



# **LEGISLATION IN TOURISM**



## ABOUT TANGIBLE IMMOVABLE GOODS – BY THEIR NATURE OR BY DESTINATION

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*Abstract:* During time there were multiple criterion for defining the notion good. Among them, two have been mainly highlighted and that are the one of utility and of approach.

*Keywords:* immovable goods, destination, legislation, real estate

### Introduction

During time there were multiple criterion for defining the notion good. Among them, two have been mainly highlighted and that are the one of utility and of approach.

The definition that dominated the juridical literature before the new Civil Code is following: „The good ist the economical value that is useful for the satisfaction of material and spiritual human needs and that is suceptible by the approach under the form of patrimonial rights”<sup>1</sup>.

Despite the Civil Code from 1864 that didn't define the notion of good, the actual Civil Code mentiones in art. 535 that „goods are things, tangible or intangible that form the object of a patrimonial right”.

Without trying to detail the notion „tangible” and „intangible”, we shall refer shortly to the first part of the definition.

Tangible assets are those that have a material existence, being perceived by the human feelings, while intangible personal property is the one that has only an ideal, intangible existence.

Art. 536 in the Civil Code makes a difference: „Goods are movable and immovable”. The difference between movable and immovable goods comes from the Roman right, where it wasn't assigned a similar importance as the one gathered nowadays: the criterion of the difference was strictly the nature of the good and the classification is applied only to tangible assets. Much more important was the classification in *res mancipi* and *res nec mancipi*, having as criterion the value of the good.

In the Middle Age this classification became more significant, being given the economical importance of real estates, in a mainly agricultural

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<sup>1</sup> G. Boroi, *Civil Right. General Part*, II. Edition, revised and added, Ed. All Beck, Bucharest, 2002, P. 72.

economy. Movable goods faded in importance towards immovable goods: *res mobilis res vilis*.

Combining the criterion, we remark that real estates might be tangible (those by their nature and destination) and intangible (those by the law determination). Object of our paper forms the first category, that is the tangible real estates.

### **Immovable goods by their nature**

Real estates, by their nature, foreseen by art. 537 in the Civil Code, form the main category of real estates. Among these, are „soil, water springs and water flows, plantations anchored in roots, constructions and any other works fixed in earth with permanent character, platforms and exploitation installations for submarine resources situated on the continental highland, as well as everything that naturally or artificially is incorporated in them with permanent character”<sup>2</sup>.

**I. Earth (soil)** is the only *real estate by its nature*, the other goods (plantations, constructions, platforms, exploitation installations) becoming real estates only by their incorporation, by their connection with soil. A soil fund can't never be entirely moved: by uncovering, excavation or exploitation of the subsoil there shall result a movable good: a certain quantity of soil, sand or gravel in case of uncovering or excavation, coal or other digging in case of the subsoil exploitation. But, the soil fund in its essence shall remain the same, irremovable.

#### **II. Real estates by incorporation:**

Goods that are fixed or incorporated in soil shall be also considered real estates by their nature, either they are goods having a natural existence or they are goods, where at their creation or placing human had a certain participation. The legislator includes in the category of real estates which have a natural existence, as example, the springs and water flows, as well as the plantations anchored in roots.

Springs and water flows, although apparently movable, considering their continuous flow, are considered by the legislator as being immovable due to their incorporation in soil, in the ground where they come from or through which they unfurl their flow.

Plants and scrubs that grow in vases are movable, even if the vase is situated on earth in certain periods of the year. It is not necessary that the plant

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<sup>2</sup> Art. 887 par. 3 in the Civil Code mentions, as well, that by real estate in the meaning of the Title VII – Land Register, it is understood one or more neighbored soil parcels, indifferent of their using category, with or without constructions, belonging to the same owner, situated on the territory of a certain administrative – territorial unit and that are identified by a unique cadastral number.

is destined to remain in soil, a longer period of time. Thus, scrubs planted in a farm are immovable even if they are destined to be moved in the future<sup>3</sup>.

In the category of real estates created artificially by human, the legislator lists, as example, „the constructions and any other works fixed in soil with permanent character, platforms and other exploitation installations of submarine resources situated on the continental highland”.

There must be remarked that, in order to be considered immovable, buildings must be incorporated in soil, anchored in soil with permanent character, that is, they can't be moved without losing its being<sup>4</sup>. This means, that a construction laid only on soil or close to soil, but without foundation – for example a provisional barrack, the tent of a circus, a container – won't be considered as immovable, because it is not bound to the soil and might be moved into another place without being destroyed. We shall consider as being included in this category any construction at the soil surface or in its inner part: embankments, barrage, gas pipes, water supply pipes, wind or water mills, etc<sup>5</sup>.

At the end of art. 537, in order to conclude, the legislator includes this category, of real estates by their nature – in the incorporation – „and everything that naturally or artificially is incorporated in them with permanent character”. All (movable) goods naturally reunited or which the owner *chooses* to reunite permanently with a real estate by its nature (literally or by incorporation) become at their turn, real estates by incorporation.

Thus, we consider that, in order to be part of this last category, the good must fulfill following conditions:

- to be a *movable good* by its nature;
- to be established a relation of *permanent connection* with the fund, asserted or not by a *material connection* with it.

What the first condition regards, we consider that there are no discussions: in the hypothesis that the reunited good is itself immovable, there might eventually appear the problem of its connecting relation with the main real estate, whose juridical destiny it would follow, but not the one of classifying it according to the nature criterion.

Movable goods are defined by the legislator by using a criterion that is at least disconcerting from the point of view of our actual discussion: of the exclusion. Art. 539 says that „goods that law doesn't consider as being immovable, are movable”. The class of goods is a residual one<sup>6</sup>. Thus, from the

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<sup>3</sup> M. Planiol, *Traité Élémentaire de Droit Civil*, refondu et complété par G. Ripert, 5<sup>ème</sup> édition, Tome Premier, Librairie Générale de Droit et de Jurisprudence, Paris, 1950 p. 891.

<sup>4</sup> H. Mazeaud, J. Mazeaud, L. Mazeaud, F. Chabas, *Introduction à l'étude du droit*, Ed. Montchrestien, Paris, 1991, p. 285.

<sup>5</sup> G. N. Luțescu, *Teoria generală a drepturilor reale. Teoria patrimoniului. Clasificarea bunurilor. Drepturile reale principale*, Imprimeria „Văcărești”, București, 1947, p. 119.

<sup>6</sup> O. Ungureanu, C. Munteanu, *Eseu asupra clasificării bunurilor în dreptul civil*, ed. Universul Juridic, București, 2010, p. 81.

point of view of the legislator, without outlining a sphere of fixed properties, we can't mention the one of movable goods, that can't lead to a vicious circle: for the definition of immovable goods there is necessary to determine with a certain exactness the movable goods, determination that the Civil Code reports for the first category that we try to define, the one of real estates.

Needing a fixed point, we shall start from the old definition of movable goods foreseen by art. 473 in the Civil Code from 1864 as being „bodies that might be transported from one place to another”, considering traditional as being movable those goods susceptible to be moved.

Obviously, considering the fact that we discuss of tangible assets, also movable goods susceptible to pass the border to real estates shall be part of the category of tangible assets.

In regards of the second condition, the one regarding the establishing of a relation of *permanent connection* with the fund, outlined or not by a *material connection* with it, discussions are multiple.

We remark first of all that the existence of the second condition leads to the dividing of this class of goods in two categories:

- immovable goods by incorporation that present a material connection with the fund and
- immovable goods by incorporation that present no material connection with the fund.

1. Regarding the first category, we consider that, so far the incorporation with permanent character is outlined by a material connection with the real estate (that is the good is built, bound, embedded, in a way or another in the main real estate), there isn't necessary that the good represents an economy utility<sup>7</sup> for the real estate; even if it isn't useful but to the owner (and even it has a purely decorative destination), it shall be considered real estate, under the condition that the owner has the intention (proven by a material connection with the fund) to make it a permanent accessory of the fund. As a matter of fact, the Civil Code doesn't mention any condition of the goods' utility, need or compulsoriness, when it has to be included in this category.

Thus, as example, we shall consider that there are part of the real estates through incorporation, having a material connection with the fund, the following goods: doors, windows of a house, electric and sanitary installations, bricks that built the house, tiles that cover the house, wallpaper that covers the walls (goods that are compulsory for the existence or functioning of the real estate), but also mirrors embedded in masonry or bound to the walls of the house through nails, wood screws or other specific means, upholstery bound to the walls of the construction, statuettes bound through gypsum or other materials, etc. (that is, decorative objectives bound to the material fund, without being critical for the proper real estate, but only for the pleasure of the owner).

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<sup>7</sup> A. WEILL, *op.cit.*, p. 193; H. Mazeaud, J. Mazeaud, L. Mazeaud, F. Chabas, *op. cit.*, p. 289.

The material connection might be outlined in different forms: old and traditional gypsum, lime or cement in the Civil Code from 1864, that served to the connection of the good to the fund, different nails, screws or special adhesives for moquette or wallpaper, carpets, hooks for ceiling lamps, candelabrum or hold fast, etc.

Passing to the second mentioned category, it has to be discussed if the phrase „everything that naturally or artificially is incorporated in it with permanent character” might make reference also to goods assigned by the owner to the fund, that still outline no material connection with it (animals affected by agricultural culture, fishes in the pond, bees in the beehives, etc). Has the legislator wished to include in this category of real estates through incorporation also the old real estates by destination, consisting in goods foreseen for the service and exploitation of the fund, *without any material connection*? Why not?

To incorporate means to unite, to put together more things in order to make a body, a whole. The definition in the dictionary doesn't mention as need of the incorporation the material connection with the whole to which the good was bound and thus we might consider that the phrase mentioned above refers also to the *mental, intentional* incorporation of a good in an immovable fund.

And why has it not to be so? Is it possible that the legislator has used in the discerning of the two categories of goods – movable and immovable – a simple and rude criterion as the material connection? Is it difficult to believe that things would be reduced just to it. The society is much more evolved, the relations between people connected to goods – much more complex, such as it would be an error to pressurize the distinction between real estates and movables, by connecting them to a criterion as material connection. That is, a good physically connected to a real estate is a real estate by its nature, by incorporation, even if it isn't critical for the functioning of the fund, but only useful to it or has only decorative aim, but in the hypothesis that it isn't physically connected to the main fund (or it doesn't follow to be, case in which we would classify it as real estate by destination), is it movable, despite the critical character of its assignment to the real estate?

In reality, we consider that there are included in this category the movable goods needed and useful for the fund which its owner assigned to the use with permanent character, „în perpetuum”<sup>8</sup>. The French jurisprudence pretends as

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<sup>8</sup> See also, for an apparent contrary opinion, O. Ungureanu, C. Munteanu, *Drept civil. Partea generală în reglementarea noului Cod civil*, Ed. Universul juridic, București, 2013, pp. 148-149, although later on, on page 151, the authors include wild animals from arranged parks or from the zoological garden into the category of real estates by destination. As well, for a favorable opinion, see also E. J. Prediger, *Introducere în studiul dreptului civil*, Ed. Hamangiu, București, 2011, p. 75; the author, although he includes the discussed goods in the category of real estates, he doesn't mention as certain to which category of real estates: to the one by their nature, by incorporation or by destination.

well, that in order to be classified in this category, the goods mustn't be only useful, but „*absolutely critical*” in the exploitation of the fund<sup>9</sup>.

The formulation of the old art. 468 in the Civil Code from 1864, considering „objects that the owner of the fund has put into the service and the exploitation of this fund” involves the idea that the *good serves to the fund and not to its owner*. Goods that serve to the person of the owner and not to the fund enter in this category: while trucks affected by the industrial exploitation are immovable, the personal car of the employer is a movable good.

The destination of the good might be *agricultural*<sup>10</sup> or *industrial*<sup>11</sup>, as it was foreseen by the Civil Code from 1864 regarding real estates by destination, but (seldom) *commercial*<sup>12</sup> or for *household use*<sup>13</sup>.

Either it has or has not any material connection with the fund, in order that a good to be considered as real estate by incorporation (by its nature), it is indifferent if the one who made the incorporation is the nature, the owner of the fund or a third party. In case that a third party (beneficial owner, inhabitant) would incorporate the good into the fund, he couldn't take it anymore at the end of the usufruct or of the lease, because the good has lost its individuality by its incorporation into the real estate. When leaving, the third party shall leave the incorporated goods, as part of the real estate, having, eventually, towards the owner of the fund, a right of receivable for the countervalue of the respective goods.

Concluding this category of real estates by their nature, by incorporation, we might remark that the legislator included in it, the real estates previously classified, in the Civil Code from 1864, as real estates by destination: those characterized by placing them into fund in perpetuum (with permanent character), outlined by a *material connection* with the fund (these „embedded

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<sup>9</sup> This double conditioning was formulated by the French jurisprudence in order to avoid the expansion of the notion as real estate in the detriment of the unsecured creditors, in order to not risk an assignment of all goods of the debtor, qualified as real estates by destination, whereby the creditors had available a mortgage over the real estate by nature. Thus it was maintained the category of real estates inside the reasonable limits imposed by economical considerations.

<sup>10</sup> The Civil Code from 1864 insists on this category, because at the moment of its issuing the agriculture occupied a primordial place.

<sup>11</sup> Generalizing, there might be affirmed that there are real estates by destination, all goods that serve to the industrial exploitation and the manufacture of products, raw materials, plants, etc.

<sup>12</sup> In order to consider that a good enters in this category, there must exist a connection between the building the the goods destined for serving it; still, a commercial activity might be performed in a certain building and thus, the goods in the building – being not critical for the performing of the activity – shall be considered as movable goods. There are still goods that might be framed into the mentioned category: the furnitures of the hotel, the decorations, the costumes, the machines needed to the activity of a theater, the icons, the clothes, the goods placed into a church, needed for the religious service.

<sup>13</sup> Goods n this category are submitted also to the condition of being necessary to the real estate by nature: keys of the doors, movable louvers, moquette on stairs, etc.

with gypsum, lime or cement” or those that „can’t be taken out without destroying or deteriorating the part of the fund where they are attached to”, as it was foreseen in art. 469 of the Civil Code from 1864), as well as those attached to the use of the fund, with intention, *without any material connection* with it (instruments and animals affected by the cultivation of soil or by the functioning of the household, etc.). We consider it is an optimal choice, between the old division created confusions between real estates by their nature – by incorporation and real estates by destination.

### **Test of the immovable character of the good**

It is obvious that the owner is tempted to affirm, according to the interest he has at the respective moment, that movable goods situated in the fund are or aren’t affected by it, with permanent character: if the real estate is followed by a mortgage creditor, the owner shall pretend he hasn’t affected any good of the fund with permanent character and vice versus, after case. In order to demonstrate the immovable character of the good, there must be proven the permanent character of its fixing or incorporation.

Thus, in the case of the goods in the first category, the simple showing of the material connection with the fund shall be sufficient for including them into the wished category. In regards of goods in the second category, because a certain material test, like the material connection, isn’t at the disposal, there must be shown the intention of the owner to make permanent the staying on the fund of the respective goods: by the duration of their assignment to the fund, by the useful, needed or even critical character they have towards the main real estate, etc.

### **Real estates by destination**

Art. 538 par. 1 of the Civil Code is foreseeing following: „There remain immovable goods the provisional materials separated from the real estate, in order to be used again, so far as they are kept in the same form, as well as the integral parts of a real estate that are temporary disconnected from it, if they are destined to be reintegrated”. And parl. 2 foresees: „Materials brought for being used instead of the old ones become immovable goods from the moment they gathered this destination”

Real estates by destination are movable goods by their nature, considered real estates due to the relation of connection *wished by human* between them and an immovable good. Their character as accessory goods towards an immovable good lead to the removal of the proper juridical regime of movable goods<sup>14</sup> and to the application of the juridical regime of real estates.

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<sup>14</sup> E. Chelaru, *Drept civil. Partea generală*, Editura All Beck, București, 2003, p. 72.

**I. Aim** of this category consists in the wish of the legislator to submit these movable goods to the same juridical regime to which are submitted the immovable goods they depend on. Thus, when a real estate is burdened by a mortgage, it expands also on the real estates by destination, accessories of this real estate. At the same time, the alienation of the immovable good by nature shall regard also the real estates by destination, if the parties do not foresee the contrary in the concluded juridical document. A contrary solution would compromise the value of the real estate by nature, real estate considered by the legislator as being the main good<sup>15</sup>.

**II.** In order that a good might be considered real estate by destination, there must exist a relation of connection (of destination) between the accessory good and the main real estate<sup>16</sup>, outlined by the intention that the respective good is unified with the fund. According to the Civil Code, this relation of destination doesn't need (even forbids) any material connection, being generated by:

- the provisional disconnecting of the movable good from the real estate where it was incorporated: „provisional separated materials from a real estate, in order to be used again, so far as they are kept in the same form, as well as integral parts of a real estate that are temporary disconnected from it, *if they are destined to be reintegrated*”;
- the destination to become real estate by incorporation: „*materials brought in order to be used instead of the old ones become immovable goods from the moment they gathered this destination*”.

Practically, compared to immovable goods by incorporation that gather this quality by the permanent unification with the fund, the real estates by destination become real estates, if once disconnected from the fund, *the intention* was to reintegrate them or if they are new, they were brought *for being bound* to the fund with permanent character.

We remark that there exists a close relation between the real estates by destination and those by incorporation: in essence, the real estates by destination are those that *do have the destination to become (or to become again) real estates by incorporation*.

There appears the question: who establishes this relation of destination: the owner compulsory, or might it be done even by a third party?

The old regulation established, in art. 467-470 of the Civil Code from 1864, that only the owner might „put the good on the fund”, this involves the fact that the discussed good belongs to him. The movable goods belonging to an inhabitant or a beneficial owner, located on the fund (even if ”for its use and

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<sup>15</sup> H. Mazeaud, J. Mazeaud, L. Mazeaud, F. Chabas, *op. cit.*, p. 286.

<sup>16</sup> G. Cornu, *Droit civil. Introduction. Les personnes. Les biens*. 11<sup>e</sup> édition, ed. Montchrestien, Paris, 2003, p. 395; H. Mazeaud, J. Mazeaud, L. Mazeaud, F. Chabas, *op. cit.*, p. 287; M. Planiol, *op. cit.*, p. 895.

utility”), wouldn’t never be real estates by destination<sup>17</sup>. The reason of this condition is the one that, when the owner of the movable good and of the respective real estate are different, it is useless to submit these goods to the same juridical regime, because they won’t be never mortgaged or sold together, but contrary, when the inhabitant or beneficial owner shall leave, he shall take with him the immovable goods that served him to the exploitation of the fund.

According to the new regulation, are these observations still valid?

Our opinion is that, they are, this condition remains valid. To singularize according to the situation:

Par. 1 of art. 538 speaks about „materials provisional separated from the real estate”, as well as about „integral parts of the real estate that are temporary disconnected from it” – that is, goods that were integral part of the real estate of the owner or of whom they might belong excepting him? Once they became integral part of the real estate – physically speaking – they follow the same destiny and the juridical regime, as any real estate by incorporation, either they belonged initially to the owner or they belonged to a third party who was beneficiary of a receivable right for these goods. In such a situation there might be spoken only of goods that belong to the owner of the fund.

Par. 2 of art. 538 refers to „materials brought to be used instead of the old ones” and which – as the Code says – „become immovable goods from the moment they gathered this destination”.

We are in the situation of goods that have no material connection with the fund. In the hypothesis that they would already be incorporated in the fund, this question wouldn’t appear, because they would be real estates by incorporation and would follow the destiny of the fund, being alienated or burdened together with it. But, they are separated from the fund, united only through a relation of destination established by the human mind. By the human mind of the owner of the fund or by the mind of a third party?

Obviously that in the hypothesis that the fund and the movable goods do have the same owner, the last ones shall follow the destiny of the fund and become accessory to it, that is real estates by destination.

But, in the hypothesis they belong to a third party, being brought in order to replace old materials, in our opinion, the third party might any time, till their unification with the fund, take them and deposit them in another place, giving them another destination and thus, they won’t follow the juridical destiny of the real estate to which they were initially destined. Obviously that, after their binding to the fund „in perpetuum”, becoming real estates by their nature, by incorporation, they can’t be taken anymore by their previous owner and thus they are following the destiny of the main real estate.

As a conclusion, in both situations foreseen by art. 538 of the Civil Code, in order that a good might become real estate by destination, it must have the

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<sup>17</sup>M. Planiol, *op. cit.*, p. 894.

same owner with the main real estate, with the fund for which it is foreseen. However, as shown in the doctrine, although the legislation doesn't mention formally, it is understood that the owner of the materials must be also the owner of the construction, because, otherwise, we would be in the case of access regulated by the provisions of art. 580 in the Civil Code<sup>18</sup>.

Thus, we consider that goods, in order to be part of this category, must fulfill following conditions:

- they must be *movable goods* by their nature;
- the affecting relation (of destination) between the accessory goods and the main real estate, outlined in the way foreseen in art. 538 of the Civil Code;
- the two goods must belong to the same owner<sup>19</sup>.

### Conclusions

The categories of immovable goods and movable goods aren't fixed, irremovable, goods might transit according to the destination granted to them by human. Thus, immovable goods become movable by the separation of some parts of them (by excavating the soil – immovable good by its nature – results soil, sand – movable goods by their nature, by the demolition of a building there result bricks), but, at the same time, the same movable goods might become immovable under the hypothesis that human grant them this destination.

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<sup>18</sup> E. Chelaru, în *Noul Cod civil. Comentariu pe articole*, art. 1-2664, de Fl. A. Baias et alii, Ed. C.H. Beck, București, 2012, p. 585

<sup>19</sup> In regards of real estates by destination foreseen by art. 538 par 1, another condition might be considered the one that materials keep the form they had at the moment of their separation, in order to be incorporated as such in the real estate they were disconnected, arguing with the idea that the change of form might be considered as clue of the destination change, that would take these goods out of the category of real estates; and in regards of real estates by destination foreseen by art. 538 par 2 there was considered that they must fulfill also the condition that they are brought to the location of the real estate where they follow to be incorporated (*Idem*, p. 584).