THE RIGHT OF WITHDRAWAL FOR CONSUMPTION CONTRACTS

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Abstract
The romanian legislature in its attempt to align the national legislation with European law requirements stated by a series of acts the right of termination in some consumer contracts.
The rule is not a general application one of this category of contracts but concerns only the conventions more dangerous or more disadvantageous to the consumer through the procedure for their termination or by the effects of engaging them.
These consumerism rules relating to prior mandatory period of reflection and denial free and legal right applicable to training of certain consumer contracts aimed at trying to protect the consumer before the transaction contract.
By the regulation, there is either delaying the final formation of the contract or subsequent withdrawal, in a certain period of time stipulated by the law of consent expressed, leading to derogate from the traditional way of reaching at the volitional agreement .

Keywords: *the right of termination, consumer contracts, volitional agreement, the offer to contract, the moment of signing the contract*

1. Classical Form of a Volitional Agreement

1.1. Preliminaries

The volitional agreement notion expresses one of the meanings[1] of the consent[2] that is the will agreement, a result of the understanding between two or several persons in order to produce juridical effects.

In this case, it is about "consensus" as a structural element of the conventions.

According to art. 942 Romanian Civil code, the contract represents "the will agreement of two or several persons in order to constitute or turn of a juridical report between them"[3].

As such, the contract execution supposes the accomplishment of the will agreement of the parties on the contractual clauses, by meeting on a full concordance, under all aspects, the offer to contract its meaning.

The contract offer and its acceptance represent the two sides of the will to contract, sides that initially appear separate, but that, by their meeting, may be reunited in what we call a will agreement.

The mechanism of reuniting the offer and the meaning represents the mechanism of the contract execution itself. It is usually complex and that is why it is preceded by negotiations.

1.2. The Offer to Contract

The parleys related to the contract signing start with a suggestion to contract made by a person. This suggestion is called offer or unfinished offer and represents the first will expression for forming the volitional agreement.

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[1] The other acceptation assigns the will manifestation to be force.

[2] Etymologically, the term of consent comes from the Latin expression „cum sentire", meaning "to feel" or "you together". See, Gh. Iliescu, Civil Law. General Part, Sibiu, 1977, p. 173, M. Bojincă, Romanian Civil Law. General Theory, („Academica Brâncuşi" Press, Târgu Jiu, 2008), p. 186.

[3] In the acceptation of art. 1166 of Law no. 287/2009 (Assumed Civil Code) "The contract is a will agreement between two or several persons wanting to constitute, change, transmit or turn off a juridical report".

The offer to contract is often preceded by commercials, publicity, discussions, negotiations, and it is finally materialized in an offer juridically valid.

The offer may be made in writting, verbally or even tacitly.

For the offer validity, mainly, it is not required any special condition of form.

The offer to contract can be addressed either to a determined person, but also to some undetermined persons – addressed to the large public. Also, the offer can be made with or without a term.

The offer, being a side of the consent, must fulfil its general conditions. Thus, it should be:

-a real, serious, conscious, non-vitiated will expression having the purpose to juridically conclude a contract;

- firm, meaning that the tenderer has no possibility to change or retract it;

- unequivocal – specific, exact and punctual;

- complete, namely it should contain all the essential elements of the contract.

The problem of the mandatory force of the offer regards the moments before its acceptation. After being accepted, we deal with a formed contract, regarding which we may apply the rules regarding the mandatory force of the contract.

In literature, there were the following two problems:

- if the offer is launched, before being accepted, it gives birth to an obligation in the tenderer's target;

- if it creates obligations in his target, what the nature is and how long this obligation lasts.

Whereas in the current Civil Code there is no express regulation that could elude these things, and the only text referring to this matter– art. 37 of Commercial Code[4] – leaves us to understand that, until signing the contract, the offer may be unilaterally revoked by the one who did it, the judicial practice and the special literature accept that, in discussing the mandatory effect of the offer it is necessary to consider two situations whether the offer arrived or not to its addressee[5].

If the offer did not get to the addressee, the tenderer may revoke it freely and with no consequences. But it is necessary for the revocation to get to the addressee at the same time with the offer, the latest.

If the offer got to the addressee, we must distinguish it whether it has or has no term.

If it has a term, the tenderer has to keep it until the term expires. As soon as the term expires, the offer becomes weak.

If the offer has no term, it is admitted that the tenderer is forced to keep it for a reasonable time appreciated depending on the factual circumstances, in order to allow its addressee to deliberate and to pronounce on it.

1.3. Accepting the Offer

Accepting the offer constitutes, similar to the unfinished offer a unilateral voluntary document by means of which its addressee accesses the contracting suggestion.

Symmetrically to the offer features, an acceptation is valid if:

- it is the expression of a juridical will consciously elaborated and freely declared;

- it corresponds to the unfinished offer, namely it constitutes a response to all the offer requirements and data;

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[4] Art. 37 Commercial Code stipulates that "Until the contract is perfect, suggestion and acceptation are revocable. However, even if the revocation stops the contract from being perfect, if it gets to the knowledge of the other party, after it had proceeded to its execution, then the one revoking the contract is responsible for damages – interests".

[5] L. Pop, *Civil Law. General Theory of Obligations. Treaty, (*"Chemarea" Foundation Press. Iaşi,) 1994, p. 47-48; C. Stătescu, C. Bârsan, *Civil Law. General Theory of Obligations*, (All Press, Bucharest, 1993), p. 44-45; T. R. Popescu, P. Anca, General Theory of Obligations, Scientific Press, Bucharest, 1968, p. 72-73; R. *Sanilevici, Civil Law. General Theory of Obligations,* (laşi University, 1976), p 40-41.

- it is unequivocal, namely it expresses, no doubt, the contracting will of the unfinished offer addressee;

- it is opportune, and it should interfere when the offer is current or efficient.

The material modalities used by the acceptant in order to show his accession may be very different whereas, just like the unfinished offer, the acceptation is expressed in written or verbally, by gesture or by attitude, or by the simple execution of the offer content.

1.4. The moment of signing the contract

1. 4. 1. The importance of the moment of signing the contract

Whereas most of the contracts are consensual, the moment of signing the contract coincides to the one of accomplishing the will agreement. The exception is represented by the solemn contracts that are signed when accomplishing the formalities stipulated by the law for their validity. The determination of the moment of signing the contract presents a practical importance whereas, in report to this moment, it is appreciated:

- the parties' ability to contract;
- the civil law applicable for law conflict in time;
- the date when there start certain legal and conventional terms, such as: the extinctive prescription term and the suspensive or extinctive term of executing the contract;
- the date of the transfer of the property right or of other real rights and of the risk of the fortuity disappearance of the good from the one estranging to the acquirer in the translative contracts, having as an object certain goods;
- nullity causes or causes of annulling the contract;
- the place of the contract signing.

In order to determine the moment of the contract signing, it is necessary to distinguish, in the first place, if the contracting parties are present, or they are not in the same place, a situation when the convention is contracted by correspondence. In the last case, we should distinguish between mutual obligation contracts and unilateral contracts.

1.4.2. Determining the moment of the contract signing between present persons

If a contract is signed between the present parties, it is formed since the moment of the agreement accomplishment, for the consensual contracts or of the accomplishment of the other formalities or material requirements for the solemn or real ones.

Both of the parties being present, the moment of the contract signing will be concomitantly known by each of them, the problem of specifying the constituting time has no special interest for the juridical technique. The moment coincides to the one of declaring the integral acceptation of the offer, with no reserves. The acceptation declaration should interfere immediately so that the tenderer knows it even from the moment it is expressed by the other party. As a consequence, in that moment the contract is signed. To these, we assimilate the contracts signed by phone from the viewpoint of determining the moment of their signing.

1. 1.4.3. Determining the moment of the contract signing between absents

1.4.3.1.Determining the moment of signing the mutual obligation contracts[6]

For contract signing between absents or by mail (post office, courier, telegraph, telex, internet etc.), whereas the offer transmitting and the answer reception suppose a lapse of time that is often difficult to establish, it is necessary to specify the moment when the convention is accomplished if the addressee accepts the offer.

[6] Juridical term of signing these contracts is constituted by the stipulations of art. 35 and the following ones of Commercial Code, by means of which the mutual obligation contract is regulated between distanced persons.

For determining this moment, there were suggested several systems, namely:

a) ***The emission system or the system of the will declaration***. It considers that the contract is signed when the offer addressee expresses the will to access the suggestion made and to contract the convention. It is a juridical wording that emphasizes the consensualism principle. It considers the contract as being signed since the moment of the acceptation emission whereas, no matter how it gets to the tenderer's knowledge, the acceptation produces juridical effects like a unilateral juridical document. The emission system has the advantage of not being able to specify with no doubt for both of the parties the moment when the acceptation is produced and also the one of allowing the acceptant to come back to the accession before it is known by the demander.

b) ***The dispatching system***, establishes that the contract signing is produced the moment when the acceptant entrusts his affirmative answer in order to be sent to the tenderer, to the postal services or to other means of transmitting the mail: It is a system having efficiencies under the aspect of the security conditions offered by the tenderer's rights as it does not allow him to be immediately aware by the acceptant's consent. In the lapse of time between sending the acceptance and its reception by the demander, the acceptant being allowed to come back on his voluntary manifestation and to create difficulties to the other party, by means of it.

c) ***The system of reception acceptation*** by the demander whose basic idea is concretized in the increased certainty provided to the juridical operation by the tender of the one who accepts. Elaborated depending on two of the hypotheses that may interfere in reality - the simple mail reception by the addressee without opening the letter and its reception followed by its opening and finding its content, this formula is presented as „***the reception***" or the simple reception of its acceptation and the one of „***information***".

c_1) According to the ***first option*** of the reception or of the simple reception of the acceptation, the acceptation is considered as being known by the tenderer since the mail containing the access to the unfinished offer gets to its residence (the reception system) without being necessary for the tenderer to be informed on the content of the received letter. The offered solution, settling the moment of the contract signing when the mail is received, even it is more specific and, by that, more prudent by the others, still keeps an uncertainty coefficient whereas it does not allow the addressee to be fully elucidated on the mail content.

c_2) ***The second option*** – the informing system– considers that the agreement was contracted and the convention was formed only when the tenderer received the mail from the acceptant addressee, opens it and it is informed on its content. This time, there were also spotlighted deficiencies regarding the acceptant's position. He is left in the terms of the informing system at the arbitrary of the tenderer that may tergiversate or stop the contract signing by an intentional delay or a deliberate refusal to acknowledge the content of the received mail.

The relativity of the practical results of these systems of establishing the moment of the contract signing determined the doctrine to grant them the value of certain presumptive data having a limited proving efficiency of accomplishing certain contrary evidence. Practically, it is useful to consider, in choosing the system, the stipulations of the special laws or the contractual stipulations of the parties. In their absence, it is necessary to settle the moment of the contract signing, the one corresponding, depending on the cause circumstances, real will of the parties.

The contract is usually considered as being signed at the tenderer. However, according to the stipulations of art. 37 Commercial Code it is possible for a contract to be also signed at the acceptant if the tenderer considers the convention as being contracted by the simple execution of its object by its addressee.

1.4.3.2. ***Determining the moment of signing unilateral contracts***

The moment of signing unilateral contracts is mainly determined according to the acceptation starting from the stipulations of art. 38 Commercial Code stipulating that: "the suggestion is mandatory as soon as it gets to the knowledge of the party for which it is made". The law relatively

presumes that the acceptance interfered when the offer is received. This presumption may be removed by contrary evidence.

The system of the acceptation emission is applied only as a principle, since there are no special derogatory legal stipulations. For example, for the donation contract, by an exception norm, it was consecrated the informing system or the acknowledging one with a correction, namely it had place when the donor accepted the reception.

In this sense, art. 814, paragraph 2 Civil Code stipulates that, when the donation acceptance is made by subsequent authentic writing, it is necessary for the acceptance document to be communicated to the donor during his life.

2. Juridical mechanisms of accomplishing the volitional agreement in some consumption contracts

2.1. Preliminaries

The Romanian legislation, by transposing the stipulations of certain Directives and European Regulations[7] in the field of consumption contracts, integrated, regarding the contract signing of the mechanism of the mandatory prior reflection term and the one of the legal and free right of unilateral denunciation of the contract in order to protect the consumers by juridical means.

2.2. The mechanism of the mandatory term of prior reflection

In the Romanian right of consumption, Law no. 289 from June, 24th 2004 regarding the juridical system of the credit contract for consumption meant to the natural persons stipulate in annex 1 called "Mandatory minimal causes of credit contracts, depending on the object of each of them, at point 1 Credit contracts having as an object the financing of the goods and services supply, letter g)" indicating the eventual term of reflection (indicating a grace term in order to analyse the credit opportunity).

The Romanian legislator, even if he stipulates the necessity to indicate this term, does not establish the legal time of such a reflection term and it does not show the sanction applicable to the professional who would ignore this protectionist proceeding.

3. Mechanism of the unilateral denunciation of certain consumption contracts

3.1. Notion

The unilateral denunciation right represents the proceeding (mechanism) offering to the consumer the possibility to come back, after signing the contract, in an usually quite short time placed in the proximity of its acceptance.

3.2. The application field

This mechanism of accomplishing the volitional agreement – consisting in the retraction right that is constituted in a legal denial right that can be manifested in a certain lapse of time established by the law refers to:

[7] See, for example, the Directive of the European Parliament and of the Council no. 97/7/CE from May, 20th 1997 regarding the consumers' practice for the distance contracts, Directive 1999/44 from May, 25th 1999 regarding certain aspects of the sale and of the connected guarantees, CE Regulations no. 593/2008 regarding the law applicable to the contractual obligations (also called Roma I Regulations). This regulation was adopted by the European Parliament on June, 17th 2008 and became valid on December, 17th 2009 in all the member states of the European Union (except for the United Kingdom of Great Britain and of the Kingdom of Denmark). The regulation replaces the Rome Convention regarding the law applicable to the contractual obligations.

- distance contracts[8]. According to art. 7 of G.O. 130/2000 regarding the consumers' protection when signing and executing distance contracts, the consumers have the right to unilaterally denounce the contract in a 10-working day term, with no penalties and without invoking a reason";

- contracts outside the commercial spaces. According to art. 9 of the Government Ordinance 106/1999 regarding the contracts signed outside the commercial spaces, the consumers are allowed to unilaterally denounce the respective contracts "in a 7 working days term that start flowing: a) since the contract is signed, if this date is concomitant to the date of the product deliverance; b) since the contract of service performance is signed; c) since the consumer receives the product, if the deliverance was accomplished after signing the contract";

- *time sharing* contracts. According to art. 6, paragraph 1 letter a) of Law no. 282/2004 prevents the acquirers' protection regarding certain aspects of the contracts referring to the gaining of a using right on a limited term of some real estates, the acquirer has, complementarily to the common law options related to the contract nullity or annullable feature, the right "to unilaterally denounce the contract, without needing the invocation of a reason, in a 10 calendar days term since it has been signed by both of the contracting parties or since the parties have signed a pre-contract, depending on the case".

3.3. Reasons of the legislator regarding the regulation of the unilateral denunciation right of these contracts

Naturally, for each of the three categories of contracts, the legislator referred to the consumers' protection, but the reasons this protection is based on are different.

Thus, in case of distance contracts, the legal retraction right of the consent resides in the fact that the consumer contracts, based on some simple images or descriptions of the product or of the services, and this is the risk of receiving a good that would not correspond to his expectations comes from.

Actually, the consumer is able to appreciate the opportunity of contracting and the correspondence of the good features to his needs only after receiving the product.

The reason of unilateral denunciation right of the distant contract is different from the one applicable to the contracts signed outside the commercial spaces. Thus, unlike the residence offer, when the buyer is deprived, in the first place, of the possibility to compare and, in the second place, of the possibility to reflect enough on the contracting opportunity, in case of the distance selling contracts, the consumer has a sufficient lapse of time for thinking, but he has no possibility to accomplish a sensorial direct contact with the respective product. As such, it is possible for him to be disappointed regarding the product qualities when he has contact with it.

In case of the *time-sharing* real estate contract, the reason of the consumer's legal right of consent retraction comes from the dangers the consumer is liable to, reported to his contractual situation that comes from a location contract[9].

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[8] The distance contract, defined by art. 2, paragraph 1 letter a) of the Government Ordinance no. 130/2000 regarding the juridical system of the distance contracts that transposes in the intern legislation the requirements formulated in the Directive 97/7/CEE from May, 20th 1997 regarding the consumers' protection in matter of distanced contracts, represents "the contract of supplying products or services contracted between a merchandiser and a consumer, in frame of a selling system organized by the merchandiser who exclusively uses, before and when signing this contract, one or several techniques of distance communication".

[9] For the time-sharing contract, the consumer has a series of inconveniences such as:

-accomplishing a contract in order to temporarily use a real estate that is still unconstructed or being constructed but for which he is forced to pay in advance the integral price of the future using periods;

-the lack of finishing the real estate or the recovery of the advanced sums;

-the big time of contracting, the law stipulating the minimum time of 3 years, but it does not limit the maxim lapse of time.

4. Conclusions

The special literature[10] has tried to explain the juridical nature of these contracts and has advanced a series of theories. As far as we are concerned, we acquiesce to the opinion according to which the unilateral right of denunciation of these contracts registers in the specific mechanism of accomplishing the volitional agreement in a progressive way. This supposes that the valid forming of these contracts is not accomplished anymore when the offer meets the acceptation.

The initial meeting of the consumer's content with the professional's one does not lead to the fully forming of the volitional agreement, but only for a short time, whereas the legislator – starting from the professional inequality in matter of the two co-contracting parties – offers to the consumer a term of 7/10 days of growing and gradually reinforcing the consent – in a direct contact with the good. Only when the respective term is achieved, the consent is considered as fully formed and definitely expressed.

As such, in these contracts, the consumer's initial juridical will is not enough in order to improve the respective contract, but it needs a subsequent confirming will expressed in the 7/10 days term since the initial moment. This confirming will is accomplished by non-exerting in this lapse of time the legal denial right. On the contrary, if the consumer uses the retracting right, the initial juridical will is denied and the parties are put in the situation before the initial meeting of the contracting offer with its acceptation.

As such, the consumer's original consent is insufficient for the full accomplishment of the volitional agreement.

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[10] For their development, see: J. Goicovici, Potestative Right of Retracting the Consent in Matter of the Consumption Contracts, (in Romanian Pandects, no. 1/2009), p. 45-70.