

Good Faith Acquisition of Movables in Albania**Law**

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The forecast of the institute of good faith acquisition of movables has been dictated by the need to ensure a fast moving and secure civil circulation of movables. Consequently the modern law, being revised so the ancient rule recognized in Roman law 'nemo dat quod non habet' (you cannot give what you do not have)¹⁰⁵, acknowledges that the good faith acquirer of movables becomes the owner even when the thing does not belong to her, except when the object has been taken from owner against his will. In this article, I will first focus on the regulation of the institute of good faith acquisition of movables, in the legislations of different European countries, focusing particularly on relevant provisions in Germany, France, Italy, and the United Kingdom. Furthermore, I will examine the regulation made to this institute in the articles 166 - 167 of the civil code of the Republic of Albania in force, analyzing the legal criteria required for its implementation.

Introduction

Ownership of goods is acquired only in the manner provided by law. This fact is sanctioned in article 41/2 of the constitution of the Republic of Albania, where it is foreseen that: '*Property may be acquired by gift, inheritance, purchase, or any other classical means provided by the Civil Code*'. Contract is one of the basic ways of acquiring ownership of goods. Despite not mentioning the contract explicitly in Article 41/2 of the Constitution, as a way of acquiring ownership, legislators refer to this way of acquiring ownership when referencing that property is acquired by gift and purchase. Acquisition of property by contract, as a way of acquiring ownership references Article 164 of Civil Code.

In the acquisition of ownership by contract the title of ownership of goods is acquired by a person designated pursuant to the right of the previous owner of the property. Consequently, the alienator should be the owner of the goods in order to be able to transfer the ownership of the goods by contract. If the alienator is not the owner of the goods, the individual that has acquired the goods does not become their owner.

However, from this classic rule an exception is made in the case of acquisition of property firstly. Such is the good faith acquisition of movables, where the ownership of the goods acquired by an original (primary) title, in conditions when the transfer of titles to property has been done in a derivative way, through a juridical act that aims the transfer of the property (the contract), is prohibited by the fact that the seller of the goods is not its owner.

Historical developments and regulation of the institute of acquisition of movables in good faith in some European legislations

Good faith acquisition of movables was not recognized as an institute of the civil law in Roman law. The rule of good faith acquisition of movables through good faith possession was first accepted in the old German law¹⁰⁶. This rule was later sanctioned in the German Civil Code, according to which '*the good faith acquirer of the movable becomes the owner even if the thing does not belong to the alienator, except in cases*

¹⁰⁵ Morrison v. Robertson 1908 S.C. 332 and Benjamin's Sale of Goods, 6th ed., London: Street & Maxwell 2002, para. 7-001, Sandra Frisby/Michael Jones, National Report on the Transfer of Movables in England and Wales, in: Wolfgang Faber/Brigitta Lurger (eds.), National Reports on the Transfer of Movables in Europe. Volume 2 Munich: Sellier 2009, p. 1-154, at 119; M.G. Bridge, Personal Thing Law, 3rd ed., Oxford: OUP 2002, p. 97.

¹⁰⁶See Prof. A. Nathanaïli, 'Acquisition of ownership by possession, Popular Justice 4/1956, Publication of the High Court and the General Prosecutor's Office, page 16

when the goods were stolen from the owner, are missing or have been lost in any other way (article 932 and 935)¹⁰⁷.

From the old German law, the rule of good faith acquisition of movables entered into the old French law, by being reflected in the formula *'les Meubles n'ont pas de suite'* (movables cannot be followed by the owner); a formula which was also later sanctioned in article 2279 of the French Civil Code, under the principle *'possession vaut titre'* (possession means title), unless the goods are lost or have been stolen from the owner.

Good faith possession of movables was also provisioned for in the Italian civil law, whereby Article 1153 of the Italian Civil Code stipulates that: *"He to whom movable property is conveyed by one who is not the owner, acquires ownership of it through possession, provided he is in good faith at the moment of consignment and there is an instrument of transaction capable of transferring ownership"*. The Italian civil law has not recognized the owner's right of revindication to the good faith purchaser, even in the case when the goods are conveyed from the owner against his/her will, including also the case when the goods have been stolen from the owner, with the exception of movables registered in the public records¹⁰⁸.

English and Scottish common laws, which like civil law, originate from the wellknown rule *'nemo dat quod non habet'*, determine a stronger position to the owner as compared to that of the purchaser. This rule is found in section 21 (1) of the Sales of Goods Act 1979, which envisages that: *'Where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell'*. Hence, the English common law has not accepted a general exception to the rule *'nemo dat quod non habet'*, in favor of the acquisition of items by good faith possession, but it has only accepted several specific exceptions to this rule in common law and in statutes. Some of the exceptions acknowledged in the common law have been also codified in the Sale of Goods Act 1979, whereas specific exceptions, provided for in statutes, to the rule *'nemo dat quod non habet'* are found in the Factors Act 1889¹⁰⁹.

Historical Development of the institute of good faith acquisition of movables in Albania

The Institute of good faith acquisition of movables was first provided for in Albania in the Civil Code of 1929, according to the model accepted in the French Civil Code. Therefore, this Institute was regulated in Articles 1065 and 1066 of the Civil Code of 1929, determining that regarding movables and bearer titles, good faith possession of third parties had the effect of title in their favor, except when the goods were lost or had been stolen from the owner.

The rule of good faith acquisition of movables was also reflected in Article 43 of the Decree "On Ownership" (which came into force on September 1, 1955), by stipulating that: *'A person who, under an agreement, had acquired a movable object against good faith reward, became the owner of this object even if the alienator had not been the owner. The acquirer, even in good faith, could not become the owner of the object, with the exception of currencies and bearer paper, when that object had been stolen from or lost by the owner, as well as when the object which had belonged to an institution or a state enterprise or a cooperative or social organization, had gone out of their possession in any illegal way'*.

¹⁰⁷ Prof. A. Nathanaili, Vep. Cit., page 17

¹⁰⁸ See F. Galgano, Private law", Publishing House Luarasi, Tiranë 1990, fq. 161 – 164.

¹⁰⁹ See in detail, Arthur F. Solomons, Good faith acquisition of movables, <http://ssrn.com/abstract=1515719>, fq. 2-5

This rule was also stipulated in Article 90 of the Civil Code of 1982, where the content of this article was the same to that of Article 43 of the Decree "On Ownership".

Good faith acquisition of movables

Possession is an institute of the civil law, which with the completion of certain legal requirements, leads to acquisition of ownership of things. This principle serves both for movable and immovable goods, with an essential difference that ownership of movables is immediately transferred in the moment of the transfer of the possession of the item, whereas ownership of immovable items requires possession of the item for a continuous time.

The Institute of the acquisition of movables by good faith possession is provided for in article 166 of the Civil Code. In this article it is foreseen that: *'The person who on the basis of a legal transaction for the passing of ownership has acquired a movable object against good faith reward, becomes the owner of this object, even if the possessor was not its owner. Nevertheless the acquirer, even if in good faith, does not become the owner of the object when this object is stolen. The good faith acquirer becomes the owner of money or bearer paper, even if they were stolen to or lost by the owner or by the public juridical person. The above mentioned provisions do not apply to movables that are registered in public records. The property is acquired free from the rights of others over the object, in case these rights do not derive from the title and from the good faith of the acquirer'*.

From the above definition it is clear that good faith acquisition of movables requires the following conditions:

- a) the acquirer be a third person;
- b) acquisition of the object must have occurred through a synallagmatic legal act;
- c) the acquirer be in good faith;
- d) the object must have come out from its owner at his own will;
- e) the object must have entered into effective possession of the acquirer;
- f) the object must be capable of being acquired by the third person through good faith possession.

Let us analyze the above requirements:

a) The third person

The acquirer must be a third person, to whom the object has not been directly transferred by the owner, but by a person who is not the owner of the object¹¹⁰. This institute shall be applied in the case when the person who is selling the object to a third person, is not the owner of the object, because the contract by which the seller has acquired the object from its owner has been pronounced invalid. In this case, the third person becomes the owner of the object, despite the fact that the object has been sold to him by a person who was not the owner.

b) Synallagmatic legal act

The third person must have acquired the object through a legal act intended for the transfer of ownership, such as: sales contracts, lease contract (mutual legal acts), testaments (unilateral legal acts), legal

¹¹⁰The legislator in Article 166 of the Civil Code has used the term "possessor of the object". Taking into consideration the fact that possession, as one of the powers of the owner, determines the ability of the owner to determine the fate of the object; we believe that the use of this term is not accurate. The correct term would be 'owner' or 'transferor'. In this way this Institute of right would be configured by transferring the right of ownership of goods to a third person not by its owner. Therefore, there is place for replacement of this term with the term 'owner' or 'transferor'.

inheritance by law, etc. A third person may acquire ownership over a movable object provided that: i) the legal transaction be intended for the transfer of ownership and ii) the legal act be synallagmatic.

The legal act for the transfer of ownership must be valid, but it cannot entail its effect, which is the transfer of the ownership right, only because the seller of the object is not the owner. From this view point, the existence of legal act additions for the transfer of ownership of the object renders the institute of good faith acquisition of movables inapplicable. Therefore, the third person cannot become the owner of the object. This institute is also inapplicable in cases when the object has been transferred to a third person through a legal act which is not intended for the transfer of the ownership, such as a rent contract, a lease contract, etc.

The institute of the acquisition of movables by the non-owner does not apply even in the case when the object has passed to a third person through a non-synallagmatic legal act, like a donation contract, a will, etc.¹¹¹. Under such circumstances, the legal acts mentioned above, the legal requirements set forth in Article 166 of the Civil Code, are only satisfied through the sales contract and the lease contract.

c) Good faith

The third person must not only acquire the goods through a legal act intended for the transfer of ownership, but it must also be in good faith. Such is the person who, at the time of the acquisition of the goods, was not aware or was not obliged to know that the alienator of the goods was not the owner. If the third person was aware or had he been more careful, he could have known that the alienator of the goods was not the owner, then he is deemed to have acted in bad faith and therefore he cannot gain ownership over the goods through application of the institute of good faith acquisition of movables.

d) Removal of goods from owner's hold

Goods can only be removed from the owner's hold at his own will. Such a thing occurs when the owner transfers the goods to the possession of another person (eg. a usufruct, a pledger, a tenant, a depositor, etc.) or to the entrustment of another person (eg. a servant, a loader, etc.). If the person to whom the goods have been entrusted by the owner alienates the goods, then the third person who has acquired the goods in good faith becomes the owner of the goods, and its former owner loses the right to revindicate the goods from the third person. However, the former owner is acknowledged the right to compensation by the person to whom he had entrusted the goods.

A third person can become the owner of the goods even when they have been removed from the owner's hold without the will of the latter. The Civil Code provides for only one case when the goods can be removed from the owner's hold without his will, which is the case when the goods have been stolen from the owner¹¹². To this regard, the legislator has revised the principle originally determined in the old German law that a third person cannot become the owner in the event that goods have been removed from the hold of the owner without his will, which also included the loss of the goods¹¹³. This exception is provided for in the second paragraph of Article 166 of the Civil Code which states: "*Nevertheless the acquirer, even if in good faith, does*

¹¹¹ The Institute of good faith acquisition of movables, provided for in Articles 932 to 935 of the German Civil Code, Articles 2279 to 2280 of the French Civil Code and Articles 1153-1157 of the Italian Civil Code, does not require that the legal act has been carried out synallagmatic. In this way, the third person becomes the owner of the object even by virtue of the donation contract. (See to this regard F. Galgano, Private Law, first edition, Luarsa Publishing House, p. 163).

¹¹² A different opinion was expressed by the Civil College of the Supreme Court in the civil case no. Decision (163), dated 17.04.2014, which states that (quote): "*These are the negative preconditions that must be present in a case of acquisition of proprietorship under Article 166 of the Civil Code; i) the owner must not have lost the goods and ii) the goods are not a public object, hence be recorded in the public records*".

¹¹³ Article 935 of the German Civil Code provides the impossibility of becoming the owner a third person who acquires the goods in bad faith by the non-owner when the thing was stolen from the owner, is not found or has lost him in any other way. Article 2279 in the Civil Code provides the impossibility of a third person becoming the owner in case the goods were stolen or lost from the original owner. The Italian Civil Code has provided for as exception the failure to gain ownership over stolen goods, or lost goods.

not become the owner of the object if this object was stolen". Therefore, if the goods have been removed from the hold of the owner against his will, because the goods were stolen, then the third person who has acquired the goods even in good faith, does not become the owner of the goods through the application of the institute of good faith acquisition of movables. In this case, the acquirer can become the owner only through the application of adverse possession. The theft of the goods must not only be understood as secret or disclosed theft under the strict sense of the word (Article 134 of the Criminal Code), but also as theft committed through abuse of office (Article 135 of the Criminal Code), robbery (Article 139 of the Criminal Code etc.). Theft of goods in the sense of Article 166/2 of the Civil Code also exists in case the offense is prescribed, amnestied, pardoned etc.

If the third person steals the goods from the person to whom the owner has entrusted them, he does not become the owner of the goods, as he lacks the requirements that must exist for the acquisition of the goods, through good faith possession of them, which in this case is the legal act for the synallagmatic transfer ownership with, and the good faith of the person.

The above exception, which has to do with the third person not becoming the owner of stolen items, suffers another exemption when the goods stolen from the owner¹¹⁴ or the public legal person are currencies or bearer paper¹¹⁵. Therefore, in this case we have to do with a return to the rule and therefore their former owner cannot revindicate stolen currencies or bearer paper. The reason for which this particular rule is set for these goods is that currencies, as generically defined goods, are not subject to revindication, unless they have been individualized one way or another, whereas vouchers bearer paper, due to their nature, have such a great circulation capability, passing from one person to another, through simple delivery, hand to hand, that they behave like currencies. Under such circumstances, the good faith acquirer of currencies and securities to the bearer should be fed with trust that they cannot be taken away from him¹¹⁶.

e) Entry of goods into effective possession of the acquirer

In order for the acquirer of ownership of movables to become the owner of movables through good faith possession, goods must have entered into effective possession of the third person, and the latter must have the will to hold the goods as his own (*animus rem sibi habendi – intent to keep the goods*). In the case of individually defined good faith acquisition of movables, the definition that the ownership of individually defined goods is acquired from the very moment of the execution of the legal act for the transfer of ownership does not apply in the case of application of the Institute of good faith acquisition of movables. Therefore, for the acquisition of their ownership, they must have necessarily entered into the effective ruling of the third person. If the goods have not entered into the effective possession of the acquirer, the legitimate owner of the goods has the right of their revindication¹¹⁷.

Effective possession of the goods makes it possible, that in the case of the transfer of ownership of movables through contracts to several persons, the acquirer of the goods becomes the one who has acquired the goods in his effective possession, despite the fact that the agreement for the transfer of ownership of the goods has been entered into on a later date. If a person has an agreement for the transfer of the ownership of the goods entered into on a previous day as compared to the agreement of the acquirer of the possession of goods, he cannot claim that the ownership of the individually determined goods has been transferred to him from the moment the

¹¹⁴In Article 166/3 of the Civil Code the legislator has determined that the good faith acquirer becomes the proprietor of currencies and vouchers valuable at the bringer even when they *'have lost'* to the owner. We think that the use of the term *'have lost'*, is excessive and without any legal value, as the legislature has not provided the impossibility of implementing the institute of acquisition of movables by possession with good faith when the things have lost from the owner.

¹¹⁵Article 935/2 of the German Civil Code provides for the possibility of making owner the bona fide possessor of currencies or bearer paper. Possibility of making owner over titles to the bearer is provided for in Article 1065 of the Civil Code of year 1929.

¹¹⁶A. Nathanailli, Vep. Cit., page. 21

¹¹⁷Article 2280 of the French Civil Code has foreseen that: 'where the present possessor of goods lost or stolen has bought them at a fair or market, or at a public sale, or from a merchant selling similar things, the original owner may have it return to him only by reimbursing the possessor for the price which it has cost him'.

contract was entered into and request revindication of the goods. This rule is sanctioned in Article 167 of the Civil Code, which stipulates that:

“In case ownership over a movable good passes, by means of contracts, to several persons, the owner becomes the person who has acquired the disposition of the good in good faith, even if the contract is of a later date”.

f) Goods capable of being subject to acquisition by good faith possession

In order for the acquirer to acquire goods by good faith possession, the goods must be capable of being subject to acquisition by good faith possession. As such, only movables can be subject to acquisition by good faith possession, as immovable things cannot be acquired through good faith possession. The Civil College of the Supreme Court in the civil case with Decision No. (163), dated 17.04.2014, states that: *‘The above exception applies only to movables and the ratio goal of this provision is made on the basis of the nature of such things, forming part of civil circulation, which circulate faster, in order to provide quickness and efficiency in the relations between subjects of law, i.e. for the consistency and stability of civil circulation’.* On the other hand, ownership over immovable goods can only be acquired through the application of the institute of winning prescription.

Goods listed in public records as a guarantee for the satisfaction of an obligation, which have come out of the possession of their owners, are excluded from the rule of the acquisition of ownership over movables, through good faith possession (Article 166/4 of the Civil Code)¹¹⁸. This exemption has resulted from the necessity to ensure the stability of legal relations, considering the fact that such goods enjoy a kind of publicity comparable with immovable goods, and serve to ensure the fulfillment of the obligation in case a lien has been imposed on the movable good.

To enable the application of the institute of acquisition of ownership over movables in good faith, the goods must be in civil circulation. Therefore, ownership cannot be acquired over movables of cultural, historical, archeological, ethnographic values, as well as over goods of a rare nature, of scientific importance, which are discovered, detached or extracted from land or water (Article 187/1 of the Civil Code), as such goods are exempt from civil circulation.

Legal nature and the effects resulting from the acquisition of movables by the non-owner

The application of the institute of acquisition of movables through possession in good faith entails the loss of the right of ownership of the former owner of the goods and the acquisition of this right by a new owner - the purchaser of the goods. Along with the loss of the right of ownership, the right of the owner to revindicate the goods is also lost.

Being a primary way of acquisition of ownership, acquisition of movables in good faith entails, as a consequence, together with the termination of the right of ownership of the former owner, the termination of the real rights of third persons, which the latter might have had over the goods, such as: the usufruct, pledge etc., provided that these rights do not derive from the title, and the acquirer of the goods has been in good faith for these rights, too.

¹¹⁸Article 1155 of the Italian Civil Code, in addition to exception of acquisition of ownership by possession of things registered in public registers, has provided for the non-profitability of the entire ownership of movables (e.g. a library).

The rights of third persons over the goods do not expire if they derive from the title, which means that the rights of the others are provided in the legal act for the transfer of ownership of the goods. If the acquirer of the goods is in bad faith regarding the rights that third persons have over the goods, i.e., if he knew or was bound to know that the goods were subject to the rights of third persons, the real rights of third persons are not terminated. The third person can become an owner over these rights only through the application of the acquisitive prescription institute.

The institute of acquisition of movables through good faith possession is not applicable in the acquisition of other in rem rights over the goods, such as the usufruct, use and pledge, since the legislator has not foreseen the possibility of the application of this institute over these in rem rights, too¹¹⁹, neither in the provisions that regulate the institute of good faith acquisition, nor in the provisions that specifically regulate these real rights.

Conclusions

The study on the institute of good faith acquisition of movables, comparing the provision given in our legislation with the provisions given on this institute in the legislations of western European countries, it is noted that the interests involved are the owner's right and the right of the purchaser in good faith, interests which are differently protected by the above mentioned legislations. Within Europe Italian and Portuguese law represent two contemporary extremes, the former choosing for almost total protection of the good faith acquisition and the latter all but completely favoring the dispossessed owner¹²⁰. Between these two extremes stand also other legal systems, which specifically regulate the institute of good faith acquisition of movables, where an undoubtedly special regulation is also provided by the stipulations contained in Articles 166 -167 of the Civil Code in force.

Taking into consideration the above-mentioned provisions in conclusion of this paper, I would also like to express some opinions on the improvement of this institution in the future.

First: The conomic development of Albania and the increase of the flow of goods require the increase of the safety of the movement of goods, ensuring the good faith acquirers that acquired things cannot be revindicated by the owner. To this regard, I think it is worth omitting the “*synallagmatic*” element from the institute of the acquisition of ownership of movables in good faith. Omission of the synallagmatic element from the provision of this institute would serve to bring this institute closer to its provisions in the above mentoned western European countries.

Second: Being in favor of keeping the prohibition of the good faith acquisition of stolen things, I believe that the provision of this institute might well be improved by excluding from this rule the goods acquired at public auctions or via internet, or by conditioning the owner's right of revindication of the stolengood with the payment of the good purchasing price to the possessor.

Third: I think that there is room for the rescission of the word group '*or that have been lost by the owner*' in paragraph 3 of Article 166 of the Civil Code. The use of this word group in this paragraph has no legal effect since the legislator has not provisioned it as an exceptional case of the application of the institute of the acquisition of movables in the event when goods have been lost by the owner, in the second paragraph of article 166 of the Civil Code.

¹¹⁹ Acquisition of in rem rights of usufruct, use and pledge in good faith are explicitly provided for in Article 1153/3 of the Italian Civil Code where it is specified that: "Rights of usufruct, use and pledge can be acquired in the same way". I think there is room for providing this right explicitly in the Civil Code in force.

¹²⁰ Arthur F. Solomons, Mal fide acquisition of movables, <http://ssrn.com/abstract=1515719>

Fourth: The legislator, in Article 166/1 of the Civil Code, has used the term *‘possessor of the goods’*. Possession is one of the powers of the owner, which determines his ability to determine the destiny of the goods. Given this fact, I share the opinion that the use of this term in Article 166/1 of the Civil Code is not correct. The correct term would be *‘the owner of the goods’* or *‘transferor of the goods’*. In this way, this institute of law would be configured through the transfer of the right of ownership of the goods to a third person by its non-owner. Therefore, the term *‘possessor’* would be best replaced by the term *‘owner’* or *‘transferor’*.

Fifth: I think the expression *‘to the public legal person’* adapted in article 166/3 of the Civil Code by Article 43/2 of Decree No. 2083, dated 06.07.1955 “On Ownership” *‘as well as when the item had belonged to an institution or a state enterprise or a cooperative or social organization’*¹²¹ is unnecessary, as the preceding term *‘owner’*, used in this provision, includes all affiliations, both when it pertains to natural persons and to private or public legal persons.

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¹²¹See A. Nathanaili – ‘The right on proprietorship of the Republic of Albania’, published in the Publishing Directorate of T.S.U, Tiranë 1968, pg. 94.