis of the creation of periodic property, it can be argued that this right can arise through juridical acts *inter vivos* or *mortis causa*, as well as juridical acts made by onerous title or by gratuitous title. In the case of immovable goods, the acquisition of the periodic ownership right is conditioned by the registration in the real estate register, except for the cases in which the basis of the acquisition is

¹⁰ See, in this regard, M-L Belu Magdo, *Proprietatea periodică*, in Dreptul no. 5/2019, p. 12.

constituted by the will (art. 887 para. 1 Civil Code). Regardless of the nature of the juridical act by which the periodic ownership right is acquired, it must include, obligatorily, the time interval during which each co-owner is entitled to exercise the attributes of his/her right over the common thing.

Regarding the termination of periodic property, in addition to the case expressly regulated by law (art. 692 Civil Code), which actually produces a transformation of the periodic property into an exclusive ownership right, belonging to a single owner, it may also cease in the hypothesis of the total loss of the thing that is its object or of the acquisition of the ownership right over the whole thing through acquisitive prescription. Also, similar to other cases of forced co-ownership, periodic ownership cannot cease by judicial division, but could cease by the agreement of all co-owners, namely by voluntary division (art. 671 paragraph 3 of the Civil Code).

3. Particularities regarding the exercise of periodic ownership

In terms of its exercise, the periodic ownership has a series of particularities. Thus, unlike the other cases of co-ownership, in which the owners exercise simultaneously and concurrently the attributes of the ownership right, in the case of the periodic ownership right each co-owner exercises, for the period of time assigned to him/ her, alone and independently of the other owners, the attribute of use from the content of the ownership right over the common thing (art. 687 Civil Code). In connection with the wording, imprecise according to us, contained in art. 687 of the Civil Code, the question arises what happens to the other attributes that compose the content of the ownership right, possession and disposal. This is all the more so as the lack of these attributes in the content of the ownership right is equivalent to the very lack of this right. Therefore, we consider that the periodic ownership right includes in its content all the attributes of the ownership right.

Its holders also exercise within the established unit of time, which corresponds to their share, the attribute of possession, and not only that of use¹¹. However, the exercise of these attributes takes into account the particularities of the periodic ownership, both the material possession of the thing and the use being limited to the determined time interval, allocated to the respective co-owner within a calendar year. From this perspective, as it has been pointed out in the juridical doctrine, the exercise of possession and use, as attributes that are part of the legal content of the periodic ownership, is done in a successive, repetitive way, this manner being determined by the time period in which the co-owner is in contact with the common thing¹². Instead, the exercise of the attribute of material or juridical disposal regarding the thing that is the object of the periodic ownership can be made only by all co-owners, acting together. Another interpretation, although expressed in the literature¹³, is contrary to the rules contained in art. 689-690 Civil Code.

In this sense, any of the co-owners can conclude by himself only juridical acts of administration and disposal having as object the time interval (quota) to which he is entitled (art. 689 paragraph 1 of the Civil Code). Moreover, a similar rule is contained in art. 634 para. 1 of the Civil Code regarding the manner of exercising the right of each co-owner over his share of the ownership right, in the hypothesis of the ordinary co-ownership. In both cases, disposing of his/ her fraction of the ownership right, regardless of whether it is expressed in the form of a mathematical quota or a time interval, the disposing co-owner will be replaced by another person, who acquires a right of the same nature and extent, which does not affect the rights of others, nor the common thing, in its materiality.

Instead, all juridical acts of administration and disposal that have as object a different time period than the interval at which the co-owner is entitled will be non-enforceable to the one to whom the respective unit of time actually belongs. In the relations with third parties acting in good faith, another sanction will be applicable to these acts, namely the relative nullity (art. 689 paragraph 3 of the Civil Code). The solution of the law is normal and perfectly compatible with the particularities of

¹¹ See, for the opposite opinion, V. Stoica, *op. cit.*, p. 286.

¹² L. Uță, *op. cit.*, p. 194.

¹³ In the sense that the holders of periodic ownership right also exercise, exclusively, the attribute of disposal over the common goods within the corresponding time interval, L. Uță, *op. cit.*, p. 192-194.

the common ownership. Thus, a co-owner, being the holder only of a fraction of the ownership right over the common thing, cannot dispose alone of its parts that do not belong to him/her. In the same sense are the provisions of art. 642 of the Civil Code, enacted in the matter of ordinary co-ownership, regarding the sanction of non-enforceability of administration or disposal acts concluded by a co-owner, while exceeding the limits of his/her right over the common thing.

The co-owners also have a series of obligations, which include the main obligation that, at the end of the time interval during which they are entitled to exercise their right, to hand over the thing to the co-owner entitled to use it in the next interval (art. 690 para. 3 Civil Code). At the same time, regarding the conclusion of juridical acts of conservation by any of the co-owners, acting alone, this is not only a possibility, as for the other co-ownership cases, but even an obligation, which must be correlated with the obligation to hand over the thing to the next holder, because the acts of conservation are designed, within the meaning of the law, to maintain the thing in a state of normal use, thus avoiding the hindrance or impediment of the exercise of rights by the other co-owners (art. 690 para. 1 Civil Code).

Also in connection with the exercise of the right of periodic ownership, unlike the regulation contained in the Civil Code in connection with the other forms of common ownership, on this matter art. 691 of the Civil Code expressly provides for the possibility of judicial exclusion of a co-owner if he seriously disturbs the exercise of the periodic ownership right by the other co-owners. Therefore, within the meaning of the law, the sanction of exclusion can be applicable only upon the request of the co-owner affected in his/her right, by judgment of the court of law, and only if one of the other co-owners or a third party buys the share of the excluded owner (art. 691 paragraph 2 and 3 Civil Code). Without entering into details in relation to this legal provision, by which the legislator probably intended to counterbalance the inconveniences resulting from the impossibility of resorting to judicial division in the case of periodic ownership, we emphasize that it has caused grounded debates and criticisms in the juridical literature, under the aspect of its inadequacy with the legal institution of the ownership, including from a terminological point of view, of the inaccuracy of the judicial exclusion procedure, but also of the circumstance that it is not sufficiently comprehensive, i.e. it does not cover all the hypotheses that could arise in such a situation¹⁴. Although we consider these criticisms to be well-founded, we cannot agree with the idea, expressed in the juridical literature¹⁵, that this legal provision would violate the constitutional guarantees in the matter of the private ownership right. Actually, it is a form of forced sale, ordered by the court of law by judgment, which, unlike the forced execution, does not involve the intervention of forced execution officers. At the same time, precisely in order not to generate an unjust deprivation of the owner of his right, without compensation, the exclusion is possible only in the hypothesis in which one of the other co-owners or a third party buys the share of the excluded one. Basically, this judicial procedure is completed by pronouncing a judgment meant to replace a sale-purchase contract.

In order to decide on the exclusion, the court will first have to issue a decision admitting in principle the request for exclusion, in which it will be shown that the conditions of exclusion are met, decision that can be challenged separately. After the decision on the admission in principle has remained definitive, the price of the forced sale will be established through the agreement of the parties, and in the absence of such an agreement, based on expertise. After recording the price at the bank to be established by the court, the judgment will be pronounced and will replace the sale-purchase contract for the share of the excluded co-owner (art. 691 paragraphs 4 and 5).

4. Conclusions

Forced co-ownership is one of the forms in which the right of common ownership on quotas may appear. It exists and is maintained, in principle, independently of the will of its holders, having

¹⁴ For more details, see M-L Belu Magdo, *op. cit.*, p. 15-18; on the same topic, C. Jora, I. Ciochina-Barbu, *Unele consideratii in legatura cu prevederile art. 691 C. civ., referitoare la obligatia de despagubire si excluderea in cazul dreptului de proprietate periodica*, in *Dreptul* no. 8/2017, p. 22-24.

¹⁵ C. Jora, I. Ciochină-Barbu, *op. cit.*, p. 22.

a permanent character, determined by the permanence of the purpose that led to its creation. Thus, the object of forced co-ownership is a thing or several goods which, by their nature and destination, can only be used jointly, in a permanent manner, by several co-owners. Their division is impossible, because in this way the goods become inappropriate for the use for which they are intended.

The notion of forced co-ownership is based on two essential ideas, also considered by the law, namely the idea of the existence of goods which, by their nature and destination, can only be used in common and which are indispensable to others, which constitute the object of an exclusive ownership right and, secondly, the idea of necessary accessory, of dependence between goods, for the proper exercise of the exclusive ownership right. Therefore, in principle, in the case of forced co-ownership, each co-owner is both the holder of an exclusive ownership right over a thing and, at the same time, the holder of a forced co-ownership right on quotas over other goods, which serve to the exercise of his exclusive right¹⁶.

However, all these characteristics do not find their applicability in the case of periodic ownership, although it is expressly conceived by the legislator as a case of forced co-ownership. Nevertheless, the option of the legislator to provide an express legal regulation on periodic ownership is welcome, it has undoubtedly tried to conceive the legal provisions as sufficiently coherent and comprehensive in order to put an end to the controversy over the existence and legal nature of this form of co-ownership. Thus, the Civil Code currently in force has tried, and from certain points of view has succeeded, to clarify several aspects regarding the legal nature, the legal content, the particularities or the exercise of this form of forced co-ownership. However, the legislative approach is perfectible, because the legislator chooses some legislative solutions that are either questionable, incomplete or insufficiently outlined.

Bibliography

1. B.C. Stoica, S. Stoica, *Investițiile imobiliare în regim de „time-sharing” între miraj și posibilități de implementare*, in „Pandectele Române” no. 5/2004.
2. C. Jora, I. Ciochină-Barbu, *Unele considerații în legătură cu prevederile art. 691 C. civ., referitoare la obligația de despăgubire și excluderea în cazul dreptului de proprietate periodică*, in „Dreptul” no. 8/2017.
3. C. Toader, *Contractul de time-sharing, acum reglementat în România*, in „Revista de drept comercial” no. 9/2004.
4. D. Lupulescu, *Drept civil. Drepturile reale principale*, Lumina Lex Publishing House, Bucharest, 1997.
5. Ion Popa, *Coproprietatea spațio-temporală*, in „Pandectele Române” no. 5/2004.
6. L. Pop, L.M. Harosa, *Drept civil. Drepturile reale principale*, Universul Juridic Publishing House, Bucharest, 2006.
7. L. Uță, *Modalitățile dreptului de proprietate*, in M. Uliescu (coord.), *Noul Cod civil. Comentarii*, Universul Juridic Publishing House, Bucharest, 2010.
8. M-L Belu Magdo, *Proprietatea periodică*, in „Dreptul” no. 5/2019.
9. T. Sâmbrian, *Proprietatea în sistem „time-sharing” - proprietate periodică - o nouă modalitate a dreptului de proprietate*, in „Dreptul” no. 5/1997.
10. V. Stoica, *Drept civil. Drepturile reale principale*, C.H. Beck Publishing House, Bucharest, 2009.

¹⁶ D. Lupulescu, *Drept civil. Drepturile reale principale*, Lumina Lex Publishing House, Bucharest, 1997, p. 76-77.