

## **PRACTICAL NOTIONS REGARDING THE CONTRACTUAL PROVISION ON THE WARRANTY AGAINST THE EVICTION OF SELLING CONTRACTS**

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#### **ABSTRACT:**

*The contractual provision on the warranty against eviction is a matter in which the parties involved in the making of a selling contract often have tight negotiations. Many times the seller is looking for the exemption of provision of warranty, but is such a clause legally available? In the following we will present you the procedure in which the parties can limit or extend the provision against eviction.*

**KEY WORDS:** *warranty against eviction, contractual limitation*

#### **I. Introduction**

Writing a sales contract can seem like a very easy job. However, during the preparation for such a document, an expert should consider the theoretical aspect- applied legislation, the doctrine and the jurisprudence regarding the matter, and also practical part of a transaction. So, during the making of a contract, the expert must represent more than a simple uninvolved advisor, and it is mandatory that he must profoundly know the commercial agreement between the parties, in the scope of turning it into the right words.

#### **II. THE CONCEPT OF WARRANTY AGAINST EVICTION**

Article 1672 Romanian Civil Code states that the seller has the following obligations: (i) to transfer the propriety or the right of the good , (ii) to deliver the good to the buyer and (iii) to guarantee the buyer against eviction and against the vices of the good.

A first observation which we mention in this article is the fact that, if the first two obligations are strongly influenced by the moment of signing the sales contract, in the case of warranty we acknowledge the fact that this is a continuous obligation, of which accomplishment can be demanded later than the moment of signing. Thus, we can state the fact that satisfying the provision of warranty against eviction is not mandatory in perfecting the contract, the possibility of it to never be executed being very high, and this absence doesn't affect in any way the validity of the contract.

The provision of warranty against eviction finds its appliance in the article 1695 Romanian Civil Code. Practically, the provision against eviction is that insurance which the

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seller provides to the buyer regarding the useful and undisturbed use of the good which functions as the object of sale. Moreover, the law states the fact that the warranty against eviction subsist against any second receiver of the good, even if these ulterior transfers are made in an onerous or free way, the warranty continues. This solution states that along the right of the sold good, the buyer is entitled to all the other rights that are bound with that good, rights that are closely linked to the good which is the object of the contract.<sup>1</sup>

### **III. THE CLASSIFICATION OF THE WARRANTY AGAINST EVICTION**

From the way it is described in the law, the warranty can distinguish itself in two big categories: -(i) by the person which causes the eviction (ii) by the juridical consequences determined by the intervention of eviction.

From the perspective of the person which determines the apparition of the eviction, the Romanian Civil Code states two cases of warranty against eviction: (i) the warranty against eviction which originates from circumstances imputable to the seller and (ii) the warranty against eviction which originates from the claims of a third-party.

When it comes to the category of juridical consequences which occur as a result of an alteration in the quiet usage of the sold good. The Romanian Civil Code provides three situations: (1) total eviction (2) partial eviction and (3) eviction was overthrown by the buyer, with the price of some patrimonial sacrifices.

#### **3.1. The warranty against eviction resulting from the personal matter of the seller**

##### **3.1.1. Notion and conditions**

Article 1695<sup>2</sup> Romanian Civil Code states the obligation of the seller to guarantee the buyer against any eviction which originates from facts imputable to the seller, no matter the moment in which these facts occur, before or after the signing of the contract.

As a result, the warranty against eviction resulting from the personal fault of the seller is qualified as a perpetuate and abstinent (the obligation of not doing) which comes as a seller, but also an eventual successor with universal vocation responsibility. It is inconceivable the fact that through the sales contract, the seller transferred to the buyer not only all the rights which he had regarding the seller's benefit good-object at the date of the signing of the contract., but also all the rights susceptible to be received by him in the future, for example the right to build by virtue of a building authorization which was not emitted at the date of the closing of a land sales contract. An example- the guaranty school against eviction regarding the future rights which the seller would have about a good which presumes the obligation of abstention from the seller is the one in which the good is sold to another, and later the seller inherits the true owner or gains through a donation that very good<sup>3</sup>.

We highlight the fact that the obligation of warranty against eviction of the seller is born in the case of a disturbance of a right against which the buyer can defend himself by

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<sup>1</sup> See Fr. Deak, Lucian Mihai, Romeo Popescu – “Tratat de drept civil”- Volume 1 of the fifth edition, Ed. Universal Juridic 2017, pg. 139

<sup>2</sup> Art.1695 Al.3 Romanian Civil Code specifies: “Moreover, the warranty is owed against the eviction that originates from the imputable deeds of the seller, even if these appeared after the sale”

<sup>3</sup> See Civil Sentence no. 264/2016 pronounced by the Motru Court, published on [www.rolii.ro](http://www.rolii.ro), as well as Monna Lisa Belu Magdo - Contract for Sale in the New Civil Code, Hamangiu Publishing House, 2014, pp. 243, Răzvan Dincă - Special Civil Contracts in the New Code Civil, Course Notes, Universul Juridic Publishing, 2013, pg. 127

invoking the personal exception from the warranty<sup>4</sup>. As far as the in fact disturbances, in the virtue of the owner of the right of property, the buyer will be able to defend by appealing to actions for recovery. In accordance to the in fact disturbances, these involve the prohibition of the seller to commit any material fact, even an illegal one, which roots can disturb the buyer to apply the right of property's powers<sup>5</sup>. The disturbances consist the interdiction of the seller to emit any claims on a right (a real or a receivable one) over a sold good, as long as the contract is in force. This matter doesn't mean that will be prohibited neither the seller's possibility to bring the validity of the sales act up nor the possibility to request under any legal way the implementation of the buyer's obligations. Equally, we're still in the situation of a right disorder and a signing procedure of some acts between seller and third-parties, until the sales contract, in which the sold right is limited or the seller gets to know the limits of the causes, and he hides from buyer the existence of these. <sup>6</sup>In case the seller signs this kind of act in which the limits of the property right are brought up, for example a transaction in which a place is given to two persons, it is obviously that the first person who will write this right in the Land Registry, will be the one who evict the other one. The eviction is produced as a result of signing a sales contract between seller and an eviction third-party. In this case, we can underline that the warranty obligation against the seller's eviction, which has come from a personal deed, implements the effects as a result of a direct or an indirect eviction (or through a third party who wants to fix his right in the Land Registry).

### **3.1.2 The contractual regulation of the warranty against eviction from own deed**

In our legislation there are no provisions on limitation of cases that would imply the seller's liability. As a result, we agreed that the seller's liability could be aggravated and/or extended to other unforeseen circumstances or situations, such as the extension of warranty against eviction caused by disturbances in fact generated by the seller. Such an extension of warranty could be justified by a higher price requested by the seller compared to the situation in which they would not grant additional warranties.

As for the contractual limitation of the warranty against eviction owed by the seller for his disturbances in fact, some specifications are imposed. Firstly, in accordance with the provisions of article 1699<sup>7</sup> Romanian Civil Code, a clause for total exemption from the seller's liability for the caused disturbances in law, which came from own deed, is considered unwritten. This provision is based on the principle according to which he who warrants cannot evict.

The same principle is found in the legal solution to the unwritten consideration of the exemption clause in which the seller, even though knew about the existence of an eviction cause, hid this information from the buyer. The reason why the legislative power introduced such an interdiction is that the seller is no longer of good faith in his relationship with the buyer, for he had misled him by omission of facts.

We also specify that, in the case the buyer was informed of an eviction cause, it is presumed that the latter assumed the risk of the eviction and so, is unable to request the

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<sup>4</sup>See Monna Lisa Belu Magdo, op. cit. pg 243

<sup>5</sup>Gheorghe Comăniță, Ioana-Iulia Comăniță, Civil Law. Special civil contracts, Universul Juridic Publishing House, Bucharest, 2013

<sup>6</sup>Ibidem

<sup>7</sup>Art. 1699 Romanian Civil Code specifies : "Even if has been agreed on that the seller will not owe any warranty, he is still responsible for the eviction which was caused after the sale by his own deed or by causes which were known before the sale and which were hid from the buyer."

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warranty from the seller. Of course the contractual parties can extend, while negotiating and only through specific clauses, the warranty against eviction owed by the seller even if such a cause was brought to knowledge to the buyer.

In the doctrine<sup>8</sup> appeared the opinion that the existence of a clause for total exemption from the seller's liability would not have the desired effect of reimbursing the price by the buyer only in the case where a possibility of eviction was brought to his knowledge before concluding the contract.

### **3.2. The warranty against eviction from a third party's deed**

#### **3.2.1. Notion**

The seller also has the obligation to warrant the buyer for the disturbances caused to him by the deeds of third parties in the exercise of the prerogatives of the property rights over the purchased good. Thus, unlike the warranty for own deeds, which is actually an obligation of abstain(not to do), the warranty for a third party's deed is a commissive obligation, consisting in defending the buyer by rejecting the claims of the third party, by fulfilling some conditions

As for those disturbances of the prerogatives of the property rights, there are some specifications imposed. Thus, regarding such disturbances, the buyer can even be responsible for the eventual limitations of his propriety right, allowing third parties to act lawfully, or the buyer himself is capable of averting the respective demands if the third party's deeds were unlawfully. In the first instance, we cannot identify any legal justification of a warranty demand from the seller, and in the latter instance, such a demand would be futile, the buyer solely having every possibility to defend himself against such a disturbance. Therefore, the seller is to ensure the buyer that those deeds of third parties, which can limit or prevent the exercise of the propriety rights of the purchased good, deeds that must be both legal and not caused by the buyer

#### **3.2.2 Terms**

To invoke the warranty against eviction from a third party, the legislative power imposed the necessity of having fulfilled the next conditions: a disturbance in law must exist, the cause of eviction must be prior to the conclusion of the sales contract and the buyer must not have known about the cause of eviction while closing the contract. These requirements were also examined in the judicial practice when the courts were vested with the settlement of some claims regarding evictions. The refore, the Bucharest Court of Appeal, in nr. 1098R/09.11.2015, stated that *"The seller's duty to ensure the buyer of the "quiet possession of the good" implies not only the warranty against own deeds, but also the warranty against third party's deeds. Thus, the seller is expected to know the legal status of the sold good, which is why it is natural that he should be defending the buyer from the third party. The seller's obligation to warrant exists in this instance only if the following requirements are met: it must be a disturbance in law, the cause of eviction to be prior to the conclusion of the sales contract and the cause of eviction to not be known by the buyer"*.<sup>9</sup>

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<sup>8</sup>See Monna Lisa Belu Magdo op. Cit. Pg.252

<sup>9</sup>See the Civil Decision of the Bucharest Court of Appeal , No 1098R/09.11.2015- The Fourth Civil Section, irrevocable, which was published on the site : <http://www.rolii.ro/hotarari/58a03517e49009b433000ff0>

As far as the existence of a disturbance in law (be it a real right or a claim right) is concerned, the third party must invoke in his favor a right, a privilege or a power that would allow him to proceed in order to prevent or restrain the buyer from the exercise of his acquired right, or, through his actions, the third party must reduce the value of the good or its purpose (i.e. the right of use based on a tenancy agreement).

This obligation cannot be used when it comes to disturbances in fact, against which the buyer can defend himself, by appealing to actions for recovery and possession. The disturbance in law caused to the buyer must be recent or at least imminent, not only eventual<sup>10</sup>. In most cases, this occurs as a result of a definitive court order from which the third party gains a right over the good. The existence of the court order is not a *sine qua non* condition that generates liability for the seller, the eviction produces its effects even in the absence of any legal action brought before justice by a third party. However, in the doctrine it was established that the disturbance must be recent or to result from a serious threat of dispossession for it to justify the seller's liability for eviction<sup>11</sup>. The sole probability of a disturbance in the exercise of the prerogatives of the proprietary right is not and will never be enough to admit an illegal action against the seller, even if the buyer would find out about the existence of a right which could expose him to eviction.

Regarding the condition according to which the cause of eviction should be prior to signing the sale contract, this means that the judicial fact or act which is the generator of the right on which the third-party is based on or of the limit of the given right which they claim to have must be on a date which is previous to the one on which the sale contract was signed. We mention the fact that in order for this condition to be accomplished it is not necessary that the right claimed by the third-party to be in their patrimony at the date on which the contract of sale was signed, the condition being accomplished even if at the moment when the sale of the right was realized and it was in the patrimony of another party which was then transmitted to the third-party. In other words, what is relevant is the existence of the right, regardless of the patrimony it belongs to at the date of the contract being signed.

We underline the fact that if we were to accept that the seller would be responsible for causes which have their origins prior to the sale and are not imposed on them, there would be a breach of the arrangements that regard the risk of the contract and which is to be supported by the buyer after the moment of transferring the property and the transition of the good. Even more, in such a situation, the seller would not be able to be protected in any way against any possible abuses made by the buyer. In the eventuality in which the eviction case appears after, and the reason can be imposed to the seller, they will respond as a consequence of their own act and not the third-party.

According to article 1695, Civil Code, one of the conditions of existence of a guarantee against eviction is that the right claimed by the third-party should not be known by the buyer at the moment of materializing the sale contract. In the situation in which, at the moment of signing the contract, the buyer knew the cause of eviction, they obliged to pay the price being fully aware with regard to the limits of the given right and/or with regards to a possible threat to the exercise of the right, thus accepting the possibility of the threat to materialize. As there was mentioned in doctrine<sup>2</sup>, the buyer which knew about the cause of

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<sup>10</sup>Florin Moțiu, Special contracts in the new Civil Code, the fifth edition, Universul Juridic Editure, Bucharest 2014

<sup>11</sup>Camelia Toader, Eviction in the civil contracts, All Editure

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eviction accepted the risk of total loss or partial loss of the good, as they agreed to the realization of the sale contract, which gains a random<sup>3</sup> nuance. If the seller who is given the burden of probation proves by any method the fact that the buyer knew about the risk of eviction ( and not just a simple possibility ), they will be exonerated of any liability. It must be reminded that good-faith of the buyer in the moment of signing the contract involves not knowing the eviction by the buyer and is presumed by the law.

**3.2.3. Contractual agreement of the guarantee against eviction started from the action of a third-party**

According to article 1698, the parties can limit the liability of the seller of eviction coming the action of a third-party, as they may even reach the total elimination of it. Still, the clause according to which the obligation of guarantee against eviction is limited or eliminate completely will no exonerate the seller from the obligation of giving back the price, fully or only partially, depending of the effects of the eviction ( total or partial ), with the exception in which the parties introduced specific clauses through which they anticipated that the price will not be repaid or when the buyer themselves assumed directly and without hesitation the risk of eviction. In the absence of a concrete specification, the mention will not be interpreted in the way in which it would reflect the knowledge of the buyer regarding the cause of eviction, but only of the method through which the engaged parts decided to share the risk in the situation in which the eviction would take place<sup>5</sup>.

**IV. CONCLUSIONS**

As we previously mentioned, the guarantee against eviction is an essential obligation of the seller, which is stipulated in article 1672 from the Civil Code, along with the obligation of transferring the property right as well as giving the sold good.

Generally, the ending of the sale contract for eviction is to be established by a competent court, method which will also establish the damages to which the buyer is entitled. Such a conclusion results from the form of article 1700 from the Civil Code – the buyer may ask the end of the sale. The Civil Code also mentioned the exception from this rule by the stipulations from article 1552 – unilateral resolution of the contract or article 1553 Cod Civil – the existence of a commissary pact according to which the parties established that in the eventuality of an eviction the contract would stop.

As a rule, the parties can establish freely thought the contract the limits of the guarantee against eviction, as well as its effects. As it is a derogation from the legal statements, these contractual clauses must be written in such way that the will of the parts of extending or limiting the effects of the guarantee against eviction should be clear, without any other interpretation. From the form of the article results that the parts can even use to the total elimination of the liability of the seller in such case. It was not the same solution used by the law-maker in the situation of eviction which comes from the own action of the seller or of the eviction which origins from causes which were hidden by the seller at the time of the sale from the buyer – eventual contractual clauses which would eliminate the liability of the seller in those situations will be considered unwritten, as the previously mentioned rules would be applied.

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