

Good Faith Acquisition - Why at all?

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A. Introduction

This contribution deals with the good faith (*bona fide*) acquisition of property and, as its title suggests, questions whether there should be any such acquisition within the framework of the Transfer of Moveable's team (TOM) of the Study Group on the European Civil Code (SGECC).

The first issue one must clarify is the concept of good faith (*bona fide*) acquisition of property and for that I appeal to Arthur F Salomons' article¹ in this volume: the '*[acquisition of] a movable from someone he [the buyer] erroneously considers to be entitled to transfer it to him.*'

Arthur Salomons opts, quite naturally, to focus his article solely on the good faith acquisition of movables, as it is delivered within the context of the TOM. My approach to the issue will be broader, as in my view, although included in the same working group, the pertinence of good faith acquisition should be discussed in both movable and immovable things.

The starting point for the discussion is the assumption that 'The approaches to acquisition in good faith adopted by the legal systems of the EU Member States span from total rejection of any such acquisition in Portugal to its general admissibil-

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¹ Arthur F Salomons, 'How to draft new rules on the bona fide acquisition of movables for Europe? Some remarks on method and content', in this volume at p # [we will fill in the first page later], sub C.1

ity in Italy...';² Salomons' article retains this same assumption.

Good faith acquisition is, as the team recognises, a 'grave intrusion to the original owner's rights... justified only because it satisfies two interests: firstly, the interest of the public at large in a steady functioning of commerce. It is common opinion that acquisition in good faith is an expression of distributive justice (*iustitita distributiva*), as the individual freedom of an owner has to yield, under certain circumstances, to the general welfare, the safety of commerce, and the interests of specific purchasers.'³

These statements clearly justify the need for a Portuguese input into the discussion and that, I think, is the reason why the team invited me to deliver this article.

B. Portuguese Law - General rules

To discuss the legal framework of good faith acquisition I must, in the first place, clarify some aspects of contractual invalidity in Portuguese law.

There are several degrees of contractual invalidity in Portugal: inexistence, nullity and annullability (as in French legal order *annulabilité*). The first degree, inexistence, refers to situations where it is so obvious that no intention to contract is present, that no legal effects whatsoever can be extracted from the situation; the classical examples of such situations are physical coercion (if someone's harm is pushed during an auction as opposed to moral coercion considered in Portuguese law as an illegal intimidation with or without infliction of physical or psychological harm) and *non-serious* declarations (eg, when a law professor gives an example in class). Nullity, on the other hand, occurs when the interests that the law protects when establishing the cause of invalidity

² SGECC-TOM 2006, Activities 2005-2009, <http://www.uni-graz.at/brelwww/tom/page19/page20/page20.html>, 2006.

³ See SGECC-TOM 2006, above.

are, although protecting one, both or none of the parties, public interests; in such case, the cause for invalidity may be relied upon by any interested third party and may be raised, *ex proprio motu*, by a court of law. The annullability is the third degree of invalidity and, generally speaking, applies to the situations where the interest protected by the law establishing the invalidity is a party's only interest - the classical situation includes the mistake theory in the formation of contracts. The main differences between nullity and annullability are, because of the nature of the underlying interests, the time-driven legalisation that occurs in respect of the latter, the limited legitimacy to argue annullability, the general legitimacy to argue nullity and the powers of the *ex officio* declaration that exist in relation to nullity but not in relation to annullability.

The general solution for the sale of things by someone who is not legally entitled to do so is, according to the article 892 of the Portuguese Civil Code (CC),⁴ nullity. This would mean, if no exception is made, that the invalidity of the contract could be relied upon by any interested third party as well as between the parties themselves at all times,⁵ and that the nullification would produce retrospective effects.⁶

This is not exactly the case in a sale of things by someone who has no legitimacy to do so. In the first place there is a limitation on the right to claim the nullity: the seller may not bring such claim against the good faith buyer, as article 892 CC clearly shows. In the second place, contrary to

⁴ Article 892 CC: The contract by which one sells third party assets is null and void (*ab initio*) if the seller has no legitimacy to contract; the seller may not bring a claim against the good faith buyer, as the bad faith buyer may not against the good faith seller.

⁵ Article 286 CC - Nullity can be relied upon at all times by anyone interested and may be raised by the court of its own motion (*ex proprio motu*).

⁶ Article 289 CC - Nullification of the contract produces retrospective effects.

the general rule of non-legalisation of null contracts, article 897 CC imposes on the seller a mandatory legalisation; *ie*, when the buyer is in good faith the seller must convalidate (legalise) the contract by acquiring the asset;⁷ the breach of such obligation vests the seller with the duty to additionally compensate the good faith buyer.⁸

Because the sales contract, when the seller lacks the legitimacy to sell, is null the original owner has the power to demand the asset before a court of law; if he has been dispossessed, according to article 1311 CC, he may take direct action within the limits of articles 1314 CC and 336 CC and may bring a negatory action before the court. The good faith buyer is entitled to compensation in any case, even if he has not been evicted.⁹

C. Portuguese law - Exceptions

There are a number of exceptional situations where the good faith buyer is protected under Portuguese law. The first relates to assets subject to registration in a national register (immovables, vehicles); in such cases, when the inscription of the acquisition in the national register is still pending, then nullification has no effects on the good faith buyer (doctrine of register acquisition) - Article 291 CC. Another situation where the good faith buyer enjoys legal protection against the original owner is a sham contract: the original owner who simulated a sale cannot argue the nullity against the good faith buyer - articles 240 and 243 CC.

⁷ Although there is no obligation of the original owner to agree on this legalisation; the basic principle of the freedom to contract (article 405 CC) applies to him without restrictions.

⁸ Article 900 CC.

⁹ Manuel Baptista Lopes, *Do contrato de compra e venda no direito civil, comercial e fiscal* (Coimbra : Livraria Almedina 1971), p 543.

Apart from these two situations, all other exceptions to the general rule depend on acquisitive prescription periods and, eventually, on the way the seller came into possession of the asset.

The general rules on acquisitive prescription apply to the good faith acquirer, and the particular circumstances of a case may determine the existence of special solutions. This is the case of the reduced period for acquisitive prescription of lost or missing movables, if the finding was announced (one year instead of three or six years, depending on the type of possession of the movable - article 1299 CC) - article 1323 CC.

The Portuguese system of acquisitive prescription establishes different acquisitive prescription periods depending on the nature of the asset and the type of possession. As to movable assets, the acquisitive prescription period is three or six years, depending on whether the possession is good or bad faith possession; entitled possession is presumed to be good faith possession (entitled possession is the one that is grounded on a regular modus of property acquisition, even if invalid for some reason) - articles 1259 CC, 1260 n 2 CC and 1299 CC.

D. Portuguese Commercial Law

If the seller is a professional trader, article 467 n 2 of the Commercial Code 1888 applies. The contract by means of which one sells another person's assets is permitted, and the seller is obliged to acquire the asset and deliver it to the buyer, otherwise he is liable for damages. Although there is a different degree of validity of contract, the contract now being a valid contract, for the good faith acquirer to keep the asset it is required that legalisation occurs, that property is acquired by acquisitive prescription or that rules on sham contracts or on registration in the national registry apply.

E. Conclusion

The Portuguese system appears, in my view, to be a logical consequence of the 'consensual approach' to the transfer of property - the first consequence of the sales contract is the property right transfer - article 879 a). *Traditio* is not an immediate effect of the contract and occurs only as a consequence of one of the ways established in article 1263.

Getting back to Salomons' article in this book,¹⁰ and the possible explanation for the different solutions found across Europe, I would stress the hypothesis of the loyalty of the 20th century Portuguese legal doctrine to Roman law, the inherent consideration that the fall of Rome was the end of civilisation and that the best way to scientification of the law is through Roman sources.

Finally, Good faith acquisition - Why at all?

In spite of all the differences Salomons points out, I consider that it is quite common for European systems to acknowledge some sort of good faith protection in this matter. Its extent may vary, but I think one thing we all agree on is: some protection should be provided. The problem here, I think, is to find the *quantum*.