Law Review • vol. XII, issue 1, January-June 2022, pp. 94-102

PRIVATE LAW

Agricultural Tenancy in Hostile Contexts: a Romanian Story. Rights, Risks, and the Legal Liability of the Agricultural Tenant - a Critical Review of Legal Regulations

Adrian Călin Cuculis[1]

Abstract

Among the contracts regulated by the Civil Code, the agricultural lease contract suffers from a profound lack of popularity, on the one hand, and very few positive associations in the Romanian mentality, on the other. Beyond the empirical reality, there is no doubt that this image is based on the very legislative construction of the agricultural tenancy contract. Precisely in this regard, the present paper aims at outlining the specifics of the agricultural lease contract from the perspective of the tenant, in terms of rights, together with the risks and legal liability related to the contract. The problematization ends with some remarks related to certain elements of tenant protection within the French system.

Keywords: *agricultural tenancy; tenants' rights; risks of agricultural tenancy; tenants' legal liability*

1. Introduction

Nowadays, the practice of agricultural tenancy is still to associated in the Romanian outlook to archaic land-work – and rightfully so, since not much has changed for individual farmers- burdening costs, investing resources and not always a return of investment. In the dawn of 1990 democracy, there has been a wave of enthusiasm towards finally having the chance to develop agricultural policies directed to tenants and landlords alike and to position agriculture, in general, as a central engine of the economy[2]. However, up until the 2000's, only law 16/1994 (repealed) touched upon the central issues of Romanian agricultural

[1] PhD, Faculty of Law, Alexandru Ioan Cuza Police Academy, Romania

[2] The present study is a translated excerpt of my PhD thesis, entitled The agricultural tenancy contract- legal perspectives within a European context, pending to be defended at the "Alexandru Ioan Cuza" Police Academy.

tenancies, later to be completed by law 223/ 2006. Most of the Civil Code provisions we have today are tributary to law 16/1994, while worth mentioning that an important part have been removed[3]. Had the law-maker been more concerned about the importance of agricultural tenancy at least for EU- funding purposes, we would have witnessed a more timely and developed legislative framework around the matter; and, presumably, fewer lawsuits in courtrooms.

2. Methodology

The following analysis looks at how the Civil Code provisions outline the rights and legal liability of the agricultural tenant, along with the risks that may define the outcome of the contract. The underlying hypothesis behind this approach is that agricultural tenancy is defined foremost by the legislative context in place and that the law maker has failed to delineate a motivating framework for tenants in the light of these three important elements.

Thus, the present study employs a content analysis of the Civil Code provisions on agricultural tenancy, together with a contextualization of the regulations provided by the Code of Civil Procedure.

3. The rights of the agricultural tenant: an analysis of the Civil Code provisions

The agricultural tenant has the obvious right to use the goods which are the subject of the contract, to surrender the contract to a spouse (which, technically, is not much of a right as this is likely to happen unofficially anyway in a family), to change the use category of the rented goods, should the landlord is notified in writing;, as well as having the upper-hand in what concerns land-buying (pre-emptive rights).

By contrast, the list of responsibilities is exponentially larger and more consistent, with the tenant being obliged to: purchase an insurance for the goods subject to the contract, use these goods diligently and return them in the estate in which they were received, support all costs related to the contract signing, registration and publicity, pay the tenancy price in the amount and at the terms established within the contract.

The right of pre-emption of the lessee is a right that arises naturally from the tenant's work, and the existence of that right was intended to motivate individuals to engage in agricultural tenancy (European Commission, 2017). It consists in the fact that the tenant has priority in the acquisition of the leased

[3] On the contents of Law 16/1994 and law 223/2006 which were not included in the current Civil code provisions, see Cuculis (forthcoming). "Agricultural tenancies in Romania: en evolutionary perspective of legal regulations". *Journal of Legal and Administrative Studies.*

property, over other individuals who would like to acquire that good (art. 1849 and 1730 of the Civil Code). If the lessor has entered into a contract of sale with another person, he is obliged to communicate to the lessee not only the terms of the contract but also the full name of the person to whom the sale was made - art. 1732, paragraphs 1) and 2). This provision escapes the legal logic from two perspectives: first, the disclosure of a person's full name is the disclosure of personal data in accordance with applicable GDPR regulations and may entail various forms of pressure from the lessee to a third party. Secondly, as Eugen Chelaru pointed out in a recent article, the condition of the pre-emptor - of the lessee, in this case - is somewhat paradoxical: he is not part of the sale-purchase contract, but can become a part of it; he may obtain the termination of the contract concluded between other individuals, although this does not bring him an immediate benefit; and the pre-emptor may substitute one of the parties to the contract, or may request the generation of a new contract (2020).

There are a series of blind spots in what regards the tenants' pre-emptive rights, which actually question their authenticity. Firstly, letters a) and b) of article 1734 (Civil Code) create a very unclear picture concerning the person who would actually have priority in buying the leased goods in the situation where multiple pre-emptors arise. The article states verbatim: "*If several holders have exercised their pre-emption on the same good, the contract of sale is considered concluded: a) with the holder of the legal right of pre-emption, when he is in competition with the holders of some conventional pre-emption rights; b) with the holder of the legal right of pre-emption chosen by the seller, when this person is in competition with other holders of some legal rights of pre-emption*". Thus, what can be understood from here is that the seller's choice actually makes a difference, regardless of who has pre-emptive rights.

On the same note, it is important to outline here that in Romania the landlords have unlimited freedom to sell properties at their own prices, without having to use benchmarks of the market or to be liable for the price offers to Romanian authorities- as opposed to France, for instance. It becomes clear that any landlord can by-pass a tenant by simply imposing a price offer that he knows this pre-emptor cannot afford.

Secondly, the duration in which these pre-emptive rights can be exercised is very reduced, especially for immovable property. The right of pre-emption is to be exercised in the case of movable property sale, within a maximum of ten days, and in the case of real estate sale, within a maximum of 30 days (art. 1732, paragraph 4). It is particularly hard to understand why a group of individuals who would be able to access funds for a land in 30 days (not the vast majority of the population, surely), would be still working the land in present – since we know that generally, Romanian agricultural tenants do not carry out this activity out of passion, but rather for subsistence purposes. Thus, this is another case of

form without substance in the Romanian legislation, in which some rights seem to be highly appraised, when they are, actually, completely unaccounted for.

Thirdly, in the absence of other regulations to support the lessees, article 848 of the Code for Civil Procedure further empowers landlords to by-pass the tenants, by stating that the holders of a pre-emption right who did not participate in the auction lose this right after the adjudication of the immovable goods. No specifications are made in relation to the notification about this auction, nor the tenant's capacity to participate: did the tenant receive the notification? Was the tenant in the right state of health to be able to participate in an auction in that day and moment?

In addition to tenants, those who have priority in purchasing property may be: co-owners, owners of neighboring land that have a common border with the land for sale, young farmers with domicile or residence in Romania for at least 1 year, research and development units from the fields of agriculture, forestry and food industry, individuals with domicile / residence located in the administrative-territorial units where the land is located or in the neighboring administrative-territorial units, and the Romanian State, through the State Domains Agency (Vranken et al, 2021).

If no preemptor shows an intention to buy the property/ goods, within 30 days the sale is addressed to these potential buyers:

- individuals domiciled or residing in Romania in the last 5 years, who have carried out agricultural activities in Romania registered by the Romanian tax authorities;
- legal entities with registered office and / or secondary headquarters in Romania in the last 5 years, during which time they carried out agricultural activities in Romania in proportion of at least 75% of the total income, and the main partner or main shareholder had his domicile or residence in Romania in the last 5 years - in other words, to companies in the field of agriculture.

If the potential buyer does not meet these criteria, the Ministry of Agriculture and Rural Development issues an unfavorable opinion. If during this 30-day period, after the 45 working days of pre-emption, none of the potential buyers will meet the mentioned conditions, the sale can be made freely. Sales approval is always required from government bodies (e.g. town hall, Ministry of Agriculture and Rural Development), and transactions must be recorded in the land books.

3. *„Spinning the wheel of fortune"*: risks of agricultural tenancy

The recurring tendency in legal studies on agricultural tenancy is to approach the existing risks only in the direction of the fortuitous ones, in the letter of the Civil Code, from the perspective of articles 1841 and the following.

Although some phenomena such as drought have had a significant frequency in recent years, with important losses, there are many others with similarly impacting consequences, such as soil erosion, which they may not be as visible - and many other which may or may not be fortuitous (for instance, Mangu, 2013; Atanasiu et al., 2011), due to previous irrational exploits. Such risks deserve increased legislative attention in order to reach a decent agricultural productivity and beneficial land use, by sanctioning uncoherent farming practices.

Another provision in the direction of fortuitous losses in the Civil Code refers to the fact that the lessee can bear these losses (art. 1460). This provision not only does not justify its presence in the Civil Code, as it could have represented a mere contractual clause, at the discretion of the parties, but it does not help the contract as a whole. It is unclear why the lessee would want to assume accidental losses as a right, when this person assumes a number of risks through the lease anyway.

Other important risks, that are not taken into account by the doctrine, but are equally important for the leasing activity and for the extent to which it is encouraged in the long term, refer to:

Financial losses that the tenant may incur: the value of the crops collected by the lessee is variable, while the price established by contract represents a fixed amount. Here, not only fortuitous losses are the core matter, but also the fact that Romanian agriculture is not yet at the level where all small farmers can place their products on the supermarket shelves. The sale of these crops takes place in time, in uncertain conditions and at very low prices most of the time, so without offering the chance of a quick financial recovery to the tenant after months of work.

Working conditions: agricultural tenancy involves outdoor work, most of the times, implying the possibility of all sorts of work accidents and deaths, not taken into account by the contract.

The lack of regulations regarding labor relations and which translates into a lack of contribution to the pension and health system. When we talk about agricultural tenancy, we are talking about an activity that is not regulated neither in terms of employment relationships (employer-employee, part-time or full-time work) nor as a service-provider.

4. To rent or not to rent? A question of legal liability

Any discussion on legal liability involves two central concepts: that of guilt and prejudice. Both involve a contextualization in the conditions of the regulations on the liability involved by a contract, in general, so that the situation of a agricultural tenancy could be better understood.

Article 1353 of the Civil Code specifies that the person "*who causes damage by the very exercise of his rights is not obliged to repair it, unless the right is abusively*

exercised". In the case of agricultural tenancies- and where the applicable provisions of the contract, in general, apply - which stipulate that the tenant is obliged to deliver the goods received in the condition in which he received them, one can deduce, however, that this person is not obliged to repair them if the damages occurred as a result of the exercise of the right to lease - in the likelihood of prudent use. Thus, the idea of guilt is difficult to outline here if we take into account the fact that various machines, agricultural tools suffer from damage attributable to ageing, long duration of use, etc.

At the same time, the tenant is liable for any damages occurring from not buying an insurance policy for the goods subject to the contract.

According to Liviu Pop, the responsibility for objects can be considered, in reality, a responsibility for fortuitous events. The argument behind this rationale is that a movable property too (for instance, leased animals) can cause damage to another property (such as various tools or agricultural machinery), and here, of course, the usufructuary of these goods (or the one in guarding them, according to the author) is liable, although this person did not cause the damage directly (2020). Under European law, liability for objects has been limited to the category of dangerous goods, for example, the case law in the United Kingdom admits strict liability only for damages caused by dangerous things. In that case, it is therefore debatable, whether insuring leased property can cover all potential damagse, on the one hand, and whether the tenant should be held liable for it, on the other.

The legal liability in regards to tenancy price has been seen in more flexible terms by some Romanian courts. In this regard, the decision of the Călăraşi Court in 2011 did not sanction a 5 month delay in payment in an agricultural tenancy contract (Călăraşi Court, 2011). However, the non-payment of rent is often the subject of court cases, either for reasons of interpretating the contractual price (a share of the crops and / or money), or for the non-responsivity of some tenants to pay the price lease. If the parties have contractually agreed to pay a performance guarantee in cash, as is the case with decision no. 4431 of November 8 (High Court of Cassation and Justice, 2012), the lessee must comply with this condition, not being able to invoke the various natural disasters that may occur.

Nonetheless, in a not-so-recent case, the conclusion of the judgment of the Court (Fifth Chamber) of 21 January 2010, has stated that by virtue of Regulation No 40/94 1782/2003 and Regulation no. 795/2004, the community law does not oblige the tenant, at the expiration of the lease term, to hand over to the landlord the leased lands together with the payment rights established for these lands or related to them (European Court, 2010).

Last but not least, if the landlord decides to sell the leased property, the tenant (who has failed his pre-emptive rights) becomes liable to the next owner,

by virtue of the fact that the sale-purchase contract has also established a transfer of the agricultural lease contract (Creţu, 2022).

5. Conclusions

Although some authors have argued that the provisions of the Civil Code have, presumably, improved the status of agricultural tenancies, favoring landlords and tenants alike (Moceanu, 2014), this is hardly the case, as the power gap between the two contractual parties remains impossible to ignore.

At the moment, the tenant solely enjoys his usufruct, while his pre-emption rights are easy to by-pass by the landlord and are not actually defended by the law. Some of the provisions of the Civil Code and the Code for Civil Procedure remain vague and, in this form, are loopholes for landlords. In addition, the pricing of agricultural tenancies is discretionary, being completely unregulated, and there is no institution to defend tenants' rights. A very important model to take into consideration here is France, where SAFER (Sociétés d'Aménagement Foncier et d'Etablissement Rural) regulates the transfer of agricultural land in order to avoid speculation and to support farmers. SAFER has the right to intervene if a real estate transaction is considered inappropriate, by rejecting it, and if a price offer presented to the pre-emptor is considered too high, SAFER demands a new offer from the landlord (Vranken et al, 2021).

The Romanian tenant has exponentially more responsibilities from a legal standpoint, while courtrooms might ease this burden- although this also implies the obvious cost of a trial. Basically, this person represents the center of the agricultural lease contract, taking risks of all sorts upon themselves, becoming liable to anyone who buys the property, all of this while his/ her work is seen as a taken-by-granted by-product.

Surely, better regulations could have been enforced to upgrade agricultural tenancy from this Middle-Ages paradigm.

Acknowledgements

The author thanks the anonymous reviewers and editor for their valuable contribution.

Funding

This research received no specific grant from any funding agency in the public, commercial, or not-for-profit sectors.

Disclosure Statement

The author has not any competing financial, professional, or personal interests from other parties.

References

Atanasiu, A.-G., Dimitriu, A. P., Dobre, A. F., Georgescu- Banc, A., Ionescu, R.-A., Ionescu, R. A., Paraschiv, M., Pădurariu, I., Piperea, M., Piperea, P., Rățoi, A.- S., Slujitoru, A.- I., Sorescu, I., Şerban, M., Uluitu, G.-A. & Văduva, C.-M. (2011). *Noul Cod civil. Note. Corelații. Explicații* (ediția 1) (The new Civil Code. Notes. Correlations. Explanations) (first edition), Bucharest: C. H. Beck.

Chelaru, E. (2020). Titularul dreptului de preempțiune legală – spectator sau actor? (The holder of the legal pre-emption right –a spectator or a protagonist?) *Revista Română de Drept Privat* (Universul Juridic), nr. 1, 2020, pp. 182-191.

Creţu, F. E. (2022). Înstrăinarea bunului arendat. Cesiunea legală de contract (The alienation of the leased property. The legal transfer of contract), *Dreptul,* no. 2, pp. 168-172.

European Commission (2017). Commission Interpretative Communication on the Acquisition of Farmland and European Union Law (2017/C 350/05)", *Eur-lex.europa.eu*, https://eur-lex.europa.eu/legal-content/MT/TXT/?uri=uriserv%3AOJ.C_.2017.350.01.0005.01.ENG&toc=OJ%3AC%3A2017%3A350%3ATOC.

Mangu, C. E. (2013). *Riscul în principalele contracte civile potrivit noului Cod civil (Risk in the main civil contracts according to the new Civil Code)*, Bucharest: Universul Juridic.

Moceanu, M. (2014). Informațiile pe care ar trebui să le cunoaştem despre arendare (The information we need to know about agricultural tenancy). *Legestart* (online), no. 4.

Pop, L. (2020). *Tratat de drept civil. Obligațiile. Vol. 3: Raporturile obligaționale extracontractuale (Civil law treaty. Obligations. Vol. 3: Non-contractual contractual relations),* Bucharest: Universul Juridic.

Vranken, L., Tabeau, E. & Roebeling, P. (2021). Agricultural land market regulations in the EU Member States. *Data and information on agricultural land market regulations across EU MS,* https://www.europeanlandowners.org/images/AGRI__LAND_MARKET_REGULATIONS_IN_THE_EU_/Agri-Land_EU_-_D3_-_MAIN_REPORT_final-3_21.04.27.pdf

***Călăraşi Court, Agricultural lease contract, February 23, 2011, https://lege5.ro/App/Document/gi4tonbtgi/contract-de-arenda-interpretarea-clauzelor-in-conformitate-cu-dispozitiile-art-977-985-cod -civil? pid = 59981730 & expression = plata% 20arendei% 20 # p-59981730

*** European Court (2010). Document 62008CJ0470. Judgment of the Court (Fifth Chamber) of 21 January 2010. Kornelis van Dijk v Gemeente Kampen. Reference for a preliminary ruling: Gerechtshof te Arnhem - Netherlands. Common agricultural policy - Integrated administration and control system for certain aid schemes - Regulation (EC) No 1782/2003 - Single payment scheme -

Transfer of payment entitlements - Expiry of the lease - Obligations of the lessee and the lessor. Case C-470/08, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62008CJ0470

*** High Court of Cassation and Justice, Civil Section II, Decision no. 4431 of November 8, 2012, Agricultural lease contract, https://ilegis.ro/spete/spete/act/id/84480