LEGAL REGIME OF SELLING BY TASTING IN THE PREVIOUS AND CURRENT CIVIL CODE

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Abstract

This article examines the regulations on selling by tasting included in the previous Civil code (of 1864) compared to those of the current Civil Code (of 2009). The study reveals to an equal extent the continuity elements and the aspects regulated for the first time in the current Civil Code in the researched matter.

Although it seems paradoxical, since the rules of the current Civil Code on selling by tasting have entered into force fairly recently, nevertheless, the author identifies some flawed regulations in the field and issues ferenda law proposals aimed to confer clarity, cohesion and efficiency to legal norms.

The paper highlights the doctrinary opinions expressed in the examined area and the author's personal opinions that contribute to the clarification of obscurities of interpretation of the analysed norms, subject to raise jurisprudence disputes

Key words: selling by trying; the time of conclusion of the selling by tasting; the transfer of ownership; the term for giving approval; the risk of extinguishment of the good.

JEL Classification: [K12]

1. Legal regime of selling by tasting in the previous Civil Code.

The law of selling by tasting is regulated by the Civil Code of 1864 in art. 1301. According to this law "*As regards wine, oil and other similar goods that, normally, are tried before they are purchased, the selling is not performed until the buyer has tried them and has declared that they are suitable*."

Even after a synthetic review of the provisions mentioned, we see that we are subject to the previous Civil Code as regards some ideas that shaped the judicial regime of selling by trying.

We give an overview of these provisions in the hope of rendering, by comparison, a logical coherence to the judicial regime of selling by trying in the current Civil Code, by highlighting the continuity and the novelty elements characterizing the latter.

First of all, we underline that *the moment of conclusion of the contract of selling by tasting* is when the person who wants to buy, namely the future buyer, has checked the good for sale by trying it and expressed his/her willingness to buy it.

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Until the good is tested and the potential buyer gives its consent that the good is satisfactory, no sale contract is concluded. At best, before tasting, we are dealing with a unilateral selling proposal by the selle[1].

Another characteristic is that selling by tasting *did not have the judicial nature of a sale subject to a condition*[2].

If the agreement was performed under a condition, the sale would have been considered a purely potestative condition and, consequently, it would have been entirely void, being at the exclusive discretion of the buyer.

In reality, trying the good for sale led to the conclusion or not of the contract and not to its execution.

In the specialized literature[3], the idea that the evaluation of the good by tasting is purely subjective for the buyer was expressed as suggestively as possible by the wording ”nothing is as personal as taste”. As a matter of fact, this is a axiomatic truth fully reflected in the Latin dictum ”*De gustibus non disputandum”*[4].

As such, the so-called buyer, namely the potential buyer may refuse to buy the good tasted by saying that it does not correspond to its senses, pleasures, despite the fact that, objectively speaking, the good is consistent with quality standards[5].

As regards *the scope* of the selling by tasting, the goods subject to this type of sale that were from the category of fruits, alcoholic drinks, dairy products, etc. which were not pre-packaged, but were sold in bulk.

The doctrine[6] has revealed that we are no longer dealing with selling by tasting if the goods of the type mentioned are in pre-packaged recipients and have a certain brand, whose characteristics were already certified and known.

The action of tasting by the person who was about to buy the goods was conducted at the location of the goods or at the place where they are given for trying.

The term of tasting was not stipulated by law.

In the specialized literature[7] it was stipulated that the term of tasting is that established by convention or the one stipulated by law for the delivery of the good.

We think that the allegation mentioned could not be shared.

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[1] See Fr. Deak, L. Mihai, R. Popescu*, Tratat de drept civil.Contracte speciale*, Universul Juridic, Bucharest, 2006, p. 137; Beret O., *Vente*, in Repertoire civil, Dalloz, 1996, p. 68; D. Alexandresco*, Explicațiunea teoretică și practică a dreptului civil român. Vol. VIII*,.Socec, Bucharest, 1925, p. 199.

[2] See R.I. Motica, F. Moțiu, *Contracte civile, Teorie și practică judiciară*, Edit. Lumina Lex, Bucharest,2004*,* p. 156; I. Dogaru,- coordonator, *Drept civil. Teoria generală a actelor cu titlu gratuit*, Ed. All Beck, Bucharest, 2005, p.69.

[3] See Ph. Malaurie, L. Agnes, P.-Y. Gautier, *Les contrats speciaux*, 2nd ed.,, Defrenois, Paris, 2005, p. 67, apud C.E Mangu,*Riscul în principalele contracte civile potrivit noului Cod civil*,.Universul Juridic, Bucharest, 2013, p. 317.

[4] Latin phrase which means*In matters of taste, there can be no disputes* – see L. Cârjan, *Dicționar de cultură juridică latină,* Universitară, Bucharest,2013, p. 65.

[5] See M. Mureșan, *Contractele civile. Vol I. Contractul de vânzare-cumpărare,* Cordial Lex, Cluj-Napoca, 1996, p. 113.

[6] See D. Chirică, *Tratat de drept civil. Contracte speciale.Vânzarea și schimbul, vol.I*, C.H.Beck, Bucharest, 2008.,p. 288.

[7] See D. Alexandresco, *op. cit.,* p. 200,I. Dogaru, *op. cit.*, p. 67.

On the one hand, because art. 1301 of the previous Civil Code stipulated, expressis verbis, that selling by tasting does not exist as long as the buyer has not tasted the goods and has not expressed its approval to buy them (”the sale does not exist until the buyer has tried them and declared that they are suitable.”).

But, since the sale convention was not concluded it was logical that the trying term could not be foreseen in a non-existent law.

On the other hand, not even the second thesis of the allegation that we object, namely the one referring to the circumstance that the tasting term is the term set forth by the law for the handover of the good, can be accepted.

Without insisting too much on this matter, we underline that the authors do not specify what law they refer to.

If we refer to the previous Civil Code, it is obvious that the text regulating the selling by trying does not talk about the delivery of the good.

Equally, it is not clear who has the obligation to deliver the good in order to establish the term of tasting. Probably the authors were referring to the term of delivery (which means of return) of the good by the person who tried it, to its owner. Since this term is not stipulated by law and since the goods offered for trying are presumed to be subject to consumption, not to return, we think that the author’s solution mentioned is not valid.

By contrast, we adhere to another thesis[8], according to which if the parties did not set the date for tasting the goods, this operation should have been made within a reasonable term.

The judicial norms included in the previous Civil Code regarding the selling by tasting were *additional*. In this situation, the potential seller and the potential buyer could reconsider the waiver to the benefit of tasting[9].

In so doing, we are not in the presence of selling by tasting, but maybe this is a variety sale called selling goods by type.

Finally, the doctrine[10] also stipulated that the parties could extend the judicial regime of selling by tasting also to other goods that were not normally subject to this kind of sale. The example given is the parties’ agreement that the potential buyer should read a book provided by the seller for a time and then, based on the subjective opinion of the reader regarding the correspondence of the book’s content with his/her tastes, to decide whether to buy the book or not.

[8] See J.Huet, *Responsabilite civile*, in Revue trimestrielle de droit civil, nr.4/1986, p.200.
[9] See D. Chirică, *op. cit,* p. 288.
[10] B. Gross, Ph. Bihr, *Contrats, tomul I. Ventes civiles et commeciales. Baux d’habitations, baux commerciaux,* PUF, Paris, 1993, p.92.

2. The legal regime of selling by tasting in this Civil Code

Selling by tasting is also regulated by the Civil Code in force[11].

In the new regulation there are many characteristics of the legal regime of selling by tasting taken from the previous code. The new regulation of the analysed field has an apodictic foundation that does not contradict the reports and the nuances of the previous regulation, deemed necessary.

In accordance with the provisions of art. 1682 of the Civil Code:

"(1) The selling as long as the good corresponds to the buyer's tastes is ratified only if the buyer has given its consent within the term agreed or set by the customs. If this term does not exist, the provisions of art. 1681 par. (2) shall apply.

(2) If the good sold is at the buyer and the buyer does not decide within the term set out in par. 91), the sale is considered ratified at the expiry of the term."

The provisions of art. 1681 par. (2) of the Civil Code stipulate that if it is not agreed by the parties and if this does not result from the customs, the term is of 30 days from the handover of the good.

Comparing the provisions of this Civil Code regarding selling by tasting with those of the previous Civil Code, we can easily notice some regulatory similarities and differences.

Therefore, as in the case of the old regulation, *selling by tasting is validly ratified* when the potential buyer declares that the good tried meets its expectations and agrees to buy it.

Moreover, as in the case of the previous Civil Code, in case of selling by tasting, *the transfer of ownership* takes place along with the identification of the goods to be sold.

As regards the goods in block or individually determined, the ownership is transferred from the seller's patrimony to the buyer's patrimony with the latter's consent regarding the qualities of the good, if the good tasted was from the category of those goods[12].

Similarly, the transfer of risks from the seller to the buyer is performed at the time of the actual delivery of the goods to the buyer.

The matters regarding the scope, the place of tasting, the additional character of the rules regarding the waiver of the benefit of trying or as regards the extension of the scope of this variety of selling are similar to those of the previous legal regime.

The novelty that the current Civil Code brings to the matter examined refers to *the term of expressing the approval* to the potential buyer regarding the purchase of the good tried.

The term for expressing the result of tasting can be: a) the term agreed by the parties, b) in the absence of this term, the term set by the customs or c) in the absence

[11] See art. 1682 of Law no. 287/2009 on the Civil Code, published in the Official Gazette of Romania, Part I, no. 511 of 24 July 2009, with further amendments and completions.

[12] See M-L. Belu Magdo, *op. cit.*, p. 452.

of the two hypotheses mentioned, the term of 30 days from the delivery of the good for tasting.

In our opinion the 30-day term for tasting is unrealistic and ineffective. Since the goods for sale by tasting are generally perishable and consumable, the 30-day term given by the lawmaker to the potential buyer to try them and to decide whether to accept the sale offer is too high.

The tasting period of 30 days is not compatible with the goods whose guarantee expires and to those that can perish within a short period of time. This is why we invoke the futility of this term.

On the contrary, we add that the term in question is very generous[13] for the potential buyer and pretty unfavourable for the virtual seller who also bears the risk of loss or fortuitous degradation of the good, according to the *res perit domino* principle.

For these reasons, we propose, *de lege ferenda*, that the term of tasting the good for sale is, in the absence of a convention between the parties and customs, of one week. This would be a more reasonable term with a real possibility of implementation.

As already mentioned, par. (2) of art. 1682 of the Civil Code stipulates that, if the good which will be sold to the potential buyer, and the latter does not express his/her decision regarding the quality of the good being in line with its tastes, the selling by tasting is considered concluded at the expiry of the term.

Therefore, the potential buyer's silence is his/her valid consent[14] to ratify the sale and to produce legal effects[15].

In our opinion, this law is not clear of critical observations.

To formulate these observations, we think it is necessary to quote the content of par. (2) of art. 1682 Civil Code:

„If the good sold is at the buyer, and the buyer does not communicate its decision within the term set out in paragraph (1), the sale is considered ratified upon expiry of the term."

First of all, we underline that the phrase "sold good" is not consistent with the reality[16]: we cannot talk about "the sold good" as long as the sale was not concluded.

Selling by tasting is concluded after the operation of tasting the good by the future buyer takes place. As such, the more correct wording would be "the good for sale", instead of "the sold good".

Secondly, we think that selling by tasting implies that the future buyer tries a sample, a fraction, a proof (usually quantitatively insignificant) from a larger quantity of the good for sale.

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[13] In the same spirit, see C.R. Mangu, *op. cit.*, p. 320.

[14] See Ghe. Gheorghiu, *Contractul de vânzare*, în Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordonators), *Noul Cod civil. Comentarii pe articole*, Ed. C.H. Beck, Bucharest, 2012, p. 1762.

[15] See C. E Mangu, *op. cit.*, p. 320.

[16] In the same spirit, see C.E. Mangu, *op. cit.*, p. 321.

In this case, the potential seller will give to the potential buyer for tasting a reduced quantity of the good for sale, without any monetary claim representing the counter-value of the sample of that good.

In other words, the sample for tasting is given free of charge, not being subject to any payment obligation on behalf of the taster. In short, what is tried is free.

Therefore, in this circumstance which is the rule in the matter, it is not a matter of the good being at the potential buyer, for which his silence means the conclusion of the sale upon expiry of the tasting term.

On the contrary, if after the expiry of the tasting term, the potential seller does not express in any way, expressly or tacitly, explicitly or implicitly, the will to purchase of the good, its silence in this case is interpreted more as a refusal than as an approval to ratify the sale agreement.

We encounter such situations in daily life, at the market, where potential buyers taste the fruits on the stall without making any gesture of intention to buy, their silence meaning, in fact, the refusal of the goods. Similarly, some sellers of alcoholic beverages (normally, in bulk and, more rarely, even bottled) provide samples to consumers for tasting, either at the place of sale or at the domicile of potential buyers.

Also in these cases, if the potential buyers, after the expiry of the tasting term, do not express their desire to buy, their silence is interpreted not as a consent to conclude the sale, but as a refusal to buy.

Only in exceptional cases, when the potential seller gives to the potential buyer for tasting the entire good for sale, there is a presumption that the taster's silence is equivalent to an approval and therefore to the conclusion of the sale at the expiry of the term.

Here is why we think that, *de lege ferenda*, the regulation referred to in art. 1682 par. (2) Civil Code should be revised and reformulated.

The future regulation of the text of law evoked must provide that, if *the entire good for sale* is in the possession of the future buyer for tasting, and the potential buyer does not respond within the term set indicated in paragraph (1), the sale is considered concluded at the expiry of the term.

3. A few conclusions

The review of the regulation of selling by tasting, a variety of the sale agreement, allowed us to highlight that the regulation in the matter, although it seems paradoxical, since it has been adopted only recently, can be revised and corrected.

All laws must accrue from the daily reality and not be outside or beyond the judicial experience or practice.

Or else we are in the presence of sterile, impractical laws or laws that can give rise to various interpretations that may have unfavourable legal effects on the parties.

„To interpret a law should mean to search for the most convenient practical solution"[17].

But in order to define practical and convenient solution, contradictory legal debates should be initiated aimed to fully satisfy the practical interests of lawmakers.

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[17] See N. Titulescu, *Eseu despre o teorie generală a drepturilor eventuale*, Ed. C.H. Beck, Bucharest, 2008, p. X (Foreword).