

AGREEMENTS CONCLUDED ELECTRONICALLY

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Abstract

The internet is not merely a means of communication but also an important instrument in operating commercial relations. The agreements concluded electronically have as legal frame the law nr. 365/2002 on electronic commerce. The present article outlines the main discussions generated by this type of agreements: pre-contractual obligation of information, time of conclusion, the relative nullity of contracts concluded by electronic means, the right to unilateral withdrawal of contract, long-distance contract enforcement.

Key words: electronic agreement, contract,

The definition of electronic agreement

In order to define the electronic agreements, the most important feature is the „electronic” nature, that makes that the object and agreement parties would not be relevant¹, these being the same as in the common law. A suggested definition would be: the electronic agreement is „the electronically signed agreement, independently of the form taken by the negotiation or execution of this agreement”²

From the point of view of the civil law, it can be noticed that the expression „, electronic agreement” does not define but a complementary way of contracting. Although there exists an impact of the new technologies on the agreement modalities, this impact is not so significant. That is why an electronic agreement is always a legal document and the computer science environment is only a factor of complications. The principle of consensualism, that governs the internal law, can govern also the

¹ A. Oprea, *Aspecte juridice ale contractelor electronice*, in „Pandectele Române”, no. 6/2005, p. 178. (*Legal aspects of electronic agreements*, in „Pandectele Române”, no. 6/2005, page 178).

² *Ibidem*, p. 179. (page 179)

creation of electronic agreements³.

The concluding of agreements by electronic means. The frame-law for concluding agreements by electronic means is Law no. 365/2002 concerning electronic commerce⁴, that at article 7 paragraph (1) statutes that all agreements concluded by electronic means produce the effects that the law acknowledges for the agreements, when the conditions asked by the law in order to validate them are fulfilled.

The writings in electronic form are according to article 4 paragraph (2) of Law 455/2001 a collection of data in electronic form in which there exist logical and functional relationships that convey letters, figures or any other features with intelligible meaning, destined to be read through a computer science program or other similar procedure. In the area of electronic writings can enter:

- The documents in written form, meaning the documents that are transposed through printer on paper
- The visual documents, meaning the information presented on the monitor, and their transmission can be achieved through the Internet
- The documents that could be listened and understood by using only electronic means.⁵

From these three types we are interested in the last two.

In order for an electronic agreement to be valid, it is necessary to fulfill *the informing pre-agreement obligation*⁶. This obligation is meant to protect the possible co-contracting party related to some circumstances that can lead to the vitiation of his consent.⁷ The service provider is obligated to provide the addressee, before the addressee sends the offer of agreement or acceptance of the firm offer of agreement made by the service provider, at

³ *Ibidem.*

⁴ Corroborated with Law no. 455/2001 concerning electronic signature.

⁵ M. Fodor, *Înscrisurile în formă electronică, mijloace de probă în procesul civil*, in „Curierul judiciar”, no. 6/2005, pp. 80-81. (*The Writings in Electronic Form, Means of Evidence in the Civil Trial*, in „Curierul judiciar”, no. 6/2005, pages 80-81.)

⁶ Article 8 paragraph (1) of Law no. 365/2002.

⁷ T. G. Savu, *Unele considerații pe marginea efectelor noii reglementări privind comerțul electronic asupra regulilor în materia formării contractului*, in „Revista de drept comercial”, no. 9/2002, p. 99. (*Some Remarks on the Effects of the New Regulation Concerning Electronic Commerce on the Rules in the Matter of Agreement Creation*, in „Revista de drept comercial”, no. 9/2002, page 99).

least the following information that must be expressed clearly, unequivocally and in an accessible language:

1. The technical stages that must be followed in order to conclude the agreement;
2. If the agreement, once concluded, is stored or not by the service provider and if it is accessible or not;
3. The technical means that the service provider puts at the disposal of the addressee in order to identify and correct the errors occurred upon the occasion of data introduction;
4. The language in which the agreement can be concluded;
5. The behavior codes to which the service provider subscribes, as well as information concerning the manner in which these codes can be consulted by electronic means;
6. Any other conditions imposed by the valid legal provisions.

The moment of concluding the agreement is the one in which the acceptance of the offer to contract has reached the tenderer, if the parties did not established otherwise.⁸ By this, the lawgiver lets the possibility of the parties to choose the moment of concluding the agreement, by observing the principles of free will of the parties.

There are though also other hypotheses that the law took into consideration, and namely the case in which the agreement by its nature or upon the request of the beneficiary, imposed an immediate execution of the characteristic performance, it is considered closed in the moment in which the debtor of the respective performance began the execution.

The provision is almost identical with the Provision of the commercial Code, and namely it is about the theory of information⁹ (named also as the theory of knowing the acceptance), according to which the agreement is considered closed in the moment in which the tenderer is actually informed about the acceptance of the offer. The commercial code stipulates the following: „*The synalagmatic agreement between distant persons is not perfect if the acceptance did not arrived to the tenderer's*

⁸ Article 9 paragraph (1) of Law no. 365/2002.

⁹ St. D. Cărpenaru, *Drept comercial român*, Edit. Universul Juridic, București, 2007, p. 412. (*Romanian Commercial Law*, Universul Juridic Publishing House, 2007, p. 412).

knowledge in the term decided by him or the term necessary for the exchange of the proposition and of the acceptance according to the nature of the agreement"¹⁰.

In the case of sending through electronic means the acceptance of the offer to contract, the service provider has the obligation to confirm the receiving of the offer acceptance by two modalities:

1. Sending a proof of receipt by electronic mail or by any other equivalent mean of individual communication, to the address indicated by the addressee, without delay;
2. The confirmation of receiving the offer or acceptance of it, by a mean equivalent to the one used for sending the offer or acceptance of the offer, as soon as the offer or the acceptance was received by the service provider, under the condition that this confirmation can be stored and reproduced by the addressee¹¹.

These messages by which the offer acceptance is confirmed are considered electronic messages and will be considered as belonging to the addresser if they were sent by him, by a person that represents him or by an automatic computer science system, programmed by/or in the name of the addresser. By receiving such an electronic message, the addressee is entitled to consider that the message is sent by the indicated addresser and to fundament his legal behavior on this presumption, except the case in which he knew or should have known that the transmission of the message is the result of an error or that the message, such as it was received, contained errors.¹²

The relative voidness of the agreements concluded by electronic means can be invoked on the request of the addressee under the following situations:

- If the provider did not observe his obligation concerning the providing of the addressee with the necessary information or these were incomplete or inaccurate;
- In the situation in which the service provider did not offer the addressee

¹⁰ Article 35 of the Commercial Code.

¹¹ Article 9, paragraph (3) of Law no. 365/2002.

¹² I. Schiau, *Cadrul juridic al comerțului electronic*, in „Revista de drept comercial”, no. 1/2002, p. 60. (Legal Frame of Electronic Commerce, in „Revista de drept comercial”, no. 1/2002, p. 60).

the possibility of using an adequate efficacious and accessible technical procedure, that would allow the identification and correcting of the errors occurred upon the occasion of introducing the data, before the sending or the acceptance of the offer;

- If the provisions and the general conditions of the proposed agreement were not provided for the addressee in a way so that it would allow him to store and reproduce them¹³

Closing the commercial agreements at distance. The consumer protection on concluding and executing the distance agreements was regulated by Decree no. 130/2000¹⁴. Although the decree does not expressly qualify the respective agreements as being commercial, this issue derives from the provisions of article 1 that illustrate that its regulation object is constituted by „the terms of concluding and executing the commercial agreements at distance between the dealers that provide products or services and the consumers”¹⁵.

The distance agreement is defined at article 2 of the Decree as the agreement of product and service providing concluded between a dealer and a consumer, within a system of selling organized by the dealer, that uses in an exclusive manner, before and after the conclusion of this agreement, one or several techniques of distance communication.

We are in the presence of a distance commercial agreement if the following two conditions are fulfilled¹⁶:

1. It is developed within a system of selling organized by the dealer, respectively
2. The dealer uses, exclusively, before and at the conclusion of the agreement, one or several techniques of distance communication. By distance communication techniques, the Decree understands any mean that can be used for concluding an agreement between the

¹³ Gh. Stancu, *op. cit.*, p. 131.

¹⁴ The Government Ordinance no. 130 of August 31, 2000, republished, concerning the consumer protection and concluding distance agreements, published in the Romanian Official Journal, no. 177 of March 7, 2008).

¹⁵ M. Bojincă, *Contractele comerciale la distanță*, in „Revista de drept comercial”, no. 1/2002, p. 86. (Commercial Distance Agreements in „Revista de drept comercial”, no. 1/2002, p. 86).

¹⁶ *Ibidem*.

dealer and the consumer that does not require the simultaneous physical presence of the two parties.

The selling system is not expressly defined, but in the annex of the Decree the communication techniques are thus enumerated:

1. Unaddressed print;
2. Addressed print;
3. Typed letter;
4. Printed advertising with an order ticket;
5. Catalogue;
6. Human intervention phone call;
7. Phone call without human intervention (automate call, audio text);
8. Radio;
9. Videophone (telephone with image);
10. Videotext (microcomputer, TV screen with keyboard or tactile screen);
11. Electronic mail (e-mail);
12. Telecopy (fax);
13. Television (teleshopping).

In this case also we speak about **pre-agreement informing obligations**, by which before concluding the distance agreement, the dealer must inform the consumer in the exact, correct and complete time on the following elements:

1. The identity of the dealer and, in case of agreements that stipulated the anticipated payment, the address and the modalities of contacting him, telephone/fax, e-mail and the unique registration code;
2. The essential characteristics of the product or service; the retail selling price of the product or the price of the service and the applicable taxes; the delivery taxes, if it is the case;
3. Payment, delivery or performance modalities;
4. The right of unilateral agreement denunciation, except the cases stipulated in the present decree;
5. The cost of using the distance communication technique, in the case

- in which it is calculated differently than according to the basic price;
6. The validity period of the offer or price;
 7. The minimal duration of the agreement, in the case of agreements that stipulate the current or periodical providing of a product or service;
 8. The deadline for executing the obligations resulting from the agreement¹⁷.

The field of application of distance agreements is set by Decree by exclusion. In other words, the Decree is applied to all fields except the ones expressly stipulated at article 6:

1. To distance agreements concerning financial services, regulated by Government Ordinance no. 85/2004 concerning consumer protection at concluding and executing distance agreements concerning financial services;
2. To agreements concluded by automated distributors or in automated commercial premises;
3. To agreements concluded with the telecommunication operators for the purpose of using pay-phones;
4. To agreements concluded for the building and selling of real estate goods or that refer to other rights concerning real estate goods, except the lease agreements;
5. To agreements concluded within the selling at auction.

The right of unilateral agreement denunciation. Article 7 paragraph (1) of Government Ordinance no. 130/2000 confers to the consumer the right of unilaterally denouncing the distance agreement, in term of 10 working days bearing all the direct expenses occasioned with the product return¹⁸.

The 10 day term stipulated for exerting this right begins to flow:

1. For products, since the date of receiving them by the consumer, if the provisions of article 4 had been fulfilled;
2. For services, from the day of concluding the agreement or after the conclusion of the agreement, from the day the obligations stipulated

¹⁷ Article 3 paragraph (1) of Government Ordinance no. 130/2000.

¹⁸ M. Bojincă, *op. cit.*, p. 90.

at article 4 had been fulfilled, under the condition that the delay would not exceed 90 days.

In the case in which the dealer omitted to transmit to the consumer the information stipulated at article 4, the term for unilateral agreement denunciation is 90 days and begins to flow:

1. For products, since the date of receiving them by the consumer;
2. For services, since the date of concluding the agreement.

If throughout the period of the 90 days the information stipulated at article 4 is provided for the consumer, the 10 working days term for the unilateral agreement denunciation begins to flow from that moment on.

Article 10 of the Ordinance stipulates also cases in which the consumer cannot unilaterally denounce certain agreements except the case in which the parties agreed upon otherwise. These agreement types are the following:

1. The service providing agreements whose execution had begun, with the agreement of the consumer, before the expiry of the 10 working days term stipulated at article 7 paragraph (1);
2. Agreements of product or service providing whose price depends on the fluctuations of the financial market that cannot be controlled by the dealer;
3. Agreements of some product providing that are executed according to the specifications of the consumer or some products that are distinctly personalized, as well as those that, by their nature, cannot be returned or can degrade or deteriorate rapidly;
4. Agreements of providing audio, video or computer science program tapes, in the case in which they were unsealed by the consumer;
5. Agreements of providing newspapers, periodicals, magazine-journals;
6. Agreements of booking or lottery services.

The legal nature of the right to unilaterally denounce the selling is an issue that in the Romanian law was not yet debated, but in the view of the theories invoked in the French doctrine, we can conclude that according to the theory of potestative rights, the buyer is the master of the legal situation derived from agreement, which he can maintain or eliminate by

the unilateral right of exerting the denunciation right. In these conditions, the buyer has the right to opt, whereas the seller must obey unconditionally to the option of the buyer¹⁹.

The execution of distance agreements. According to article 11 of the Decree no. 130/2000, the dealer must fulfill the agreement obligations within at most 30 days since the date in which the consumer transmitted the order, except the case in which the parties agreed upon otherwise. The dealer, in the case in which he cannot execute the agreement due to the fact that the product or service is unavailable, must inform the consumer about this unavailability, and the amounts that he paid as payment must be reimbursed by the dealer in a maximum 30 day term.

The dealer can deliver to the consumer a quality product or a service and at a price that is equivalent to the requested ones only if this issue was provided before the conclusion of the agreement and/or in the agreement, so that the consumer would be informed in a clear manner about this possibility. Contrary, the providing of some products or services similar to the requested ones will be assimilated with the delivery without order, such as article 14 stipulates it. The product return expenses, in the situation of exerting the right of unilateral denunciation of the agreement, fall in this case in the duty of the dealer, element on which the consumer must be informed.

The delivery of the products or the service performance without a previous order coming from the consumer, if this delivery implies the request of performing a payment. In the case of the deliveries for which there does not exist a previous order, the consumer is exonerated by or a counter performance, the lack of response not having the value of a consent²⁰.

¹⁹ D. Chirică, *Tratat de drept civil. Contracte speciale*, vol. 1, *Vânzarea și schimbul*, Edit. CH Beck, București, 2008, pp. 297-298. (*Treaty of Civil Right. Special Agreements*, volume I, *The Selling and the Exchange*, CH Beck Publishing House, Bucharest, 2008, pp. 297-298).

²⁰ M. Niculeasa, *Regimul juridic al contractelor încheiate la distanță*, in „Revista română de drept al afacerilor”, no. 3/2006, p. 37. (*The Legal Regime of Distance Concluded Agreements*, in „Revista română de drept al afacerilor”, no. 3/2006, page 37).

