Exercising the Exception to Non-Performance in the Purchase Agreement

Lecturer PhD Maria Căzănel

"Ovidius" University of Constanta, Romania

Abstract.

Due to the development and evolution of the society in general, we are witnessing a continuous multiplication and diversification of the contracts concluded between different individuals or legal entities. The legal literature has shown that the notion of special contracts is an intermediate link between the general theory of obligations, which lays down the rules for the formation and execution of contracts in a general and abstract manner and the individual contract that specifically connects two or more persons. The purchase agreement is very important in Romanian civil law because, through it, the alienation or the acquisition of the right of ownership or other rights over the goods in the civil circuit is achieved. In a purchase agreement, according to Article 1720 of the New Romanian Civil Code, the buyer may refuse to pay the price if the seller does not deliver the good and if there is an imminent danger of eviction (art.1722 of the New Civil Code). The opposite is also valid, i.e. the seller is entitled to refuse to deliver the good, unless the price is paid, according to Art.1693 of the New Romanian Civil Code. In the new regulation of the Romanian Civil Code, the practical applications of the exception to non-performance, generally accepted in doctrine and jurisprudence, are found in the field of the purchase agreement. Thus, the exception to non-performance is a preventive defense tool, which can be used by both the seller and the buyer, protecting thus the respective contracting party and being an important means of putting pressure on the other co-contractor, having a very effective comminatory nature.

Keywords: buyer, obligation, price, seller, special contracts

International Academic Conference on Research in SOCIAL SCIENCES

8 - 10 November, 2019

OXFORD, UNITED KINGDOM

1. Introduction

The sale and purchase agreement has an important position in Romanian civil law due to the fact that, through it, the alienation or acquisition of property right or other rights over the products in the civil circulation is performed.

This contract is regulated in the New Romanian Civil Code in Book V entitled "About obligations", Title IX "The sales contract", art.1650-1762. Starting from the provisions of art.1650 paragraph 1 of the New Civil Code, the sale and purchase agreement was defined as the contract which transmits the property right over a product, from the seller to the buyer, in exchange for a sum of money¹.

2. Research methodology

There were a few general scientific research methods that were used in this research and methods of legal interpretation; it is based on analysis of legislation and scientific literature. The following methods were used: comparative and legal, analytical, logical and legal.

3. Invoking the exception of non-performance in the sale and purchase agreement

Due to the frequency of the sale and purchase agreement in commercial relations, the Romanian Commercial Code contained, until its partial repeal, certain specific rules, so that the contract had a double regulation: the Civil Code from 1865 enshrined the civil sale, and the Commercial Code regulated the commercial sale.

Although in the new Civil Code the sale and purchase agreement has a unitary regulation, some specific aspects are particularly applicable to the sales relations between the professional traders and the contracts concluded during the activity of an enterprise. Thus, the commercial sale is characterized by: the object of the sale, consisting mainly of movable goods and, frequently, future products (not yet harvested crops, products to be manufactured); the distance between the contracting parties; the transfer of property and risks; the transportation of products from seller to buyer; setting the sale price; liability for the flaws of the sold good, etc. Simultaneously, the main purpose of the commercial sale is the intention to resell: the purchase is made for the purpose of resale or rent. Moreover, the professional trader, owner of a commercial enterprise specialized in sales, buys the products with a lucrative purpose, i.e. seeks profit. On the contrary, the unprofessional buyer seeks the satisfaction of his/her or their family's needs.

¹ L. Stănciulescu, V. Nemeș, The legislation of the civil and commercial contracts in the regulation of the New Civil Code ["Dreptul contractelor civile și comerciale în reglementarea noului Cod civil"], Ed. Hamangiu, Bucharest, 2013, p.67.

International Academic Conference on Research in SOCIAL SCIENCES

8 - 10 November, 2019

OXFORD, UNITED KINGDOM

As emphasized in the legal literature, the fulfillment of the obligations stipulated in the synallagmatic contracts, must be done simultaneously by both parties, in compliance with the principle of good faith performance of the assumed obligations.

The commercial sale and purchase, being a synallagmatic contract, means that either party is entitled to refuse the performance of his/her own obligation, as long as the other party does not perform his/her correlative obligation. In jurisprudence it has been established that the refusal of one of the contracting parties to fulfill his/her obligations assumed in the sale and purchase agreement disturbs the balance that must exist between the reciprocal services of the synallagmatic contracts, so that the other party has the right, in turn, to stop the performance of his/her own obligations.

The exception of non-performance of the contract constitutes a preventive means of defense, which can be used by both the seller and the buyer, with the help of which the protection of that contracting party is realized, as well as an important pressure tool on the other contracting party, having a very effective combining character.

The effect of the exception of non-performance of the sale and purchase agreement consists in the suspension of the binding force of the contract until the party claiming the execution of the obligation by his/her contractual partner, without having fulfilled his/her own obligation, changes his/her attitude by performing the service that is his/her obligation.

In a sale and purchase agreement, according to art.1720 of the New Civil Code, the buyer may refuse to pay the price if the seller does not hand over the product, as well as in the event that there is an imminent danger of eviction (art.1722 of the New Civil Code). Likewise, the seller is entitled to refuse to hand over the product, if he/she is not paid, according to art.1693 of the New Civil Code.

According to art.1401 para. 2 of the New Civil Code, either party may request the rescission of the contract for non-performance, which also requires the exception of non-performance of the contract, in order to prevent a request for rescission for non-performance. Similarly, article 1557 para. 2 of the New Civil Code, referring to the hypothesis that the impossibility of performance is not absolute and permanent, specifies that the creditor has the possibility to suspend the performance of his/her own obligations or to annul the contract. In this situation, the rules regarding rescission shall be applied.

The invocation of the exception of non-performance by the seller: under the contract, the seller has the obligation to hand over the sold product to the buyer, an obligation that is not confused with the obligation to transfer the right of property or ownership. Thus, in addition to the obligations of handing over the product and of the eviction and flaws guarantee, art.1672 of the New Civil Code also stipulates the obligation of the seller to transfer the property right over the product.

International Academic Conference on Research in SOCIAL SCIENCES

8 - 10 November, 2019

OXFORD, UNITED KINGDOM

However, the Romanian and the French doctrines consider that the transfer of the property right is not in itself an obligation of the seller, but an effect of the contract². If the transfer of the property were to be analyzed as an obligation, we would be in the presence of an obligation to give which would not imply any action from the debtor's part, who could not be forced to perform it, since the transfer of property operates automatically, from the seller to the buyer, at the time of the conclusion of the contract, according to the provisions of art.1674 of the New Civil Code³.

According to article 1693 of the New Civil Code⁴, the seller is not obligated to hand over the sold product if the buyer does not pay the price and if a deadline for payment is not stipulated in the contract.

In our opinion, in this situation, the exception of non-performance of the contract is built on the deadline advantage, which is of a legal nature. Thus, in the event that the parties have not set a deadline for the execution of the obligations, the law sets the seller a deadline for the execution of the obligation to do, that is to hand over the product to the buyer, a deadline which becomes binding when the buyer fulfills his/her obligation to pay the price. Therefore, the buyer cannot ask from the seller the handover of the sold product unless, in turn, he/she has fulfilled the obligation to fully pay the price of this product.

This provision is an effect of the synallagmatic character of the sales contract, the parties' obligations being interdependent, which means the seller cannot be obligated to hand over the product as long as the buyer did not pay the price because it would be unfair for either party to demand the fulfillment of the other party's obligation without fulfilling his/her own correlative obligation, resulting from the same contract. It is thus corroborated with the provisions of art. 1556 of the New Civil Code, which regulate the exception of non-performance and stipulate that, when the obligations arising from a synallagmatic contract are exigible, and one of the parties does not perform or does not offer the fulfillment of the obligation, the other party may, to a certain extent, refuse to perform his/her own obligation⁵.

In doctrine it has been asserted, in relation to the right of the seller to refuse to hand over the product to the buyer until he/she pays the price, that the lien right is not a manifestation of the exception of non-performance of the contract because, in this hypothesis, between the

² D.Chirică, *Treaty of civil law. Special contracts. Vol. I. Sale and exchange ["Tratat de drept civil. Contracte speciale. Vol. I. Vânzarea și schimbul"]*, Ed. C.H.Beck, Bucharest, 2008, p.311.

³ Art.1674 of the New Civil Code stipulates that: "Except for the cases stipulated by law or if the contrary does not result from the parties' will, the property is relocated to the buyer at the time of the conclusion of the contract, even if the product has not yet been delivered or if the price has not yet been paid".

⁴ Art. 1693 of the New Civil Code stipulates that: "In the absence of a deadline, the buyer may request the handover of the product as soon as the price is paid. If, however, due to circumstances known to the buyer at the time of the sale, the handover of the product can only be made after the expiry of a deadline, the parties are presumed to have agreed that the handover should take place at the expiry of that deadline".

⁵ However, as I have mentioned, performance cannot be refused if, under the given circumstances and given the reduced importance of the non-performed service, this refusal would be contrary to good faith.

International Academic Conference on Research in SOCIAL SCIENCES

8 - 10 November, 2019

OXFORD, UNITED KINGDOM

two notions there is only one apparent interference in the cases of those synallagmatic contracts which, among others, incur an obligation to hand over the product⁶.

If in the sale and purchase agreement a clause is stipulated whereby the product will only be handed over after the price is paid by the buyer, the seller shall not be obligated to hand over the product before the payment of the price. If the buyer requests the delivery of the product, the seller will be able to invoke the exception of non-performance of the contract. We consider that it is not necessary to stipulate a clause in this regard, as according to art. 1693 of the New Civil Code, the seller is not obligated to hand over the product if the buyer does not pay the price and a deadline for payment has not been stipulated.

However, if the contract contains a clause whereby the buyer will pay the price by a certain deadline after the handover of the product, it means that the seller has given up the exception benefit and, in case of non-payment of the price by the buyer, he/she will no longer be able to invoke the exception. This observation results from the provisions of art.1555 para. 2 of the New Civil Code which stipulate *expressis verbis* that "insofar as the performance of the obligation of one of the parties requires a period of time, that party is bound to perform the contract first, unless the agreement between the parties or the circumstances indicate something else".

Furthermore, art.1694 of the New Civil Code also regulates the hypothesis whereby a deadline for the payment of the price is established and, until its fulfillment, the insolvency of the buyer occurs, or the guarantees granted to the seller are reduced. In this situation, the seller has the right to suspend the performance of the obligation to hand over the product as long as the buyer does not give sufficient guarantees that he/she will pay the price within the established deadline. Therefore, if the buyer files a bail out or provides a guarantee that he/she will fully pay the established price by the deadline, the seller will no longer be able to invoke the non-performance exception, but he/she will have to hand over the sold product, according to the agreement of the parties.

Moreover, if by the date of the conclusion of the contract the seller was aware of the insolvency of the buyer, the latter retained the benefit of the deadline if his/her insolvency status has not substantially worsened, and the seller assumed the risk of the insolvency of the buyer, according to art.1694 para. 2 of the New Civil Code.

Invoking the non-performance exception by the buyer: one of the main obligations of the buyer is the payment of the price, which is the essence of the sale and purchase contract.

Art.1720 of the New Civil Code introduces, as a novelty element, the provision that "in the absence of a stipulation to the contrary, the buyer must pay the price at the place where the product was at the time of the conclusion of the contract and as soon as the property is transferred". Therefore, the rule is that of paying the price at the place and at the moment when the seller transmits the property of the sold product, as a consequence of the principle of simultaneous execution of the synallagmatic obligations. Thus, the payment of the price is made

⁶ Ph. Malaurie, L.Aynes, P-Y Gautier, *Civil law. Special contracts* ["*Drept civil. Contractele speciale*"] – translation of the 3rd edition from French, ed. Wolters Kluwer, Bucharest, 2009, pp.193-194.

International Academic Conference on Research in SOCIAL SCIENCES

8 - 10 November, 2019

OXFORD, UNITED KINGDOM

at the moment of transmitting the proprietorship of the sold product and not at the conclusion of the contract.

As mentioned above, the obligation of the seller to transfer the property right over the sold product is distinct from that of handing over the product to the buyer. According to art.1685 of the New Civil Code, the correlative obligation of handover on the seller's part means effectively making available the sold product to the buyer "together with all that is necessary, under the circumstances, for the free and unrestricted exercise of possession". This obligation of handover is important because, by performing it, the buyer who becomes the owner of the determined individual product can exercise the de facto possession of the product, can benefit from it and can use the acquired product.

The new Romanian Civil Code also enshrines a handover method specific to commercial relations with applicability to movable goods which, in the specialized literature and in the practice of international commercial relations, bears the name of *symbolic handover*. In this respect, art.1688 of the New Civil Code stipulates that "the delivery of the movable goods can be done either through financial remittance, or by remitting the representative title or another document or product which allows the buyer to take over at any time".⁷

The handover of the product implies an active attitude on the part of the seller. In the absence of a deadline, the buyer may request the handover of the product "as soon as the price is paid" according to art.1693 of the New Civil Code. Thus, the buyer cannot ask the seller to hand over the sold product unless he/she has fulfilled the obligation to pay the price.

In case of total or partial non-performance of the handover obligation, due to the fault of the seller, the buyer has the possibility of choosing between: invoking the exception of non-performance, requesting the performance in kind of the contract according to art.1527 of the New Civil Code⁸, or requesting the rescission of the sale according to article 1549 of the New Civil Code.⁹

By invoking *exceptio non adimpleti contractus*, the buyer is not obligated to pay the price if the seller does not hand over the sold product and if the contract does stipulate a handover deadline. This right of the buyer to oppose the non-performance exception is justified

⁷ The method of handover of the products by remitting the representative title or other documents is used when the products are stored in silos, docks, cargo areas, warehouses, or when the goods are being transported by water or land. In these situations, the bills of lading, consignment notes, the deposit receipts are handed over, depending on the place where the traded goods are located.

⁸ According to art.1527 para. 1 of the New Civil Code "the creditor can always request that the debtor be constrained to execute the obligation in kind", unless the execution in kind is impossible.

⁹ According to art.1549 para.1 of the New Civil Code, if the buyer does not request the forced performance of the contractual obligations, he/she has the right to the rescission or, as the case may be, the termination of the contract, "as well as to damages, if he/she is entitled to these".

International Academic Conference on Research in SOCIAL SCIENCES

8 - 10 November, 2019

OXFORD, UNITED KINGDOM

by the fact that, in the synallagmatic contracts, the obligations of the parties are reciprocal and interdependent¹⁰.

In the legal doctrine it has been demonstrated that this use of the non-performance exception constitutes not only a means of dilatory defense, but also a means of pressure, in order to determine the seller to fulfill his/her obligations¹¹. According to the valid rules, it is necessary for both obligations (of the seller to hand over and of the buyer to pay the price) to be due to expire and, at the same time, there must be a certain proportionality between the seriousness of the non-performance and what must be paid, since a minor non-compliance cannot justify invoking the exception of non-performance by the buyer.

In the arbitration practice it has been stated that "in the synallagmatic contracts, the cause of the obligation of one party being the obligation of the other, only the party who has fulfilled his/her obligation or is ready to fulfill it, may request the performance of the obligation of the other party. A party cannot demand anything without offering the fulfillment of his/her own obligation, otherwise his/her request will be rejected by the exception of *non adimpleti contractus*. The exception implies the simultaneity of the mutual obligations, the good faith of the one invoking it and the proportionality with the gravity of the non-performance"¹².

In the French and Romanian specialized literature it has been mentioned that in the commercial sales a version of the exception of non-performance, called "*laissé pour compt*"

¹⁰ Ph. Malaurie, L.Aynes, P-Y Gautier, op.cit., p.248; C.Malecki, "L'exception d'inexécution", L.G.D.J., Paris, 1999, p.421.

¹¹ D.Chirică, cited works, p.359.

¹² In this case, "the plaintiff seller fulfilled his/her obligation to deliver the goods, and the defendant buyer took over the goods, without objection, the delivery clause being "*franco fabrica*" (Ex Works). The payment of the goods is subsequent to the handover, and is due, according to the contract, within 30 days from the date of issue of the invoice. However, the defendant claimed that, since the goods had qualitative faults, they had to be denounced on the occasion of the takeover, in order to be remediated by the seller. The defendant buyer motivated his/her refusal to pay on the exception of non-performance of the contract, in the sense that he/she would no longer pay the amounts due for some of these products until he/she had the guarantee that the expenses incurred in the performance of this contract would be at the least recovered. It is clear from the evidence administered in this case that the defendant's claim is contrary to the contractual provisions and the de facto situation. According to the contract, if the goods had qualitative faults, they had to be denounced on taking over the goods, in order to be remediated by the seller. However, it is undeniable that the goods were taken over without objections. Moreover, the contract stipulates a clause regarding the qualitative faults of the goods, in the sense that the seller has the obligation to remedy them. No clause allows the buyer to refuse to pay the price for any quality related claims arisen upon the arrival at the destination of the goods. Considering these, the Arbitral Tribunal correctly emphasized that it was established in the case that the plaintiff seller complied with the contractual objections of making and delivering the goods, while the defendant buyer, unjustly, failed to fulfill his/her correlative obligation of payment of the price, also the conditions for invoking the exception of non-performance were not fulfilled" - The Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania, sentence no. 117/1999 published in the Magazine of commercial law no. 6/2000.

International Academic Conference on Research in SOCIAL SCIENCES

8 - 10 November, 2019

OXFORD, UNITED KINGDOM

(leave in the account of the seller / refusal to receive) developed, which subsequently expanded to all the other forms of sale¹³.

Under this institution, the buyer may refuse to take over the goods when he/she considers that they are not in conformity with the provisions of the contract, thus causing the seller to make a new handover which can no longer be refused by the buyer, if it is in accordance with the parties' understanding. The French authors have pointed out that it is an exception of non-performance when the buyer decides to refuse only a faulty handover but wishes to maintain the other contractual clauses. On the contrary, when the buyer chooses the termination of the entire contract, the refusal to receive the product is nothing more than an anticipation of the future rescission of the contract¹⁴.

In turn, the seller may appreciate that the handover has been complied with, being abusively refused by the buyer, in which case the seller will be able to request in court either the forced execution of the contract or its rescission, as a result of the buyer's fault¹⁵.

The authors have shown that, until a new handover of the product by the seller, the effects are dilatory, similar to the exception of non-performance¹⁶.

Another obligation of the seller is to guarantee the buyer the full exercise of the acquired right after the conclusion of the contract. In this respect, the seller has the obligation to guarantee against eviction (for the leisurely use of the product) and the obligation to guarantee against faults (for the suitable use of the good).

According to art.1722 of the New Civil Code, the buyer who is aware of the existence of a cause for eviction is entitled to suspend the payment of the price until the disturbance ceases or until the seller offers an adequate guarantee. Thus, the buyer may suspend payment of the price when there is a well-founded fear of eviction, invoking *exceptio non adimpleti contractus*.

In this case, the suspension of the payment of the price can be done without prior approval from the court. Instead, we consider that it is the obligation of the buyer to inform the seller in a timely manner about the suspension of payment of the price, so as not to be detrimental to him/her and to give him/her the possibility to offer an adequate guarantee to the buyer.

¹³ Chirică, cited works, pp.359-360; Ph. Malaurie, L. Aynès, P.-Y. Gautier, cited works, pp.170-200; This institution is enshrined in Article 49 of the United Nations Convention on Contracts for the International Sale of Goods, adopted in Vienna, on April 11, 1980 and entered into force on January 1, 1988, ratified by Romanian Law no. 24/1991.

¹⁴ Cass.com., June 2, 1958, Bull. civ. III, no.225 in Ph. Malaurie, L. Aynès, P.-Y. Gautier, cited works, p.200.

¹⁵ F. Collart Dutilleul, Ph. Delebecque, Obs. La Cass. 3-e civ, May 25, 2004, "Revues des contrats" 2004, p.222.

¹⁶ A. Trabucchi, "Istituzioni di diritto civile", ed. Wolters Kluwer, Italia, 2017, p.1017.

International Academic Conference on Research in SOCIAL SCIENCES

8 - 10 November, 2019

OXFORD, UNITED KINGDOM

In the case of a litigation, the suspension of the payment of the price by the buyer may be opposed to the seller, by invoking the exception of non-performance of the obligation of guarantee against eviction.

However, the buyer cannot suspend the payment of the price if he/she knew the danger of the eviction at the time of the conclusion of the contract or if he/she assumed the risk of eviction, stipulating in the contract that the payment will be made even in the event of a disturbance.

In the French doctrine it has been mentioned that a particular rule allows the buyer to suspend the payment of the price "if he/she is disturbed or justified to fear being disturbed by the action, either in terms of mortgage or the recovery of possession, the buyer will not pay until the seller makes the disturbance cease"¹⁷.

4. Conclusion

Through the unitary regulation of private law, the New Romanian Civil Code has planned to change the system of regulation of commercial law. Thus, the system of the autonomy of the commercial law has been replaced by the system of the unity of the private law, in which the delimitation of the commercial relations from the civil ones is realized on the basis of the concepts of enterprise and professionals. We consider that the institution of the obligations was the most affected by the change in the system of regulation of the commercial law, because in the New Civil Code there are certain derogations, concerning the specificity of the legal acts with a professional character.

In the new regulation of the Romanian Civil Code, the practical applications of the exception of non-performance, generally admitted in doctrine and jurisprudence, are found in the sale and purchase contract's domain.

As we have shown, the exception of non-performance of the contract constitutes a preventive means of defense, which can be used both by the seller and by the buyer, whereby the protection of that contracting party is realized, as well as an important means of pressure on the other contracting party, having a very effective combining character.

According to the valid rules, it is necessary for both obligations (of the seller to hand over and of the buyer to pay the price) to be due to expire and, at the same time, there must be a certain proportionality between the seriousness of the non-performance and what must be paid, since a minor non-compliance cannot justify the exception of non-performance.

¹⁷ Cass. civ. III, May 26, 1992 in Bull.civ.no.176 – in this case, a real estate seller had brought an action in rescission for the damage, then obtained the rescission of the sale due to non-payment of the price; the appeal was dismissed for the following reason: "the buyer could not use his/her right to suspend the payment of the price, without putting the seller in a position to exercise the power recognized by this text, in exchange for ceasing the disturbance or providing a guarantee. The Court of Appeal correctly emphasized that the conditions for the implementation of this text were not met" in Ph. Malaurie, L. Aynes, P-Y Gautier, cited works, p. 248.

International Academic Conference on Research in SOCIAL SCIENCES

8 - 10 November, 2019

OXFORD, UNITED KINGDOM

References

- [1] Stănciulescu, L. and Nemeș, V., (2013). *Dreptul contractelor civile și comerciale în reglementarea noului Cod civil*, ed. Hamangiu, Bucharest, p.67.
- [2] Chirică, D., (2008). *Tratat de drept civil. Contracte speciale. Vânzarea și schimbul*, vol.I, ed. C.H.Beck, Bucharest, p.311.
- [3] Malaurie, Ph. et al., (2009). *Drept civil. Contractele speciale* – translation of the 3rd edition from French, ed. Wolters Kluwer, Bucharest, pp.193-194.
- [4] Malaurie, Ph. et al. (2009), cited works, p. 248.
- [5] Malecki, C., (1999). *L'exception d'inexécution*, L.G.D.J., Paris, p.421.
- [6] The Court of International Commercial Arbitration of the Chamber of Commerce and Industry of Romania, sentence no. 117/1999 published in the Magazine of commercial law no. 6/2000.
- [7] Chirică, D., (2008), cited works, pp.359-360.
- [8] Malaurie, Ph. et al. (2009), cited works, pp. 170-200.
- [9] *Cass.com., June 2, 1958, Bull. civ. III, no.225* in Malaurie, Ph. et al. (2009) cited works, p.200.
- [10] Collart Dutilleul, F. and Delebecque, Ph., (2004). *Obs. La Cass. 3-e civ, May 25, "Revue des contrats" 2004*, p.222.
- [11] Trabucchi, A., (2017). *Istituzioni di diritto civile*, ed. Wolters Kluwer, Italia, p.1017.
- [12] *Cass. civ. III, May 26, 1992, Bull.civ.no.176* in Malaurie, Ph. et al.(2009), cited works, p. 248.