

THE EVICTION IN THE SALE-PURCHASE CONTRACT IN THE LIGHT OF THE CURRENT CIVIL CODE REGULATIONS

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Abstract

Eviction is a theme that has permanently preoccupied the theoreticians of law, the provisions of the Romanian Civil Code on this issue being subject to extensive discussions and interpretations.

The guarantee for eviction is specific, unless otherwise agreed, only to contracts for pecuniary interest, in which the debtor of this obligation considered also a consideration at the time the contract was concluded. The guarantee for eviction refers both to the ownership transfer contracts as well as to those for the transfer of use.

The eviction is certainly among the oldest legal institutions, but undoubtedly its importance in human society has not lost relevance at all, but on the contrary we can say that over time it became more refined even if the doctrine recognizes at the same time that the practical significance of the rules on eviction is relatively low.

This article analyzes the eviction in the sale-purchase contract in the light of the current Civil Code regulations.

Key Words: *eviction*, sale-purchase contract

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1. Notion

The seller's guarantee obligation arises from the principle under which he must do everything he can in his power to ensure the peaceful possession of the purchaser and of the asset sold. Thus, the obligation of warranty of the seller is to be regarded as a double aspect: the seller must guarantee the purchaser for the quiet enjoyment of the thing, i.e. against eviction and for the useful service of the thing, i.e. against hidden vices. The guarantee represents an obligation by virtue of which a person or an institution responds to another person about something, gives the certainty that someone will have something, is responsible for the quality or value of an object (Moțiu, 2013: 67).

The obligations of guarantee differ from other obligations by the fact that the contractual debtor is responsible if the fact is not guaranteed, even if it is not at fault and has no the causal contribution to production.

The seller who receives a price in exchange for transfer of a right must guarantee the buyer that nobody will disturb the exercise of that right. If a third party could (would be entitled) to trouble the buyer in the exercise of the right on it means that this last one either does not exist either has no content and the limits indicated in the contract, so the price received by the seller would be, in whole or in part, devoid of matter. Therefore, in order to pay the price to be fully justified, seller shall

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guarantee the buyer that such disorders will not exist, according to Romanian terminology, to safeguard the purchaser against eviction (Dincă, 2013: 122).

The legal basis of this obligation comes from the seller's obligation itself to transfer the buyer's ownership right or another right in respect of the property sold and to make available. Therefore, the seller must do whatever he can in order to ensure the maximum peace of mind for the purchaser of the sold property, the obligation to guarantee against eviction being an extension of the obligation to transfer the ownership and use to the holder of the asset.

The finality of settlement of the liability for eviction is to protect the right of the purchaser not to be disturbed in the use of the thing bought through that contract, acquired either by the seller or by a third party, and if was evicted, for his compensation (Comăniță, 2013: 47)

Through the guarantee against eviction, the purchaser shall be entitled, according to the law, of the seller's promise that he will not lose the rights to the thing, whether it's for a cause prior to sale, or through a deed of the seller, post selling, and that will defend the buyer for any damage and will be indemnified if something occurred. (Decision no. 3482 of November 7th 2014 delivered on appeal by the Department II of the civil part of The High Court of Cassation and Justice, aimed at engaging liability for eviction)

In its original meaning, etymologically, eviction means a loss of a right as a result of a judgment (Prescure, 2012: 65). The word comes from the Latin *evictio-omis* = dispossession; that is, a person loses his right on a thing, because through justice has been recognized to a third party with a competitor of the evicted one (Toader, 1998:7).

Eviction represents the loss of the property or disturbing the buyer in the exercise of his ownership rights or another transmitted right, resulting from the sale of a right to a third party, which excludes fully or in part, the right of the buyer.

Art. 1695 para. 1 Civil code provides that the seller is obliged to guarantee the right to the purchaser against eviction that would prevent to fully or partly own peacefully the asset that was sold.

Eviction usually results from a court order but there is also the possibility for this to happen in the absence of legal action: for example, when the third party's right is so obvious that the buyer assigns the asset, without a judgment; the buyer has acquired from a non-proprietary and later he becomes the owner of the thing by inheritance or donation; the buyer pays the mortgage lender, relieving the property and keep it. The doctrine and jurisprudence from the old regulation admitted the possibility of eviction outside of a court decision.

In these cases, however, under the new provisions, the protection of the buyer is limited by law. Thus, according to art. 1705 para. 2 of the Civil Code, the purchaser who, without a court order, has acknowledged the right to a third party loses the right of guarantee, unless he proves that there were sufficient grounds to prevent eviction.

An amendment of the new civil code in matters of security against eviction is

aimed at consecrating of the existence of a security for upward eviction (Goicovici <http://www.universuljuridic.ro/vanzarile-sucesive-ale-bunului-garantiile-ascendente-ambienta-noului-cod-civil>). Through this involvement, if the same good was resold any of the acquirers of the object may act in court the previous seller in the sequence of all consecutive sales because, according to art. 1706 Civil code, "the seller is obliged to guarantee against eviction in relation to any subsequent purchaser of the property, without having to distinguish as the acquisition is a title for a consideration or free of charge"

This possibility was not prohibited either in the old regulations, but not necessarily dedicated to express both the parties and the courts were reluctant in terms of its usefulness. (Thus, it was noted that if the property has been the subject of successive disposals whose invalidity has not been found, the final evicted purchaser is entitled to promote action in warranty directly against the first seller or against all successive sellers. From this point of view, the guarantee for eviction is operating without any fault of successive sellers-individuals, in charge of the first seller, unless it has been proved that the abusive takeover of property in the patrimony of the Romanian State, and not a different situation would constitute the basis of eviction. Thus, the prefigured solution comes in line with the case law of the European Court of Human Rights in the application of the principle established by article 1 of Protocol 1 of the European Convention, being accredited to the idea that the attenuation of violations the former regime in Romania of ownership "should not create disproportionate drawbacks" (case *Raicu c. Romania*) and that the requirement of compliance with the security of legal relations cannot be ignored (case *Brumărescu c. Romania*). Equally it was held that the privation of property, in the absence of any compensation, constitutes a breach of the right of ownership, and where the State has taken over the property in an abusive manner is no longer able to hand over the property in nature, and shall grant the person money damages. (Civil Decision No. 450/C of 14th of December 2009, C.A., Constanța, s. civ.)

Through the regulation of the legal text, the situation improves considerably for the final purchaser, where its direct author (the seller) is insolvent, the refund of the price or its reduction can be obtained from the initial seller, after eviction (Goicovici, 2015) The guarantee removes upward multitude of guarantee proceedings on the same case of eviction and ends the costly litigation involved the eviction.

Liability conditions must be met in relation to the first sale, but the effect of the application of the guarantee will benefit against eviction the subacquirer and not co-contractor who is liable.

The action of the subacquirer in upward warranty against the original seller will be subject, mainly, to the regime of the sales contract, whereby the one obligated to guarantee has transferred the right to the next purchaser of the chain, although with all limiting clauses or exempting warranty, with one exception, namely that the defendant seller cannot be forced to return more than the actual price received in the first contract (plus damages arising from possible fraud committed).

Where the contract of sale was concluded by a representative, liability for

eviction belongs to the seller and not to the representative because the conclusion of the act by the representative does not send obligation to guarantee to the representative (If, however, the trustee acts as a seller, for example, when simulated by interposing people, then the trustee will be responsible for eviction to the buyer).

When there are more forced to guarantee against eviction, their obligation is an indivisible obligation (Turcu, 2011: 746). According to Art. 1697 Civil Code, the obligation to guarantee against eviction is indivisible between borrowers and the buyer can act against any of successors with universal vocation of the deceased seller to pay full compensation, with the subsequent possibility of the defendant to act recourse against other debtors.

In the situation of a forced sale, the provisions of Art. 860 of Civil Procedure Code, republished, according to which any application for eviction, total or partial, in regards to the awarded property is permanently extinguished. In the case of buildings submitted for the first time in the Land Registry, the application for eviction should be prescribed within 3 years from the date of award registration in the Land Registry Act. Therefore, the current regulation, a building contractor cannot be evicted if the property is not registered for the first time in the land.

2. Guarantee against eviction resulting from acts attributable to the seller

The guarantee against eviction from the seller provided in art. 1695, paragraph 3 of the Civil Code, according to which the guarantee against eviction is arising from acts attributable to the seller, even if they arose after the sale.

Therefore, the seller must refrain from any act, whether material or legal, committed before or after the agreement which could affect the buyer or in terms of ownership or the use of property acquired through purchase, even though they would have been unlawful if they had been committed by any other person other than he (Chirică, 2008: 372). An example of a fact attributable to the seller would be a situation in which the assignor of a patent for invention shall continue the operation of the invention after the date of the notice of assignment.

The warranty obligation of the seller for their actions target both direct buyer disturbance and indirect eviction, committed by the seller through a third party (Puie, 2014:106).

The buyer can defend itself against disturbances from the seller citing "security exception": who should guarantee for eviction cannot evict (*quem de evictione tenet actio, eundem agentem repellit exceptio*) a principle established in art. 1696 Civil Code. Thus, if sold, to another one, then inherited the true owner, he cannot evict the buyer, except that will oppose personal guarantee. The guarantee for the seller is perpetual, is not extinguished by extinctive prescription, exception may be invoked at any time.

Except for seller's warranty may be invoked whether law underlying its action entered its heritage before or after the contract of sale was closed.

When the object to be sold is a building, and the seller retains in its

neighborhood another building, the guarantee of eviction won't stop him to exercise his natural rights deriving from its ownership rights, even if it causes some inconvenience to the buyer.

In the French doctrine, the seller's security for its own acts involves a significant mitigation, namely where the seller has remained the owner, he can exercise the normal rights even if it causes injury to the purchaser, his disturbance is not due to guarantee, except for the situation where he would have limited the rights in the thing that he kept (Malaurie, 2009: 208) – for example, if the seller owns the house and land on the seafront and sell the house without giving servitude of view and without encumbering land with a servitude, he has the right to build on the remaining land a building that would mark the sea view, exception is only if the prohibition is resulting from the content of the contract.

3. Guarantee against eviction resulting from the act of a third party

The seller shall also be responsible for disturbances caused to the purchaser by a third party in the exercise of the right.

The seller is presumed to know the legal status of the property object of the contract of sale, such that in the absence of a clause in the contract, allegedly it was sent free the property rights to other people. So if a third party claims, however as the holder of such a right, it is natural that he be taken to protect the buyer against the third party or third party be responsible for the consequences if the claims are unfounded (Chirică, 2008: 380).

The seller's responsibility for eviction resulting from the act of a third party is engaged if three conditions are met, conditions that also needed to be met in the old regulation:

a) There should be a disorder of law, that is, eviction should have a legal question (Dincă, 2013:128)

It is considered a disorder the invocation by a third party as a right, of tasks or servitudes of the property. The invoked right by the third party can be a real right (ownership, usufruct right etc.) or a claim (the right of use resulted from a tenancy or a right of first refusal) or an intellectual property right. The seller's responsibility is engaged only if the disorder from the third party is a disorder of a right, founded on a legal basis, because if a disorder as a fact the buyer can defend himself through legal means, for example by the possessory action or recovery of possession.

In order that the seller would respond, the disorder must be present and effective, not just a possible one, a simple fear of a hypothetical eviction does not entitle the buyer to sue the seller. In this sense, the case law has held that eviction from the legal point of view is simply sending a notification from the third party, who claims ownership and is threatening the buyer with action for recovery; it was appreciated that sending the notification, with the shown content, is not an act of actual eviction and expressed through the total or partial loss of the item.

Regarding the property *easements* that would strike the object of the contract of sale, the seller is responsible for undeclared servitudes that are not apparent because it is presumed that the apparent ones (which can be recognized by visible external marks) are known and accepted by the buyer.

It is constituted as a disorder the liability against eviction and sale of a property fund as dominant, without existing servitude in reality, in this case the eviction is partial, with the consequent decrease of the property value. In the case of mortgages and privileges, warranty obligation operates only if the principal debtor fails to pay the debt and the creditor goes to achieving claims (Ciochină, 2012:76).

The good or bad faith of the seller, consisting in the knowledge or ignorance of the cause of eviction does not influence its accountability.

b) Eviction is due to prior to the sale

The establishment for liability of the seller for eviction occurs only if the third party concerned has a previous moment of conclusion of the sale contract (Stănciulescu, 2012:379). It is sufficient to establish liability of seller if the generated fact was produced or began to produce in such a way that the acquiring of the right for a third party to be considered definite. (Dincă, 2013: 129). For example, starting a procedure for expropriation before concluding the contract, but unfinished.

The seller cannot be held responsible for circumstances arising after the contract closure and transmission of heritage to the buyer, unless eviction comes from his personal fact. For example, if the seller sells twice the same property, and the second acquirer makes his first opposable act of acquiring, enters with good faith in the possession of a possession or being the first to register the right in the Land Registry, the second sale is a cause subsequent to the first contract of sale, but attributable to the seller.

c) Eviction cause is not known to the buyer

Knowing the cause for eviction by the buyer confers a random character to the contract, presuming including the acceptance of risk of eviction. The burden of proof in this case lies with the seller.

4. The operation of the guarantee obligation

To analyze the way in which this guarantee works, you need to distinguish the eviction that didn't happen, but is about to occur and assuming that eviction already happened.

From the point of view of conduct imposed on seller until eviction, till eviction he is obligated to refrain from any act or fact that could disturb the purchaser, so a negative one, of not doing so.

If eviction is imminent, i.e. a third party relies on certain rights over the goods purchased, the seller has the obligation to protect the buyer against third party claims, his obligation is an obligation to do.

Buyer sued by the third party, will introduce the seller in the process through a claim under warranty. The buyer's interest to call the seller as guarantee is threefold:

- to defend the purchaser with all means at its disposal for the purpose of refusing action of such third parties;
- to make them enforceable against the decision given by the court
- to avoid, in case of loss, the provisions of art. 1705 Civil code that exempts from liability on the not called seller to sue the buyer sentenced by a judgment entered in the power of the judged thing, if later one will prove that there were sufficient grounds to reject the request of the third party (except a bad driven process).

If eviction occurred, the buyer may require the seller's liability for damages suffered as a result of eviction, in this case the seller will be bound by *the obligation to give*.

The covering of damage suffered by the buyer by even eviction is payable by the seller regardless of any fault on his part. The good or bad faith of the seller only influences the amount of damages that will be required of him.

If the eviction occurred, the extent of liability of the seller is different, depending on whether total or partial eviction.

1. *The total eviction* means losing entirely the ownership by the buyer of the goods purchased. In this situation, according to art. 1700 Civil code, the buyer may request termination of the sale if he was evicted from the good, and with the price of rescission he may claim restitution for the damages he suffered.

In consequence, the rescission of the contract of sale and the seller owes the buyer:

a) *the repayment in full of the price received*, regardless of the decreasing value of the item at the eviction date; where the purchaser has obtained a benefit from the damage caused to the property, the seller shall be entitled to deduct from the amount corresponding to the cost of this benefit. For example, if the buyer of a forest land has exploited part of it before eviction, the seller will retain the value of the price of wood exploited. These rules shall also apply where the seller is obliged to return the received price of a subacquirer that performs an action *directly* against him, as the subacquirer paid a lower or higher price as one from whom he bought or he acquired the good with a free entitlement (subacquirer being a donee).

b) *the amount of fruit* that the evicted buyer was forced to return to third evictor, *i.e.* the one that has charged after he became in bad faith, after the date of the action of such third parties. From the moment of conclusion of the contract, the buyer has the right to acquire the fruits, as a bona fide holder. At the request of the third party evictor, he may be forced to refund the fruits perceived and the equivalent value to those which failed to collect after he became of bad faith (*i.e.* he is aware of third party's rights over the goods that were sold, at the latest from the receipt of the application of call in judgment requested by third parties, when the causes of the ineffectiveness of the title were known to him) (Popescu, <http://www.universuljuridic.ro/efectele-obligatiei-de-garantie-in-cazul-evictiunii-consumate-in-reglementarea-noului-cod-civil>).

c) *costs* of the Court process which resulted in eviction and the action in

warranty promoted by the buyer against seller, as well as the writing of the contract of sale and purchase (fees, tolls tabulation);

d) *payment of compensation* of losses and unrealized gains for the buyer because of eviction. That provision targets other losses incurred by the buyer, such as the rent paid until he found another house, damages paid to the lessee which entered into a tenancy and ceased due to eviction etc.

Also, if the property sold has at the time of eviction, for whatever reason, a value that is greater than at the time of purchase, the seller is obliged to pay the buyer the difference between the value of the asset at the moment of eviction, and the price paid by the buyer, no matter the cause and whether the seller was of good or bad faith. The jurisprudence has held that a proper application of the provisions concerning the obligation of the guarantee for the establishment of the eviction at the time of conclusion of the contract of sale and purchase (not derisory price to be paid by the applicant) implies taking into account the market value of the property; the market value at the time of eviction; the difference between the market value of the property at the time of conclusion of the contract of sale and the market value of the property at the time of eviction, this difference being actually increased by the value covered by the legal provisions on liability for eviction (Decision No. 275/2014 of The High Court of Cassation and Justice issued in file No. 58/3/2010 published on www.scj.ro).

The seller is obliged to compensate the buyer for necessary expenses (for example, the costs of painting the building), and if it is bad faith (knew the cause of eviction at the time of conclusion of the contract) will need to return the value of expenses (for luxury or pleasure) made with the thing he sold. If these required and useful charges are taken as advantage by a third evictor, the buyer will have to proceed against him primary and only secondarily against the seller. Third party evictor is not however obliged to bear the voluptuary expenses made by the buyer.

2. *Partial eviction* is the loss of only partial ownership of the purchaser right or any decrease in the value acquired through the contract of sale.

Assuming partial eviction, the buyer has the right to choose between:

a) the annulment of the sale when the loss is so important that the buyer would not have concluded the contract if he had been unable to foresee it;

b) maintaining the sale, with refund of a portion of the price in proportion to the value of evicted party, and where applicable, payment of damages. In this case, it will be taken into account the price specified in the contract of sale and purchase, and, depending on the share value of the evicted part, the buyer shall be entitled to a refund of a part of the price. It is irrelevant if between the time of sale and the time of the eviction the value of the asset has increased or decreased.

This solution differs from the previous regulation that provided for the partial eviction if the buyer was entitled to *the value the lost part* by the effect of eviction, a value considered at the moment of eviction. Under the old Civil Code, the seller could not offer a part of the price nor could the buyer ask for part of the price, commensurate with the evicted, regardless of decrease or increase value of the

property from sale until the eviction.

Art 1704 Civil Code provides for the possibility of removing eviction by the buyer, establishing the following rules:

- in the event that the buyer has kept in his heritage the good purchased, paying the third party who threatens him with eviction a sum of money or giving another good, the seller will be freed from the obligation of warranty against eviction;

- where the buyer has paid a sum of money to the third party who threatens with eviction, the vendor will have to repay the amount paid plus legal interest or applicable in relations between professionals, plus expenses relating to those operations;

- where the buyer gave to a third party another good instead of the one retained, the seller will need to redeem the value of the property given to the purchaser in exchange and that the costs of the exchange (Prescure, 2012:71). Whether eviction is total or partial, usually the Court will evaluate whether conditions are met in order for the seller to respond to eviction and -- depending on the circumstances of the case -- if the purchaser would have known about eviction would yet have concluded the contract. By way of exception, the buyer may declare unilaterally the resolution or it can intervene in the virtue of a pact, if the conditions provided by the law are fulfilled.

Eviction proceedings guarantee the buyer against the seller prescribing in general a limitation for a period of three years, the term shall begin from the date of eviction.

5. Conventional changes of warranty against eviction

These changes can take place, whereas the rules above, known as guarantee, are not mandatory. In this sense, art. 1698 Civil code provides that the parties may agree to extend or restrict the obligation of warranty. They may even agree to exempt the seller from any warranty against eviction.

However, the stipulation by which the obligation of the seller's guarantee is restricted or removed shall not exempt from the obligation to refund the price, unless the buyer has assumed the risk of eviction.

Furthermore, the seller may not be exonerated if eviction comes from his own act or causes he knew about at the time of the sale, and had hidden to the buyer (article 1699 Civil code), any clause to the contrary shall be deemed unwritten.

6. Conclusions

"A deal today about eviction may seem obsolete," says Mrs. Camelia Toader in her work "Eviction in civil contracts" and if we consider the restricted number of papers devoted to this issue in Romanian law, I particularly incline to agree with her. Because "contemporary authors are rather interested warranty against vices of the

asset, given the complexity of goods that are found today in the civil circuit, forming the subject of various contracts," so continues the same author and I would say from this perspective, as an analysis of the day, in the light of recent doctrinal and jurisprudential solutions comments, it is not without interest at all.

As a conclusion we appreciate that the concern of the legislator to ensure a complete rule in matter of eviction for the contract of sale-buy, was materialized by updating legal terminology, taking the solutions offered by the literature and legal practice, due to their correctness, without bringing major changes to the old regulation.

Bibliography

1. Francisc Deak, 2006. *Tratat de drept civil. Contracte speciale*, vol. I, 4th ed. Updated by Lucian Mihai, Romeo Popescu, Bucharest: Publishing House Universul Juridic.
2. Răzvan Dincă, 2013. *Contracte civile speciale în noul Cod civil. Note de curs*, Bucharest: Publishing House Universul Juridic.
3. Dan Chirică, 2008. *Tratat de drept civil. Contracte speciale*, vol. I. Vânzarea și schimbul, Bucharest: Publishing House C.H. Beck.
4. Liviu Stănculescu, 2012. *Curs de drept civil. Contracte*, Bucharest: Publishing House Hamangiu.
5. Florin Moțiu, 2013. *Contractele speciale în noul Cod civil*, Bucharest: Publishing House Universul juridic.
6. Lucia Uță, 2012. *Contracte speciale în noul Cod civil*, Bucharest: Publishing House Hamangiu.
7. Doina Anghel, Lizeta Harabagiu, 2011. *Contractul de vânzare. Practică judiciară și reglementarea din Noul Cod civil*, Bucharest: Publishing House Hamangiu.
8. Daniela Ciochină, 2012. *Drept civil. Contracte speciale*, Bucharest: Publishing House Universul Juridic.
9. Codrin Macovei, 2006. *Contracte civile*, Bucharest: Publishing House Hamangiu.
10. Titus Prescure, 2012. *Curs de contracte civile*, Bucharest: Publishing House Hamangiu.
11. Philippe Malaurie, Laurent Aynes, Pierre-Yves Gautier, 2009. *Contractele speciale*, Bucharest: Publishing House Wolters Kluwer.
12. Oliviu Puie, 2014. *Contractele civile în contextul noului Cod civil și al noului Cod de procedură civilă*, Bucharest: Publishing House Hamangiu.
13. Gheorghe Comăniță, Ioana-Iulia Comăniță, 2013. *Drept civil. Contracte civile speciale*, Bucharest: Publishing House Universul Juridic.
14. Ion Turcu, 2011. *Vânzarea în Noul Cod civil*, Publishing House C. H. Beck: Bucharest.

15. Manuela Lavinia Istrătoaie, 2013. *Obligațiile vânzătorului în noul Cod civil și legislația consumeristă*, Bucharest: Publishing House Hamangiu.
16. C. Toader, 1998. *Evicțiunea în contractile civile*, 2nd ed., Bucharest: C.H. Beck Publishing House.