

Seller's Liability in Online Sales of Goods



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Abstract Digitalization is one of this century's challenges and the current pandemic context has intensified this trend. Online sales are a practical application of this trend, and in this study we will analyze the online sale of movable goods from the perspective of the seller's liability for the sold goods. We start from a general review of the sale contract, and we will particularize the contract depending on the features of operations performed online, by highlighting their individuality.

Keywords Online sales · Liability · Hidden flaws · Apparent flaws · Eviction

1 Introduction

Trade has adapted to the new requirements generated by the current epidemiologic context, transferring sales online even more than before the pandemics occurrence. Online commerce emerged and developed as a result of the economy digitalization process. This was a response to a need to improve the relationship between the effects obtained and the efforts made, as it results from the hedonistic principle (obtainment of a maximum level of effects by making minimum efforts) (Ştefan and Dogatu 2012, p. 24).

Electronic commerce is an economic activity carried out for the sale of goods/services through electronic means. Thus, if the sale is performed between absent parties, it can be qualified as remote sale. In such case, two coordinates of the contract conclusion can be distinguished: the offer as such and the offer acceptance.

The offer expresses a general and abstract willingness of the seller to provide a potential buyer with particular goods/services. An offer produces legal effects only when accepted by the buyer, this being the moment of the contract conclusion. Yet, since we deal with a remote sale, the seller's liability does not arise simultaneously with the contract conclusion, but at the time when the buyer is able to see the actual

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condition of goods, meaning at the time when it takes possession of the goods and can identify their flaws. In this work, we will analyze the online sale of goods.

2 General Conditions Necessary for Obtaining Consent

Under Art. 1179 of the Civil Code, in order to be valid, a contract must meet the following cumulative requirements: the contracting parties must have the required legal competence, under the law, to conclude the contract, i.e., their consent must be valid and must be given in respect of a determined, possible and licit item, and the cause for obligations must be a valid one.

In turn, in order to be deemed valid, consent must cumulatively meet particular requirements, such as: the party giving it must have judgment, and consent must be expressed, must be given for the purpose of production of legal effects and must be free of any undue influence or error (Stoica 2008, p. 20; Deak 2006, p. 31; Turianu 2007b, p. 89). A valid legal document implies the expression of consent freely and on an informed basis. As a result, any impairment that could interfere with consent obtainment will lead afterwards to the nullification of that document (Cosma 1969, p. 151), because legal documents should be seen, at least at the time of their conclusion, as volitional constructs (Reghini et al. 2008, pp. 416–417).

In particular, in case of online sales, the seller must provide, in electronic format, all information regarding their identity¹ and the sold good/service,² in such a way that the buyer have an accurate picture on the seller and on the offer presented by it, as per Art. 8 para. (4) of Government Emergency Ordinance no. 34/2014. Also, according to Order no. 433/2009,³ economic undertakings have an obligation to post on their own website the link to the ANPC's website.

2.1 Judgment of the Person Giving His/Her Consent

The presumption of judgment existence operates in relation to a natural person having full legal competence. Yet, there are legal incapacities (in case of minors under the age of 14, as well as in case of persons whose legal competence has been prohibited by the court⁴ and natural incapacities (in case of temporary lack of judgment caused

¹ Name, sole registration code, office address, phone number, email contact etc.

² The good's/service's features, price, delivery conditions etc.

³ ORDER no. 433 of 6 March 2009 on the Creation of the Committee for Local Public Finance (updated on 27 April 2015*) (website legislatie.just.ro, accessed on 09.02.2022, 18:00 h).

⁴ The draft amending the Civil Code, drafted based on the Romanian Constitutional Court's Decision no. 601/2020, extends the scope of persons incapacitated to conclude legal documents, by replacing the prohibition on persons subject to interdiction by that on persons subject to judicial counselling. This amendment offers a wider protection to vulnerable persons, being a timely amendment. (Annex: Point 1 of the draft amending the Civil Code stipulates that: "Thus, the difference

by drunkenness, hypnosis, strong anger, somnambulism etc.) (Turianu 2007b, p. 90). Through this, the lawmaker protects persons who cannot realize the consequences of their acts (Dogaru 1986, p. 70). The absence of judgment is sanctioned by relative nullity,⁵ but some authors (Hamangiu et al. 2002, p. 80) believe that the deprivation of judgment is equivalent to the non-existence of legal volition, which would trigger the sanction of absolute nullity of the relevant document.

To establish the type of applicable nullity is important for the person entitled to rely on nullity and for the applicable limitation term (Turianu 2007a, p. 54). In this paper, we considered that, since the absence of judgment is a state of fact, not a law one, relative nullity is the applicable sanction.

2.2 Expression of Consent

Volition can be expressed expressly or tacitly, in writing or verbally, through relevant gestures or acts. Tacit consent can be expressed both through an action and an inaction. Thus, tacit consent can be expressed as per Art. 1240 para. (2) of the Civil Code.

2.3 Intent to Generate Legal Effects

The intent to conclude a legal document does not automatically trigger the effective exercise of such intent by assuming a legal commitment. Such intent lacks if consent is given vaguely, jokingly (*jocandi causa*), with a “mental reserve” (*reservatio mentalis*) or under a purely potestative condition (*si voluero*).⁶

2.4 Non-Alteration of Consent

Consent alteration is equivalent to its non-existence; it exists, but its effectiveness is diminished (Dogaru 2002, pp. 92–93, 94). An altered consent affects the conscious

between persons subject to interdiction and those subject to judicial counselling operates at two levels. These are the level of impairment of mental faculties (total in the first case and partial in the second one), and the nature of support necessary for the exercise of rights and freedoms (the first situation requiring representation, and the second one requiring assistance/counselling) Art. 41. Restricted legal competence. (1) A minor who reached the age of 14 and a person subject to judicial counselling have restricted legal competence.” (website <https://www.juridice.ro>, accessed on 09.02.2022, 14:15 h).

⁵ Turianu (2007a, b), quoted work, p. 91.

⁶ Cosma (1969), quoted work, p. 120; Turianu (2007a, b), p. 92; Dogaru (2002), 94, quoted work, p. 72.

nature of the volition incorporated in the legal document to such an extent that it can be sanctioned by relative nullity. The doctrine (Moțiu 2020, p. 187; Ungureanu 2007, p. 165) has considered that, terminologically, the wording “alterations of volition” is more appropriate than the wording “alterations of consent,” because the concept of volition is broader than that of consent. In this paper, we have considered that the wording “alterations of consent” is more accurate precisely because consent is part of the legal volition and limits to the expressed volition.

The draft European Code of Contracts places the alterations of consent under the scope of causes for invalidation of a contract. The causes for invalidation provided for by the draft European Code of Contracts also include reverential fear (McKendrick 2016, p. 109), and moral violence (Gatt 2008, p. 289).

3 Time of Transfer of the Contract Risk to the Buyer

Unlike physical sales, in case of online sales, there is an intermediary stage of product delivery. This stage influences the time of transfer of the contract risk because this is transferred to the buyer, or a party appointed by it takes effective possession of the products. However, if a non-professional carrier is tasked by the buyer to deliver the product to it, the risk is transferred to the buyer at the time when the seller delivers the product to the carrier, in compliance with Art. 20 of Government Emergency Ordinance no. 34/2014.⁷ The non-observance of these legal provisions triggers the sanction of a fine, as per Art. 28 para. (5) item (w) of Government Emergency Ordinance no. 34/2014.

4 The seller’s Warranty Obligation

Similarly to sales performed physically, online sales also trigger the seller’s liability for hidden flaws or for eviction. In the online medium, both goods and services can be sold. The seller’s warranty obligation is materialized by assuring the quiet and useful enjoyment of the good purchased by the consumer. This way, the seller warrants the buyer both against the loss of title and against hidden flaws.

⁷ Emergency Ordinance no. 34/2014 on Consumer Rights under Contracts Concluded with Professionals, and Amending and Supplementing other Normative Acts, Published in Part I of Official Journal no. 427 of 11/06/2014 (website anpc.ro, accessed on 10.02.2022, 18:30 h).

4.1 *Warranty for Eviction*

The seller is liable both for the eviction caused by acts of third parties and for that caused by its own acts. In case of eviction caused by the act of a third party, the seller is held liable only if the third party causes a *de jure* disturbance to the buyer, the cause for the loss of title is precedent to the sale and was not known to the buyer at the time of the contract conclusion (Deak 2006, p. 103).

Given that the sale of real property requires an *ad validitatem* authentic form, it cannot be concluded in electronic format. Hence, only movable goods can be sold online. Such goods can be evicted if they are charged with easements undisclosed by the seller and non-apparent or if the real owner can claim them under the terms of Art. 563 of the Civil Code.

Therefore, the seller can sell another person's good but, in such case, if on the date of the contract conclusion of the individually determined good, such good is owned by a third party, the contract is valid, and the seller has an obligation to ensure the transmission of the ownership right from its holder to the buyer in compliance with Art. 1683 of the Civil Code.

This obligation of the seller is deemed to be performed either through the acquisition of the good by it or through the ratification of the sale by the owner or through other means, directly or indirectly, which secure the ownership over the good to the buyer.

In the event that the seller fails to perform its obligation to secure the transmission of the ownership right to the buyer, the latter can request for the contract rescission, the return of price and, if the case, liquidated damages.

A loss of title caused by the seller's own acts has its origin in a fact or action concealed by the seller of nature to disturb the quiet enjoyment of the good. In such case, the seller is held liable irrespective of whether the relevant disturbance is a *de jure* or a *de facto* one. Such situation would translate practically in the area of online sales through the sale of a good several times or through reliance on a usufruct right over the relevant good.

The sale of a good several times (in such case, the seller is held liable for loss of title towards the first buyer), can be qualified as a form of loss of title, given the consensual nature of the sale, as it is concluded once the offer acceptance gets to the seller. In case of an eviction resulted from a personal act of the seller,⁸ the buyer has available a warranty objection "quem de evictione tenet actio, eundem agentem repellit exceptio" (the one bound to warrant against loss of title may not evict) (Deak 2006, p. 101).

⁸ In such case, a loss of title caused by the universal or universal-title successors of the seller is also deemed as a personal act of the seller, in compliance with Art. 1699 of the Civil Code.

4.2 *Warranty for Hidden Flaws*

In case of online sales, the seller is liable for hidden flaws that make the good improper for use or diminish its value in such a way that the buyer would not have purchased it or would have paid less for it if it had known them. In order for this warranty to operate, the flaw must be hidden, must have existed on the date of the contract conclusion and must be serious.

Given that online sales are remote sales, the buyer cannot check the good before it is delivered to it, so after the contract conclusion. This aspect that triggers also the liability for apparent flaws in the case of such sales, because the buyer is physically unable to conduct a normal and careful check before the contract conclusion.⁹

If the parties postponed the time of transfer of the risks after the contract conclusion, for example, at the time of the effective handover of the good to the buyer, then the seller is liable including for flaws occurred after the sale, but until the time of transfer of the ownership right.¹⁰

5 **Conventional Change of Liability (Limitation/Removal or Encumbrance)**

Art. 1708 of the Civil Code indirectly regulates a possibility to conventionally change the liability for hidden flaws. From an interpretation of the first paragraph, one can understand that, *per a contrario*, the parties can conventionally eliminate such liability, and according to the principle *qui potest plus, potest minus*, the parties can also limit it, not only remove it. However, the buyer's consent must be given on an informed basis and must be explicit in order to produce legal effects. Therefore, in case of online sales, the buyer should be able to clearly see such option in the offer posted on the Internet.

Also, the parties can agree to extend the seller's liability. This possibility to limit/remove/extend the liability for hidden flaws illustrates the principle of contractual freedom.

6 **Conclusions**

In case of online sales, there are some specific particularities of the contract resulted from the additional features of technical nature and from the fact that these are remote sales. Therefore, the seller's liability for hidden flaws and for eviction does not arise at the time of the contract conclusion, but at the time of the good handover to the

⁹ Court of Review, Judgment no. 258/08.02.1935, in *Revista de drept comercial* (Commercial Law Magazine), 1935, p. 449.

¹⁰ Ditto, p. 116.

buyer/ a representative of it, in order for it to be able to check the good in physical format.

Precisely because a normal but careful check cannot be conducted before the time of the contract conclusion, online sales also imply a liability for apparent flaws for the seller.

The risk of the good impairment is transferred to the buyer only at the time when the latter effectively takes possession of the good, provided that the transfer of the good/goods is secured by the seller.

Reference

Dogaru, L.: Drept civil român. Idei producătoare de efecte juridice (Romanian Civil Laws. Legal Effect-Producing Ideas). All Beck Publishing House, Bucharest (2002)

Legislation

Civil Code

ORDER no. 433 of March 6, 2009 on the establishment of the Committee for local public finances
Emergency Ordinance no. 34/2014 on consumer rights in contracts concluded with professionals, as well as for amending and supplementing some normative acts

Treaties, Monographs, University Courses

Cosma, D.: Teoria generală a actului juridic civil. Scientific Printing House, Bucharest (1969)

Deak, F.: Tratat de drept civil. In: Mihai, L Popescu, R. (eds.) Contracte speciale, vol. I, 4th edn. Universul Juridic Printing House, Bucharest (2006)

Dogaru, I.: Valențele juridice ale voinței. Scientific and Encyclopedic Printing House, Bucharest (1986)

Hamangiu, C., Rosetti-Bălănescu, I., Băicoianu, A.L.: Tratat de drept civil român, vol. I. All Beck Printing House, Bucharest (2002)

McKendrick, E.: Contract Law. Texts. Cases and Materials, Ediția a VII-a. Oxford University Press, Oxford (2016)

Moțiu, F.L.: Contracte speciale. In: Mihai, L., and Popescu, R. (eds.) The 7th edition improved and updated. Universul Juridic Printing House, Bucharest (2020)

Reghini, I., Diaconescu, Ș., Vasilescu, P.: Introducere în dreptul civil. Legal Sphere Printing House, Cluj-Napoca (2008)

Ștefan, M.C., Dogatu, M.M.: Microeconomie. Teorie și aplicații practice. University Printing House, Bucharest (2012)

Stoica, V.: Drept civil. Contracte speciale. Editura Universul Juridic, București (2008)

Turianu, C.: Drept civil. Partea generală. Persoanele. Culegere de practică judiciară. C.H. Beck Printing House, Bucharest (2007a)

Turianu, C.: Introducere în dreptul civil. University Printing House, Bucharest (2007b)

Ungureanu, O.: Drept civil. Introducere. C.H. Beck Printing House, Bucharest (2007)

Specialized Articles

Gatt, L.: Sistemul normativ și soluțiile inovatoare ale Codului European al Contractelor. *Revista Română de Drept Privat* 2 (2008)

Jurisprudence

Decision of the Constitutional Court of Romania, no. 601/2020
Court of Cassation, decision no. 258/08.02.1935 in *Revista de drept comercial* (1935)

Online Sources

<https://www.juridice.ro>