

Particularities Of The Adverse Possession

Veronica Gisca¹

Anastasia Buga²

¹PhD, associate professor, Academy of Economic Studies of Moldova, gisca.veronica@ase.md, ORCID : 0000-0002-0781-1995

²Undergraduate, Academy of Economic Studies of Moldova, buga.anastasia@ase.md, ORCID: 0000-0003-3203-6836

Abstract: Having its beginnings two millennia ago, the institution of adverse possession represents the most spectacular effect of possession. It appears for the first time in Roman law, being provided for by the Law of the XII Tables, where it is defined only as a way of long-term possession of a piece of land. If we analyze the evolution, we can see that, with time, besides the essential element, other conditions are added that lead to the acquisition of the property through this method. In this paper, comparative elements between various types of legislation are proposed for research, which involve the comparative analysis of several civil codes - of France, Italy and the Russian Federation, including that of the Republic of Moldova. These proposals were interspersed with the objective of the given paper - the development of a deep and integral study on all the issues related to the establishment and analysis of the object as a necessary condition for acquiring the asset through adverse possession, which will allow raising the level of knowledge in the given field, will contribute to the correct application of the legislation in force, to the effective settlement of disputes in that matter and, of course, a better understanding of the subject by paying special attention to the comparison process, because we consider this research method effective.

Key Words: comparative analysis, evolution, classification, legislation.

INTRODUCTION

The economic evolution and the technical-scientific development of the society also determine the goods that form the object of the property right, as well as the legal regime applicable to the different ways of acquiring the property right, in relation to their importance in the system of social values.

The institution of adverse possession is omnipresent in real rights treaties, being treated in domestic and foreign specialized legal literature. But, as it was mentioned previously, the notion still appeared in Roman law, respectively: from the Latin words *usus*, *us* - use and *capio*, *capere* - to take, taking; as a result *usucapio*, *usucapere* - taking into use, acquiring as an effect of (long) use.

With the evolution of the Roman Empire, adverse possession acquires new specific legal characteristics, constituting not only a way of obtaining property, but also acquires the quality of classifying some legal situations on the basis of long-term ownership. As a consequence, another similar institution appears, which delimits the functions mentioned above, - *longi temporis praescriptio* (later also regulating *praescriptio longissimi temporis*). The latter represented, rather, a procedural exception placed at the disposal of the non-proprietary possessor to defend himself against possible usurpers, which, however, had such an effect only as long as the person invoking it was in possession of the property in question.

INTRODUCTORY NOTIONS: DEFINITIONS AND CHARACTERISTICS

One of the newest and most important ways of acquiring property rights is adverse possession. Although it is regulated in the new Civil Code of the Republic of Moldova, no definition is provided, in the specialized literature *usucapion* is an original way of acquiring the right of ownership and other real estate rights through the effect of a prolonged possession of an asset over a period of time provided by law. *Usufructuary* (also called *acquisitive prescription*) has been defined as a way of acquiring ownership or other real rights regarding a thing, through the uninterrupted possession of this thing for all the time fixed by law. (Bârsan, 2013). Other authors define this institution as a way of acquiring the right of ownership through long-term possession of a movable or immovable asset under the terms and conditions provided by law. (Baies, 2005).

The English authors give us a definition in a less technical style: "Usucapion is the institution which allows the possessor of the plot of land, who is not the true owner, to acquire the right of ownership over it without the

latter's consent and without payment of compensation, as a result of possession for a period provided by law, at the end of which even the true owner will not be able to bring actions in court to "evacuate" the possessor." (Depoorter, 2002).

Therefore, adverse possession is one of the effects of possession as a state of fact (possession creates a presumption of ownership in favor of the possessor; acquiring the right of ownership by adverse possession; the bona fide possessor acquires ownership of the fruits of the fruitful good he possesses; acquiring the right of ownership by occupation; the actions of the possessor). Considering that it does not operate by right, the acquisition of the right of ownership or other main real right is conditioned by the positive exercise of the right of option regarding the adverse possession, as a right of protest. (Dima, 2006).

So, based on the definitions above, we derive the following characteristics of usucapion:

- long possession in the acquisition term;
- the possessor must be in good faith;
- the possession should be useful.

In the civil law of the Republic of Moldova, the institution of adverse possession was regulated for the first time by the provisions of the Civil Code of 2002. According to the Civil Code of the Republic of Moldova, adverse possession is of two types:

- real estate adverse possession;
- movable adverse possession.

The difference between these two types of adverse possession consists in the time required to possess the asset in order to acquire the right of ownership over it. The adverse possession in the case of movable goods will not be able to operate for those goods for which the transfer of the ownership right, the law requires its registration. So, the scope of movable property covers only unregistered movable property. As I mentioned before, the acquisition of the right of ownership or another right, through any form of adverse possession, represents a faculty for the possessor, representing a complex structure, which brings together the legal fact in the narrow sense of possession, as well as the unilateral manifestation of the one interested in acquiring a real right (Stoica, 2006).

Any immovable property found in the civil circuit can be acquired by adverse possession. As a consequence, assets that are not in the civil circuit (inalienable), such as those in the public domain, cannot form the object of adverse possession. In the following, we will list the assets that cannot be objects of adverse possession:

- 1) The wealth of any nature of the subsoil, the air space, the waters and the forests used in the public interest, the natural resources of the economic zone and the continental plateau, the communication routes, as well as other goods established by law (Constitution of the Republic of Moldova, art. 127);
- 2) Water (RM Water Code, art.4);
- 3) Lands with property rights of the state or of the administrative-territorial units, the right of possession, use and disposal over which belongs to the competence of the Government or local public administration authorities (Law no. 29);
- 4) The goods that constitute the public domain of the state, listed in the Law on public property lands and their delimitation: the lands of scientific research institutes and stations, of agricultural and forestry education units, intended for research, the production of seeds and planting material from the biological categories, as well as obtaining purebred animals; the lands of the forestry fund are public property of the state; the lands of the water fund public property of the state, including the lands of the surface aquatic objectives located on the territory of two or more districts, or located on the territory of a single district and intended for the protection of the energy system, the needs of the field of transport and other state services; the lands of border water objectives; lands declared natural areas protected by the state; the lands of spa resorts of national importance; the lands of water protection zones and sanitary zones, according to the data from the respective cadastres; the lands related to the buildings where the ministries, other authorities of the central public administration, the institutions subordinate to them carry out their activity; the lands occupied by national roads, railways and their protection zones, the lands occupied by national and international gas transport pipelines, by other public

transport networks owned by the state; lands intended for nature protection, including natural areas protected by the state, health protection, recreational activity and lands of historical-cultural value (historical-cultural reservations, memorial parks, archaeological and architectural monuments, etc.) that are of national public interest; the lands intended for defense needs, for the needs of border guards and internal troops; other lands used to ensure state security.)

- 5) The goods that form the public domain of the village (community), city (municipality);
- 6) The goods that form the public domain of the district, the autonomous territorial unit of Gagauzia.
- 7) State roads (national roads; local roads and streets);
- 8) State aircraft (aircraft used for military services, aircraft used for customs services, aircraft used for police services);
- 9) Natural areas protected by the state;
- 10) Monuments that are part of the cultural and natural heritage, etc

In order to acquire the right of ownership through adverse possession, it is necessary that the possession of the asset takes the form of possession, and that the possession is not precarious and useful. In order to be useful, possession must be continuous, peaceful and public (Gîsca, 2022).

a) The presence of a possession - In other words, the possession of the good must take the form of possession. In the specialized literature, this condition was individualized by the fact that the possessor must be in good faith, because there is no possession where there is bad faith on the part of the possessor of the good. Good faith means the possessor's belief that he owns the good with the conviction that he does so as the holder of the right of ownership.

b) Possession should not be precarious - possession is precarious when it is not exercised under the owner's name. So, if a person owns the asset based on a title, other than the transferable title, he will not be able to invoke the benefits of the adverse possession. This is because he owns the property in the name of another person - the usufructuary, the depositary, the tenant.

c) The possession must be useful - In order to acquire the right of ownership through adverse possession, the possession must be useful, that is, when it contains certain qualities or is free from defects. The possession will be useful if it will be continuous, undisturbed, public and non-precarious. The lack of these qualities determines that the possession of the good no longer produces legal effects.

d) Possession must be continuous – Continuity of possession implies the succession of acts of possession at certain intervals of time that denote a certain regularity of the performance of acts of use, taking into account the nature of the work. A possession is discontinuous when the use of the thing is intermittent. It cannot be considered discontinuous possession when the interruptions in the use of the property are due to a fortuitous event or a force majeure – earthquake, floods.

e) The possession must be peaceful – A possession is peaceful when it is not disturbed. By undisturbed possession, the legislator understood a possession that is not founded by acts of violence. A possession is disturbed by violence if the possessor obtained it by violence, both physical and moral, against the previous possessors. Possession will be disturbed regardless of whether violence was used only to acquire possession but during its exercise.

f) Possession should be public – Possession is public when it is exercised in full view, as the owner would exercise it himself. If possession is not exercised under these conditions, it is clandestine possession. Possession is clandestine when the possessor exercises it secretly from his opponent so that he is unable to know it.

The main effect of the adverse possession consists in the acquisition of the right of ownership over the usufructed good, simultaneously with the extinction of the former owner's right of ownership. This effect occurs retroactively (Ungureanu, 2017), in the sense that the usufructuary will be considered the owner from the first day of his possession and not from the moment the term is fulfilled. The usucapion can be invoked both by way of action and by way of exception, by the one who defends himself in a claim action brought by the former owner of the property. Unlike the extinguishing prescription, the acquisitive prescription cannot be invoked ex officio, by the court. After the prescription has expired, the user can renounce it, expressly or

tacitly. The tacit waiver must result from an unequivocal fact, which implies the abandonment of the acquired right. If the renunciation was made in fraud of the usucapant's creditors, they have the right to request the revocation of the renunciation through a Paulian action (revocation). The one who renounces the effects of the adverse possession must have the capacity to alienate. (Ungureanu, 2017).

COMPARISON OF THE BASIC CONCEPTS OF USUCAPION WITH OTHER TANGENTIAL LEGAL INSTITUTIONS FROM CIVIL LAW

Comparing adverse possession and accession as ways of acquiring property, we notice that both have as the object of the acquisition report both movable and immovable goods. According to the method of acquisition, with adverse possession the assets are individual and strictly determined, while with accession there is a main asset and an accessory asset. Thus, with adverse possession, the existence of one good is not necessary to acquire another. After the necessary period of time: in adverse possession, time is a mandatory element for acquiring the property, while in accession, time does not play any role.

There are situations when the adverse possession intersects with the accession, the first depending on the second: when the construction or plantation is made with own materials, but on someone else's land, he will be able to acquire the right of ownership over the construction or plantation after the expiration of a certain term and the fulfillment of the other conditions, if the owner on whose land the construction or plantation was built did not make his right acquired through the artificial real estate accession objectionable by registering it in the real estate register.

COMPARISON OF THE BASIC CONCEPTS OF USUCAPION WITH THE EQUIVALENT LEGAL INSTITUTION IN FOREIGN LAW SYSTEMS

a) The Romanian Civil Code provides for the adverse possession of 30 years, in the situation where the possessor does not possess, based on a just title, regardless of whether it is in good or bad faith. In this case, the one who claims to have acquired the property right or other main real right through adverse possession for 30 years, must prove, in fulfillment of the conditions, the adverse possession for 10 to 20 years, when the possessor possesses an immovable asset based on a just title and it is in good faith. Any transferable legal act of ownership (sale, donation, exchange, legacy with private title), when it emanates from someone other than the true owner, constitutes a just title, even the succession is a just title (not the heir's certificate).

b) In the French Civil Code, adverse possession can be found in the third book ("Different methods of acquiring the right of ownership"), title XXI "On possession and acquisitive prescription", chapter II ("On acquisitive prescription", articles 2258- 2277).

The French civil rules mention the existence of two categories of acquisition prescription: the 30-year prescription and the shortened prescription (from 10 to 20 years), the conditions of which are similar to those in Romanian legislation. This derives from the fact that when creating it, the authors of the Romanian Civil Code were largely inspired by French legislation. Regarding the goods that can be usufructed, as in other states, the editors of the Civil Code mention that the goods or rights that are not in commerce cannot be prescribed. At the same time, the French Civil Code allows the junction of possessions, as well as the possibility of interrupting or suspending the limitation period in the case of adverse possession.

c) The Italian Civil Code regulates the matter of adverse possession in articles 1158-1167, section III ("On adverse possession") of chapter II "Effects of property rights" of Title no. 8 "On possession", Book no. 3 – "Property", distinguishing between movable adverse possession, real estate and registered movable property. The term required for usucapion is 3 years for movable goods and from 10 to 30 years for other goods. In the table below (annex 1) the term required for the adverse possession of the goods in Italy is analyzed in detail.

Annex 1 – The term necessary for usufructuring the goods in Italy

Name	Examples of assets	Duration of possession
Movable accession	Land, buildings, warehouses, offices or real rights	20 years
Universality of goods	A library, a herd, an art gallery	

Movable property held abstractly without just title	Furniture, bicycles, everything that is not considered real estate	20 years (in bad faith) 10 years (in good faith)
Movable assets registered in public registers	Ships, planes, automobiles	3 years (in good faith and just title) 10 years (without these conditions)
Special use	Small funds and funds of rustic mountain cabins with outbuildings	15 years 5 years (with just title)

The legislation of the Republic of Moldova does not expressly provide which assets cannot be usufructured, as for example is provided by the Romanian legislation, which states that assets which, before or after entering possession, have been declared inalienable by law cannot be usufructured. For example, the goods that form the object of public property cannot be acquired by adverse possession. Of course, the text of the law is likely to apply to privately owned goods, to the extent that they have been declared inalienable by law. On the other hand, the inalienability clause inserted in a legal act does not prevent the acquisition of the right of ownership by usufructuary by a third party possessor, because, as it follows from the above-mentioned legal text, only the legal inalienability, and not the voluntary one (contractual), prevent usucapion.

At the same time, art. 527 para. (3) of the Civil Code of the Republic of Moldova provides that usucapion does not apply:

- a) movable assets over which the right of ownership is acquired, according to the law, by registration in an advertising register;
- b) movable cultural assets;
- c) if the deed under which the acquirer acquired the asset is null or voidable.

EFFECTS OF ABUSE

The most important effect of adverse possession consists in acquiring the right of ownership. The usufructuary will be considered the owner not from the moment the legal term of the acquisitive prescription is fulfilled, but from the moment he came into possession of the thing. In other words, the effect of the adverse possession is retroactive.

From this it follows that all the rights that the possessor established over the work in favor of third parties during the usucapion will be consolidated, and the possessor in bad faith acquires definitively and irrevocably the right of ownership over the fruits and products received during the usucapion.

The adverse possession can be invoked both by way of action, when the possessor requests to establish the acquisition of the right of ownership in this way, and by way of exception, when he defends himself against the claim action brought against him by the former owner of the thing. However, it cannot be invoked ex officio by the court, but must be requested by the interested party (Cercel, 2003).

The beneficiary of the acquisitive prescription can waive its effects, but only after its fulfillment. The waiver can be express or tacit. The express waiver does not have to take a solemn form, but the written form is sufficient. The tacit waiver must result from an unequivocal fact, which implies the abandonment of the right won. The possessor must renounce the adverse possession voluntarily and knowingly, as happens when he concludes a lease agreement with the real owner regarding the property he possessed. The one who renounces the effects of the adverse possession must have the capacity to alienate.

The relinquishment of the usufructuary has no effect if this act damages the usufructuary's creditors or other interested parties. Consequently, they can invoke the prescription won by their debtor, even if he has waived it, as an application of the rules that determine the rights that creditors have over their debtor's estate. It was shown that the renunciation cannot be regarded as an act done in fraud of the creditors, against which they can invoke the Paulian action, but as a refusal to enrich themselves, as a simple abdication of the faculty to acquire, which will be attacked by oblique action. In reality, the creditor can invoke the adverse possession that his debtor has renounced only after he has previously attacked through the revocation action the act of renunciation made by him.

CONCLUSIONS

Adverse possession is that way of acquiring the right of ownership and other main real rights by exercising uninterrupted possession of an asset, within the term and in the manner prescribed by law.

The institution of adverse possession is justified, first of all, by referring to the situation of the possessor, in the sense that the need for stability of situations and legal relationships requires, at a given moment and in compliance with certain conditions provided by the law, the recognition of some apparent long-term legal effects of ownership, until the transformation of a de facto situation into a state of law - de jure.

Secondly, in justifying the institution of adverse possession, the former owner's situation cannot be ignored, in the sense that, indirectly, usurpation also constitutes a sanction against the passivity of the former owner, who disposed of his property and became disinterested in it for a long time, leaving -I to be in the possession of another person who acted as the owner or holder of a main real right.

Adverse possession proves its usefulness also due to the fact that it is an original way of acquiring the right of ownership, so that it can constitute an absolute proof of the right of ownership, thus removing the existing difficulties in terms of proving the right of ownership, both in the matter of the action in claim, as well as in other matters.

The scope of adverse possession requires a double distinction, namely the category of main real rights that can be the object of usucap and the category of rights that can form the object of these rights. It is necessary to establish more concretely the object of the adverse possession, because the regulation is a little vague. In this sense, examples from the Italian Civil Code could be taken into account, namely the inclusion as assets that can be usurped of the universality of assets, registered assets, patrimonial rights, as well as non-patrimonial rights (the right to name, pseudonym, etc.) etc.

BIBLIOGRAPHICAL REFERENCES

1. Bârsan, C., Civil law. The main real rights in the regulation of the new Civil Code, Bucharest: Hamangiu, 2013.
2. Baies S., Baiesu A., etc. a. Civil law. Real rights. The general theory of obligations, Chisinau: Cartier, 2005, p.90.
3. Ben Depoorter – Adverse possession // Property Law and Economics – Encyclopedia of Law and Economics, Volume 5, Edited by Boudewijn Bouckaert, Northampton, Massachusetts: Edward Elgar Publishing.Inc., p. 183.
4. Cercel, S., Civil law. Dismemberment of property rights. Ways of acquiring real rights. Real estate advertising. Craiova: University. 2003.
5. The Constitution of the Republic of Moldova of 29.06.1994, published on 18. 08. 1994 in the Official Gazette No. 1, art no: 1, in force: 27. 08. 1994, art. 127.
6. The Civil Code of the Republic of Moldova, Adopted by the Parliament of the Republic of Moldova by Law no. 1107-XV, Published on 22-06-2002 in Official Gazette No. 82-86 art. 661.
7. The water code of the Republic of Moldova no. 1532 of 22. 06.1993, published: 01. 10. 1993 in MonitorulParlamentului No. 10 art No: 287, art. 4, para. (3).
8. Dima, D., Uzucapione. Study of doctrine and jurisprudence., Bucharest, 2006, p.206;
9. Gîsca, V., Civil law. Real rights. Chisinau: Print-Caro. 2022.
10. Law no. 29 of 04/05/2018, regarding the delimitation of public property. The Official Gazette of the Republic of Moldova from 04.05.2018, no. 142-148, art. 279.
11. Ungureanu, O., Munteanu, C., Civil law. The general part. Bucharest: Legal Universe. 2017,
12. Stoica, V., The right of option regarding ucucapion, in Law no. 4/2006, p. 49.
13. Stoica V. Civil law. Main real rights. Edition 3. V. Stoica, Real rights 2009.