

Legal Regime of the Right of Superficies in Romania

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ABSTRACT: In Romanian law, the right of superficies has not known a legal regulation before passing the Law no 287/2009 on Civil Code, this one being acknowledged only by way of doctrine and jurisprudence. The right of superficies consists in the right of ownership which a person has over the construction from the land belonging to another one. As one will notice from our study, in case of the right of superficies, two categories of rights overlap, as we the Romanian courts of law have also acknowledged' namely: on the one hand, the constructor's right of ownership over the construction and his right of use over the land on which the construction is placed; on the other hand, the right of the owner of the land on which the construction is placed to claim from the constructor to use the land on which the construction is found, according to the destination to which it is forced to pay also, if so agreed, a proper compensation for the use of that land. Therefore, the right of superficies is a beneficial right of the right of ownership of the land owner on which the construction is built by detaching from the legal content thereof of the attributes of possession and use, which are afterwards awarded to the constructor.

KEYWORDS: Right of superficies, real right, right of ownership, beneficial right, construction, land, owner, constructor

Introduction

Even though the private property right is the only right in rem including all three known attributes (*possession, use and disposal*) under certain circumstances, *some of these attributes might belong to other parties*, this separation thus generating the *distinct non-ancillary rights in rem*. These non-ancillary rights in rem born pursuant to the separation of the attributes of the private property right are referred to as *dismemberments of the ownership rights* (Boroi, Anghelescu and Nazat 2013, 165). It should be highlighted that these dismemberments do *not cancel* the private property right, but, instead, they *simply limit its attributes*, the owner being deprived of some of them.

In the Romanian law, private property dismemberments are regulated in Title III (*Dismemberments of the property rights*), Book III (*On assets*), art. 693-772 of the Civil Code (Law no 287/2009 on the Civil Code was published with the Official Gazette of Romania, Part I no 511 of 24 July 2009) and they are: the superficies right; the usufruct right; the right of use; the right of occupation and the easement right. Pursuant to the review of the provisions in art. 136 (4) of the Constitution of Romania, according to which, *public property rights are unalienable*, it follow that the dismemberments of the property rights are *incompatible* with the public property right (the Constitution was adopted during the meeting of the Constituent Assembly of 21 November 1991, it was published with the Official Gazette of Romania, Part I no 233 of 21 November 1991 and it came into force following its approval by the national referendum of 8 December 1991. It was reviewed and republished with the Official Gazette of Romania, Part I, no 767 of 31 October 2003).

Finally, it should be mentioned that, as actually also stipulated in the Romanian legal doctrine (Boroi et al. 2017, 339), other dismemberments of the property right are not possible through the will of the parties, because rights in rem are exhaustively stipulated under the law and, by way of consequence, the parties are not entitled to assign the right in rem feature to another patrimony (debt) right through their will expressed in a legal document.

Notion and forms of the superficies right

The superficies right was not legally regulated prior to the approval of the Law no 287/2009 on the Civil Code, being only acknowledged in the doctrine and case-law (The High Court of Cassation and Justice, 2nd Civil Division, Civil Decision no. 616 of 29 March 2016).

According to art. 693 (1) of the Civil Code, the superficies is "the right to hold or erect a construction on another person's land, on or underground the respective plot of land, over which the

superficiary acquires a right of use” and it consist of “*the property right that a person holds over the construction built on another party’s plot of land*” (Chelaru 2013, 1, 49-59; Rădulescu 2013, 1, 147-160).

Pursuant to the reading of art. 702 of the Civil Code, it follows that the scope of superficieses also covers “plantations, as well as other autonomous durable works”. The legislator has not defined the notion of autonomous works in the field, but a definition is, however, available in art. 578 of the Civil Code, in the field of artificial real estate accession where it is stated that “autonomous works are constructions, plantations and any other individual works performed on a property” (Sferdian 2014, 4, 33-41).

In the Romanian doctrine, superficies is defined as “*the real estate right of temporary nature, on the basis whereof a person, referred to as superficiesary, acquires the right of use over a plot of land belonging to another party, referred to as the bare owner, hosting a construction, crop or other work over which the superficiesary acquires the ownership title or the right to erect or generate the same assets on the plot of land acquired for use, which continues to be the bare owner’s property*” (Bîrsan 2017, 259).

The superficieses right is of two types:

- *principal form* (complete, full) of the superficieses right, which supposes that the superficiesary acquires the property right over the construction, the crop or of a different work located on the other party’s plot of land;
- *secondary form* (incomplete, incipient) of the superficieses right, which consists of the superficiesary’s right to build, plant or erect a work on the plot of land owned by another party (Boroi, Anghelescu and Nazat 2013, 168; Stoica 2017, 260).

Legal features of the superficieses right

The superficieses right has the following legal features:

- *it is a real property right*, a feature that derives from the very provisions of art. 693 (1) of the Civil Code, according to which the superficieses right, both in its main, and in its secondary right, as a principal right, may only be established with regards to real estate assets. If in its secondary form, the subject of the superficieses is represented by the plot of land, as the constructions, plantations or other works are developed on or underground the respective plot of land, the superficieses right is supplemented by the superficiesary’s property right over all the developed real estate assets. Since it is a right in rem, the courts of law have maintained that the superficieses right is not extinguished by non-use, it is apparent and continuous, granting to the title holder the possession, use and disposal attributes. (Iași Court of Appeals, Civil Decision no 496 of 25 October 2004; Vaslui District Court, Civil Decision no 905/A of 01 July 2015);
- *it is a temporary right*, a feature that is stipulated in art. 694 of the Civil Code, according to which “The superficieses right may be established over a period of time of no more than 99 years. Upon the expiry of this term, the superficieses right may be renewed”. The parties may agree upon a period of time below 99 years, and in case the term set between the parties in the settlement deed exceeds 99 years, the superficieses right shall be reduced to 99 years. In case the parties have not expressly agreed on a term and no proof can be produced as to the existence of such a term, the duration of this right in rem is presumed to be of 99 years;
- *it is a right that is not governed by extinctive prescription*, since, according to art. 696 (2) of the Civil Code, “the right to initiate proceedings is not subject to prescription”. Confessory pleading relying on the superficieses right may be lodged, according to para (1) of the same article, against any person that prevents the exerting of the right, including the owner of the plot of land.
- *it may not cease by way of marital property division*, because the superficiesary’s ownership title and the plot of land’s owner’s right are not in an undivided condition, but they are, instead, two distinct rights (Boroi, Anghelescu and Nazat 2013, 169).

Establishment of the superficies right

As also appreciated by the courts of law, the establishment of the superficies right requires, firstly, the production of proof as to the ownership title over the construction and, secondly, either the existence of a legal provision, or a covenant concluded by and between the superficiary and the owner of the plot of land. (Mangalia Law Court, Civil Decision no 905 of 22 May 2014).

Pursuant to art. 693(2) of thesis I of the Civil Code, the superficies right may be acquired via *legal acts*, via *usucaption and through other means regulated under the law*. In this respect, our law courts have shown that the superficies right is not acquired by the mere owning or erection of constructions on another party's land, respectively that it may only be acquired on the basis of *atitle*, by *usucaption* or *ex lege* (Braşov Court of Appeals, Civil Decision 83/A of 25 January 2016; Mangalia Law Court, Civil Decision no 905 of 22 May 2014).

It should be mentioned that, according to the provisions in art. 693 (2) thesis II of the Civil Code, in all cases of establishment of the superficies right, the special real estate register provisions shall apply.

In the case of the establishment of the superficies right on the basis of a legal act, it may be a *covenant or by will*. It should be highlighted that in all cases of establishment of the superficies right by *covenant*, whether onerously or in exchange for a fee, the authenticated form is required, under the sanction of full nullity, because, since it is a real estate right, it must be entered with the real estate register, which means that the provisions in art. 1244 of the Civil Code on the form required for the entry with the real estate register apply. It should be retained that upon the establishment of the superficies right, the consensualism rules apply and the absence of the administrative building permit is of no relevance in respect to the birth of the superficies right (Perju 2006, 11, 234).

As already mentioned, *usucaption* is an alternative manner of acquiring the superficies right [art. 693 (2) thesis I of the Civil Code]. Nonetheless, even though the legal doctrine (Bîrsan 2017, 260-261) mentions that the acquiring of superficies by usucaption is "*rather a theoretical matter*", it may be achieved through the application of the provisions in art. 930-934 of the Civil Code, concerning extra-tabular usucaption and tabular usucaption, provided that the title holder behaves as a superficiary, and not as the owner of the land.

According to the provisions in art. 693 of the Civil Code, the superficies right may also be acquired *through other means regulated under the law*. According to opinions expressed in the specialty doctrine (Stoica 2017, 381; Florea 2011, 191), such a manner may be encountered in the *family relations*. For instance, such a manner of acquiring the superficies right may operate in the case of spouses who, during marriage and subject to the regime of legal or conventional communion, develop a construction, crop or work on the property belonging to one of them. In this case, the spouse who is not the owner of the plot of land acquires the right of joint property over the construction and the right of use over the plot of land. (Bârlad Law Court, Civil Decision no 357 of 15 February 2016). In practice, it has also been accepted that the superficies right also arises as part of the family relations in case parents allow their children to erect constructions on the plots of land owned by the former. (Bârlad Law Court, Civil Decision no 357 of 15 February 2016).

It should further be mentioned that, as also appreciated by the law courts, the owner's mere consent to the erection of a building is not stipulated under the law as means for acquiring the superficies right. (Câmpulung Moldovenesc Law Court, Civil Decision no 588 of 24 April 2015).

Finally, as also maintained by the High Court of Cassation and Justice, the in case the ownership title over the land belonging to a person overlaps with the ownership title over the construction, belonging to another person, this does not give birth, as such, to a superficies right, in the absence of a legal act or fact establishing it or of a legal provision grounding it. Thus, the acknowledgement of the existence of the superficies right to the benefit of the tenant of the plot of land is illegal in the absence of the legal act, respectively of an authenticated covenant, having as subject the birth of this title and the establishment of the extent thereof as dismemberment of the property right over the land belonging to the tenant (High Court of Cassation and Justice, 2nd Civil Division, Civil Decision no 4127 of 22 November 2013).

Exercising the superficies right

Art. 695 of the Civil Code, under the marginal title “*Scope and exercise of the superficies right*”, comprises several provisions regarding the exercise of the superficies right. Thus, the first part of paragraph (1) of the aforementioned article regulates the *principle of party autonomy*, the text stipulating that “the superficies right is exerted within the limits and subject to the provisions of the establishment act”. In other words, in case the superficies right is established on the basis of a legal act, considering and taking into account the principle of the freedom of will of the parties upon the conclusion of civil legal acts, they may set the limits and the conditions for exerting the superficies right under the establishment deed.

With regards to the delimitation of the land surface area subjected to the superficies right, in the last part of the aforementioned article it is stipulated that “unless stipulated otherwise, the exercise of the superficies right is delimited by the land surface area onto which the construction is to be built and by the one required for the operation of the construction or, as applicable, by the relevant land surface and by the one required for the operation of the erected building” (Birsan 2017, 261).

As stipulated in art. 695 (2) of the Civil Code, in case the construction, the crop or a different work were already present on or underneath the plot of land upon the establishment of the superficies right, unless stipulated otherwise, the holder of the superficies title is not entitled to alter the structure of the construction. Nonetheless, it is entitled to demolish it, subject to the obligation to rebuild it to the initial form.

In case the superficiary alters the structure of the construction, art. 695 (3) of the Civil Code stipulates that the owner of the plot of land is entitled to demand, within 3 years, the cessation of the superficies right or the reinstatement to the initial condition. In the second case, the elapse of the 3-year prescription term is suspended up to the expiry of the term for which the superficies right was established.

According to art. 695 (4) of the Civil Code, the holder of the title may freely dispose of its right, and as long as the construction exists, the right of use over the land may only be alienated or mortgaged alongside the ownership title over the construction.

In order to defend its superficies right, the owner has at its disposal, according to art. 696(1) of the Civil Code, *superficies confessorory pleading*, which may be lodged against any party preventing it from exerting its right, including the owner of the plot of land. The right to the superficies confessorory pleading is not subject to prescription [art. 696 (2) of the Civil Code].

According to certain point of view expressed in the legal doctrine (Boroi, Anghelescu, Nazat 2013, 173), the holder of the superficies right may further exert the *possession pleading*, as well as, if applicable, the *personal pleading* deriving from the covenant establishing the superficies right.

Concerning the evaluation of the superficiary’s compliance with the relevant obligations, art. 697(1) of the Civil Code stipulates that in case the superficies was established onerously, unless the parties agreed upon other payment terms incumbent upon the superficiary, the holder of the superficies right shall owe, under the form of monthly installments, an amount equal to the rent set on the free market, considering the nature of the plot of land, the destination of the construction, if applicable, the area where the plot of land is located, as well as any other criteria for determining the counter value of use. In the case of misunderstandings between the parties, according to art. 697(2) of the Civil Code, the amount due to the owner of the land shall be set in court (Bucharest Court of Appeals, 9th Division for Civil Matter and Intellectual Property Cases, Decision no 219/R of 29 March 2007).

Finally, according to the provisions in art. 698 of the Civil Code, *the superficies right is extinguished* by erasure from the real estate register in the following cases: upon the *expiry of the term* for which it has been established; by *consolidation*, in case the plot of land and the construction become the property of the same person; by *the loss of the construction*, if expressly stipulated; *in other cases stipulated under the law*, such as, for instance: in the case of the expropriation of the plot of land on public utility grounds; upon the termination of the lease agreement stipulating that the lessee is entitled to build, plant or develop other works and that the

lessor will acquire the title over the construction, crop or work only upon the expiry of the lease agreement; in case the superficiary alters the structure of the construction, the owner of the plot of land may request, within 3 years, the cessation of the superficies right (Boroi, Anghelescu and Nazat 2013, 176; Boroi et al. 2017, 346; Chelaru 2013, 384).

Conclusions

The superficies right also applies in the case of crops, as well as of other durable autonomous works, constructions, crops or other works developed by the superficiary. It should be retained that the superficies right does not only operate with regards to the surface area of the plot of land, but also with regards to the underground constructions (e.g., an underground garage, a cellar, a tunnel, etc.). In other words, it takes the appearance of an air cube delimited not only in length or width (as it generally is), but also in terms of height and depth (Ungureanu and Munteanu 2008, 578).

In the light of the aspects mentioned herein, the superficies right may be defined as a temporary real estate right, on the basis whereof a person (superficiary) acquires the right of use over a plot of land belonging to another party (bare owner), hosting a construction, crop or other work over which the superficiary acquires the ownership title or the right to erect or generate the same assets on the plot of land acquired for use, which continues to be the bare owner's property (Bîrsan 2017, 259).

The superficies right is only compatible with the private property right, whoever the holder of this right may be, and it does not operate over, it is incompatible with, the public property right.

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