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THE SUPPLY CONTRACT: A SIMPLE SALE OF GOOD?

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Abstract

This paper aims to address two objectives: in general, to briefly outline the particularities of the supply contract and, in particular, to distinguish its position among the special civil law contracts.

The supply contract is a new production of the Civil Code (art. 1166-1771).

In this respect it is important to differentiate the supply contract from the other two civil law contract, namely the sale contract and the subcontracting agreement.

By defining the contract we aim at establishing its legal nature, particularly that of an independent (distinct) agreement.

This paper is structured as follows: "Introduction"; "The Supply Contract. Definition, Object and Legal Characteristics"; "The Parties' Obligations According to the Supply Contract"; "Modifications of the Legal Supply Relationships. Subcontracting."; "Supplying: an Independent (distinct) Contract or a Different Form of Sale?"

This legal undertaking ends with a lege ferenda and conclusions.

Keywords:

the Civil Code, art. 1766-1771, art. 1166-1323, 1650, 1651, 1851

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1. Introduction

By adopting the “monist” perspective, the Civil Code 2009 regulated uniformly, in principle, all the legal relationships under private law.

In this general context above, the provisions of the Civil Code thus also applies to the relationships between *professionals* (“those who operate a business”, a/n) as well as to the relationships between them and any other matters concerning the civil law.

In contractual matters, the Civil Code regulates both the “traditional” contracts as well as the “professional” ones in Book V “About Obligations”, Title IX “Various Special Contract”, art. 1650-2278.

The supply contract is governed by the provisions of art. 1766-1771 of the Civil Code.

According to art. 1771 of the Civil Code the provisions regarding the supply “are accordingly completed by the provisions regarding the sale contract” (in so far as no special regulation is provided for the supply agreement).

As it is governed by a specific type of contract (express contract a/n), the supply is subject to *the special regulations* established by the Civil Code and, in addition, to the *general contractual rules* (art. 1166-1323 of the Civil Code).

We remark that, prior to the passing of the special provisions of the Civil Code, under the provisions of the former Commercial Code, “the supply company” was considered a commercial business (art. 3 section 5 Commercial Code).

In a supply company, the entrepreneur was undertaking to deliver a quantity of goods or services, on certain consecutive dates, in return for a price agreed in advance.

The business of the company was legally regulated through a legal instrument called “supply contract” (St., D., Cărpenaru, (2019):483-484; I., Schiau, (2008):5).

In practice, the supply contract is commonly used in the relationships between manufacturers and suppliers of parts and raw materials. Furthermore, manufacturers may conclude supply contracts with owners of wholesale or retail distribution companies to sell their products, goods etc.

This paper aims to briefly present the characteristics of the supply contract as it is regulated by the Civil Code, focusing on the relation between this type of agreement and the other civil law contracts, *the sale contract* and *the subcontracting agreement*, to determine its long debated *legal characteristics*.

A. The Supply Contract. Definition, Object and Legal Characteristics

Supplying is “the contract through which one party, referred to as supplier, shall transfer the ownership of a certain quantity of goods and to hand them over, on one or more due dates subsequent to the conclusion of the contract or continuously, or to provide certain services, on one or more due dates subsequently or continuously, and the other party, referred to as client, shall take over the goods or acknowledge the provision of goods and pay their price” (art. 1766 (1) of the Civil Code).

From the text of the Civil Code it results that the object of the contract is *the legal operation of supplying* that consists in the purchase of *certain goods or services for a price* (art. 1225 (1) of the Civil Code).

According to art. 1766 (2) of the Civil Code, in the case of the supply of goods, as an ancillary of *the main obligation*, the supplier may undertake to provide the client with those services that are necessary for the supply of the goods.

In time, *the supply of goods* may consist in (A.,-T., Stănescu, (2017): 60:

- the transfer of the property rights over a determined quantity of goods and their hand over, on *a term that is subsequent* to the conclusion of the contract;
- the transfer of the property rights over a determined quantity of goods and their hand over, on *more terms* that are subsequent to the conclusion of the contract;
- the transfer of the property rights over a determined quantity of goods and their *continuous* hand over (for a definite or an indefinite period).

The object of the supply contract refers to *movable goods*. Thus, according to article 1766 of the Civil Code, the object of the contract is “determined quantities of goods” that, in the legal literature, have been considered “as *belonging to a category* and not individually determined” (V., Nemeş; G., Fierbinţeanu, (2020):161).

The parties of the supply contract are: the supplier and the client.

The supplier is the person who undertakes to transfer the ownership rights over a determined quantity of goods and to hand them over at one or more terms subsequent to the conclusion of the contract or to provide certain services at one or more terms subsequent to or continuously after the conclusions of the contract (art. 1766 (1) of the Civil Code).

As a general rule, the supplier is *a professional* (a “trader” (I., L., Georgescu, (2002):145), as previously defined by the law).

The client is the persons who undertakes to take over the goods or to receive the services and to pay their price.

The client may be or not a professional.

When the physical person client is also “a consumer” the regulations in the field of consumer protection are also applicable to him (according to art. 2 (2) of the Government’s Ordinance no. 21/1992).

The carrier, the person who hands over the goods to the client on behalf of the supplier, could also be considered as part of the supply relationship (art. 1767 (3) of the Civil Code).

As any other contract, supplying ceases once the essential validity conditions according to the law are complied with, namely regarding the capacity, the consent, the object, the cause and the form (art. 1179 (1) of the Civil Code).

The supply contract is distinguished through its *legal characteristics*, as follows (S., Angheni, (2019):516):

a). Supplying is a *specific* type of contract (express) on the grounds of the provisions of art. 1766-1771 of the Civil Code.

Being an express contract, supplying is subject to special regulations according to the provisions mentioned above and, as a complement, to those in art. 1166 and the following of the Civil Code.

b). Supplying is a *consensual* agreement because it arises “from the mere consent of the parties” (art. 1174 (2) of the Civil Code).

Thus, the legislation in force does impose a certain form for the valid conclusion of the supply contract, with the consequences stipulated at art. 1179 (2) of the Civil Code.

However, *ad probationem* it is required a written document (art. 309 (2) of the Civil Procedure Code).

c). Supplying is a transaction for *consideration* because “each party aims to gain an advantage in return for its obligations undertaken” (art. 1172 (1) of the Civil Code).

The supplier seeks to be paid the price and the client aims either to gain ownership and the taking over of the goods or to be provided with the services (that the supplier undertakes to provide).

d). Supplying is a *commutative* agreement since the parties (both the supplier and the client) know their obligations and their extent as of the moment of the conclusion of the agreement.

Consequently, the supply contract for a good *cannot have a random character*.

Exceptionally, doctrinally, the following question has arisen: however, does the contract that *supplies long term services* give birth to an alea?

The generally accepted opinion rejects the above possibility having regard to the fact that the existence and the extent of the obligations, in the

supply contract, are certain and determined as of the conclusion of the contract.

e). Supplying is a *synallagmatic* agreement since the obligations arising from it are reciprocal and interdependent (art. 1171 of the Civil Code).

Thus, the supplier's principal obligation to transfer the ownership over the goods is reciprocated by the client's obligation to pay the price.

f) Supplying is a contract with *successive execution* since the goods (or the services) will be delivered with on one or more dates or continuously during the execution of the contract.

g). Supplying is an agreement *transferring ownership* when the supplier undertakes to transfer the ownership over *a determined quantity of goods* and to hand them over.

According to art. 1767 (1) of the Civil Code, the ownership over the goods is transferred from the supplier to the client at the moment of their hand over.

The risk of accidental damage or loss to the goods operates in case of the transfer of the rights of property.

Under the provisions of the Civil Code, the risks in case of the contracts transferring ownership rights are subject to the principle *res perit debitori*.

According to art. 1274 (2) of the Civil Code, as long as the good has not been handed over, the risk of the contract remains the responsibility of the party that has to hand it over, even if the property has been transferred to the client. In case of fortuitous loss or damage of the good, the party who has the obligation to hand over is not entitled to consideration and in case it has already received it, it is obliged to return it.

We mention that, in the particular case of some goods and services which have the character of legal or natural monopoly, supplying may be an *adhesion contract*, because are used frequently standard forms with standardized clauses and the prices are regulated by established authorities in that field. For example, Law no. 123/2012 on electricity and natural gases, Law no. 325/2006 on public heating systems, Law no. 241/2006 on running water and sewage systems.

B. The Parties' Obligations in the Supply Contract

By validly concluding the supply contract arise effects that are translated into the parties' obligations.

The main obligations of the *supplier* are as follows:

a). The obligation to transfer ownership of the goods supplied.

According to the Civil Code, the obligation to transfer the ownership rests with the seller (art. 1672 and art. 1773 (1) in the matter of the sale contract).

Given that the provisions that govern the supply contract “are complemented, accordingly, by the provisions concerning the sale contract” (art. 1771 of the Civil Code), we may state that the supplier as well (similarly to the seller) has the principal obligation to transfer the ownership rights over the goods supplied.

According to art. 1767 (1) of the Civil Code, the property rights over the goods is transferred from the supplier to the client *at the time* of their handing over.

We mention that, in this situation, the rule established above does not coincide with that provided for the sale contract. Thus, at the moment of the sale, “the ownership is legally transferred to the buyer as of the moment of the conclusion of the contract, no matter if the good has not been handed over yet or has not been paid yet” (art. 1674 of the Civil Code).

b). The obligation to hand over the goods supplied to the client.

According to the provisions taken from the provisions for sale, the handing over of the good supplied is accomplished by making it available to the client, together with everything that is necessary, according to the circumstances, for the free and unrestricted exercise of ownership (art. 1685 of the Civil Code).

The obligation to hand over the good extends to its accessories and to everything that is intended for its use.

Moreover, the supplier is obliged to hand over the titles of propriety and the documents concerning ownership of the use of the good.

When the shipment of the products is at the expense of the supplier, the products received are considered to have been delivered to the client on the date of their delivery to the carrier (art. 1767 (3) of the Civil Code).

We remark that art. 1767 of the Civil Code distinguishes between the obligation to hand over the goods in two situations:

- when the delivery of the goods is done directly to the client or,
- when the delivery of the goods to the client is done through the intermediary of a carrier.

In case the object of the contract is to deliver certain services, the provider is obliged to provide the services under the conditions agreed by the parties.

c). Obligation *to provide warranty for faulty goods* supplied.

As in the case of sale, the supplier is liable to the client against any hidden defects that make the good supplied unfit for use (for which it is intended) or that diminish, to such extent, its value or use, that, had it been

known in advance, it would not have been contracted or the client would have paid a lower price (art. 1707 (1) of the Civil Code)

The warranty is due in case the defect or its cause had existed by the date of the hand over.

The supplier is not liable against any defects the client had known at the moment of the handing over of the goods (art. 1707 (4) of the Civil Code).

The client has two main obligations: the obligation to pay the price and the obligation to receive the goods (or services).

a) The obligation *to pay the price* of the supply contract.

According to art. 1720 (1) of the Civil Code (the same as in the case of sale), the client must pay the price in the place where the good was situated at the moment of the conclusion of the contract and immediately after the ownership has been transferred.

If, on the date of the conclusion of the agreement, the goods are in transit, unless otherwise provided, the price will be paid at the place resulting from practice or, in their absence, at the place of destination.

The amount of the price due by the client is the one provided in the contract or the legislation in force (art. 1768 (1) of the Civil Code)

When, during the execution of the contract, the legal regulation of the price or the mechanism for determining it is modified, the parties will continue applying the price or the mechanism for determining it initially agreed in the contract.

If the law expressly provides that the price or the method for determining it will also apply to contract in execution, either party may terminate the contract within 30 days as of the date of the coming into force of the law.

Within these 30 days, the parties will apply the prices agreed in the contract (art. 1768 (3) of the Civil Code).

b). The obligation *to receive the goods* delivered under the contract.

The client has the obligation to receive the goods, on the dates and under the conditions stipulated in the contract (art. 1767 (1) of the Civil Code).

The taking over of the goods is accomplished through the acceptance by the client, on which occasion their quantity and quality is assessed (art. 1767 (2) of the Civil Code).

The obligation of the client to receive the services provided by the provider complies with the same regulations.

C. Modifications of the Legal Supply Relationships. Subcontracting

Due to the fact that supplying does not have a *intuitu personae* (and thus concluding the contract does not consider any given persons), in principle, the legal supply relationship may be modified through subcontracting (sub-supplying).

According to art. 1769 (1) of the Civil Code, the supplier may subcontract the supplying of goods or services to a third party, except for the cases where the contract has a strict personal character or its nature does not allow this.

Thus, there is subsupplying any time when the good (the product) or the service that is the object of the contract is supplied, completely or partially, by a third party with whom the supplier has concluded a subcontract to this aim (art. 1769 (2) Civil Code).

The subcontracting third party is called *sub-supplier*.

Subsupplying is a *new supply contract* (distinct from the principal contract, concluded between the supplier and the client) (M., Eftimie, (2012):120).

The conclusion is that between the sub-supplier and the client there are no direct legal relationships. However, the subsupply contract has to comply with the main conditions of the supply contract (L., Stănciulescu, (2017):103).

As far as subsupplying is concerned, the execution of the principal supply contract will be supervised by the supplier who *is liable to the client* for the quality of the products and the services provided by the third party subcontractor (sub-supplier).

However, the supplier has the right to recourse against the sub-supplier (art. 1770 Civil Code).

When “supplying is subcontracted, we are in the presence of a *group of contract* and the consequence is the contractual liability for another person’s acts” (Gh., Piperea, Fl.-A., Baias, E., Chelaru, R., Constantinovici, I., Macovei (coord.)”, (2012):1802).

D. Supplying: an Independent (distinct) Contract or a Different Form of Sale?

In doctrine, the position of the supply contract, in the general context of “general contracts” is still a matter of dispute.

The question that arises is: is the supply contract *an independent contract* or it is *another form of another contract* regulated by the Civil Code?

The matter above presents a legal importance in establishing the *applicable provisions*, as a complement to the special ones.

If the supply contract is independent, distinct it complies with the special regulations (art. 1766-1771 of the Civil Code) and, as a complement, with the *general ones* in this matter (art. 1166-1323 of the Civil Code).

However, if supplying is defined as a different form of an independent contract, it has to comply with the special rules (art. 1766-1771 of the Civil Code) and, as a complement, with those of *the special contract where it originated from* (sale, subcontracting etc.).

We remark that supplying has a double object: *transferring the ownership of some goods* and, what is more, *providing goods* (art. 1766 (1) of the Civil Code). Thus, depending on its object, the supply contract could be included in the category of contracts transferring ownership or/and in the category of those that provide services.

In the context above, the supply contract regulated in the Civil Code has a series of similarities with the sale and subcontracting contracts.

a). Differentiating the supply contract from the sale contract.

When supplying has as an object *transferring goods* (products) to a client it is similar to the sale contract.

Sale is the contract through which the seller transfers or, as the case might be, undertakes to transfer to the buyer the property rights over a good for a price that the buyer undertakes to pay (art. 1650 (1) of the Civil Code).

From the elements above it results that supplying (of goods) and the sale present relevant similarities, especially concerning the objects of the contracts, the transfer of ownership rights, the payment of the price etc.

For the reasons above, in the legal relevant literature it has been stated that supplying is “*a species of sale*”, with the remark that delivery and the transfer of ownership rights will be completed at different dates subsequent to the contract or continuously for a longer or shorter period of time, according to the agreement between the parties (T., Prescure, (2012):101).

Moreover, the provisions of art. 1771 and art. 1561 of the Civil Code, seem to support the opinion above. Thus, according to article 1771 of the Civil Code, the provisions concerning the supply contract “are complemented accordingly with the provisions concerning the sale contract”.

The general provisions or article 1651 of the Civil Code are to be applied in the same context as they provide that the seller’s obligations apply, accordingly, to the obligations of the person who transfers rights in any other contract, if the provisions applicable to that contract or those concerning obligations in general do not provide otherwise.

The fundamental differences between the supply contract and the sale contract are as follows:

- supplying could be an adhesion contract and the sale is, in general, consensual;

- supplying is a contract with a successive execution (repetitive) and sale is an *uno actu* contract;
- supplying may have exclusively as an object *movable goods* (products) but the sale could transfer movable and immovable goods;
- the price of supplying could be paid with money or services, in change, the consideration in money representing *the essence of sales*.

b). Differentiating the supply contract from the subcontract.

When supplying has as an object *the provision of services* to a client, it is similar to the subcontract.

Through the *subcontract* the entrepreneur undertakes that, at his own risk, will perform certain material or intellectual works, or to provide a certain service to the client for a price (art. 1851 (1) of the Civil Code).

From this, it results that providing services and subcontracting are similar as far as their object, obligations of the providers, the price etc are concerned.

The main difference between the supply contract and the subcontract originates in the subcontractor's obligation to finish the works. For instance, according to art. 1857 (3) of the Civil Code, the subcontractor who has been entrusted the materials is obliged to keep them and use them according to their intended use, according to the applicable technical rules, to account for their use and to return materials that were not used to finish the works.

From the elements briefly presented above, we should understand that *the new production of the Civil Code 2009*, the supply contract (regulated in art. 1766-1771) is an *independent, distinct* contract that has an equal status as the special contracts.

Through its double object (transferring goods and providing services), the supply contract has *relevant similarities* with sale contracts and subcontracts.

Although according to art. 1771 of the Civil Code its provisions "are complemented accordingly with the provisions concerning the sale contract", as a *common legal approach in the matter*, the supply contract is not a "species" (form) of sale or of subcontracts.

De lege ferenda, we propose that the provisions above (art. 1771 of the Civil Code) to be complemented with those concerning the subcontracts.

Conclusions

The object of the contract approached in this paper is the legal endeavour that consists in supplying of providing *goods* or *services* for a *price*.

The object of the provision by the supplier is represented by *the movable goods*, in particular “determined quantities of goods”.

The supplier, the client and the carrier are subjects of the supply relationships. The supplier is, as a rule, a professional. The client could be a professional (or a non-professional).

The supplier may subcontract the supplying of goods or the provision of services to a sub-supplier, except for the contract concluded *intuitu personae*.

The supply contract is similar to the subcontract but it is different from it.

Supplying is a distinct, independent contract (not a form of the contracts above), a contract in its own and not “a mere sale of products”.

As any initial regulation, that concerning the supply contract supposes complements and reconsidering the approach.

In practice, the supply contract is used in many situations in the relations between manufacturers and providers of materials and raw materials. Thus, manufacturer may conclude supply contracts with owners of wholesale or retail distribution companies to sell their products, merchandise etc.

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