

ON THE FORMATION OF CONSENT IN THE CASE OF CONTRACTS CONCLUDED ON-LINE

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Abstract: *The trading offer on the Internet, which may be destined to other traders or to private persons, presents a lot of distinct features. Electronically catalogues, diffused on Internet, may be seen as such techniques in distance communication. When the trader wishes to sell his products through Internet, he has to issue an offer, which he releases on-line and which, therefore, could be accessed by whoever might be connected. The second element of the contract's conclusion is the unequivocal accept of the offer, because any modification brought to the offer constitutes itself as a counter-offer.*

Key words: *trading on Internet, electronically features, tele-communication.*

1. On the offer to contract on-line

The trading offer on the Internet, which may be destined to other traders or to private persons, presents a lot of distinct features. Firstly, it is an offer which transits through an international tele-communications' resource. There are differences from the traditional contracts, which are concluded between persons who are all present at the moment of exchanging consents. The on-line contract is kindred to the contracts negotiated from a distance.

a) The contract at a distance and the offer through Internet. According to art. 2 of the Government's Ordinance nr. 130/2000, by contract at a distance should be understood the supply contract, for products or services, concluded between, a trader and a consumer, into the frame of a sale-purchase system organized by the trader, which makes use of, exclusively, before and at the exact moment of conclusion of the respective contract, one or many techniques in distance communication. These are defined as whatever means that could be used as tools for the conclusion of a contract between the trader and the consumer, which do not require the physical presence of both sides simultaneously.

Electronically catalogues, diffused on Internet, may be seen as such techniques in distance communication. When the trader wishes to sell his products through Internet, he has to issue an offer, which he releases on-line and which, therefore, could be accessed by whoever might be connected. In this case the offer made at a distance does exist, while the possible sides of the contract do not meet. Yet trading offer released on-line presents some features of its own, related to interactivity. These features that we find into interactive telematics are, indeed, distinct from the classical sales by mail, which use the path of the paper support to spread their offer. Therefore, if on-line the simultaneous physical presence of the contractors does not exist, according to the definition itself given to the distanced sale, the net allows, though, a virtual presence, due to interactivity as a phenomenon. On-line, the offer and its acceptance are able to meet, almost simultaneously.

b) The on-line offer and the offer through T.V. broadcasts. The T.V. broadcasted advertising releases are, totally or partially, vowed to present and promote goods or services offered straight for sale. The T. V. broadcasted offer allowing the viewers to consume when watching T.V., may be considered a form of contract negotiated at a distance. The trading offer spread on-line may be seen as kindred to the T.V. broadcasted one, as both are public communications. Still, on the opposite of the multimedia offer which is interactive, the acquisition through T.V. broadcasts does not allow the purchaser to make use of the same mean of communication for issuing his own order. The viewer and purchaser who wishes to obtain a product advertised by the T.V. broadcast will not be able to directly transmit his consent through T.V. devices, and will be obliged to make use of other means of communication.

c) Features of the on-line offer. In the electronically medium, the purchaser has various means at his disposal. So, he may choose among the public means of communication (web, chat forums) and the private ones (e-mail, other channels, etc.). The on-line offer presents the distinctive asset of providing unlimited access to all its purchasers. It is alike a public communication. Indeed, unless the cases when such an offer would be addressed by e-mail to a determined (known) person, and when it would be encrypted for the purpose of confidentiality, such an offer has the vocation of reaching an immense public. It constitutes an example of offer addressed either to all of us or to undetermined (unknown) persons. It is, though, difficult to shape a frontier between the publicity and the privacy of the offers existing on-line, because an offer, launched by e-mail towards a large number of people, might as well be considered as a public one.

Finally, the trader-consumer interactivity, allowed by the net, is an essential asset of on-line trading. In order to juridical constitute an offer, the message displayed by a web-page or sent by e-mail ought to contain all the elements required for the conclusion of the contract. The offer should be able to contribute to the contract's formation, and, for that, it would have to be: *firm, precise and certain*.

A problem raised by the offer coming on-line is the one of the *validity' duration* for the respective offer. Generally, the validity's duration is limited in time; yet, to be correctly evaluated, the initial moment of the offer should be known. But the issue date of an offer is pretty seldom précised on-line and its deadline as well. In this case, we might ask: which date counts indeed? Is it the moment when the offer was launched on-line, or either the moment when the on-line user found out about it? Generally, the launching date of the offer is considered as its debuting moment. But this solution is not justified, in the eyes of the consumer, who received no further information about the respective offer and who has no certitude about the offer's validity, reality and duration in time. This is why the trader ought to clearly indicate the offer's launching date and its valid duration on-line¹.

This latter might be précised under the formulations that follow:

- "offer valid till the date of ...";
- "offer valid till stock exhaustion";
- "offer valid from ... on".

Two cumulative requirements determine, practically, the offer's existence: it has to be inserted upon a server and it has to be accessible to the public. The definitive disappearance of the site containing the offer leads to its nullity, unlike its temporary disappearance, due to a technical malfunction, which causes only the suspension of the offer's existence.

The essential features of the offered goods and services ought to be clearly specified:

- their designation and assets (name, dimensions, quality, colour, peculiarities, composition, etc.);
- the offered services (object, contents, etc);
- the geographically covered zone of the offer;
- the geographically covered zone of the delivery;
- the availability of goods and services;
- modalities of use and advices about them;
- methods of delivery (a good's delivery through mail couriers or through a transportation mean, the delivery of an on-line sought good or service in real time or not);
- post-sale warranties and service;
- duration of the contract, when it concerns the delivery of a good or a service, either periodically or for a long time.

Illustrating photos which sustain the information provided by the texts are not inserted to the contract's field. If errors happen to be inserted, they could not engage the trader's liability.

There are opinions stating that, in the case of such offers, like for the T.V. - broadcasted ones, the risk exists of quality distortion, in regard to the offered goods and services. The main justification of

¹ E. Barbry, op. cit., <http://www.club-internet.fr/cyberlexnet>.

this risk is precisely the use made of new technologies, which might, through appropriate adjustments, offer a denaturalised image of the proposed item².

Thus, the quality and quantity features ought to be described precisely and unequivocally. Even if the on-line description might often be accompanied by photos, alike a paper-supported catalogue, the differences should be underlined between the photographic description of the product and its reality. The particular conditions of the sale, that are displayed on screen, do precise the aggregate of these elements: they should be studied by the consumer previously, with all the attention that would be needed. Since the norms existing in various countries could impose prohibitions or restrictions upon the products sold at a distance³, it is to be preferred the clear precision about the geographical zones covered by the offer, as well as the delivery zones. The offer ought to contain precise information's about *the price*. They should concern as well the price of the offered good or service it, as all the other amounts of taxes which would have to be paid by the consumer. The cyber-client ought to be aware of the possible limitations of liability, the modalities of payment and delivery, the period for delivery, etc. Last but not least, the offer should contain *the identification data of its author*: name, unique identification number, address of the social siege or address of the offer's contact person, the e-mail, and the phone and fax numbers.

When a document is read on-line, the human capacity of awareness and memorizing is much smaller than for a paper-supported document. Thus, errors might appear a lot easier in the interpretation of on-line documents. Therefore, the cyber-consumer will be able, much easier, to prove that, when he clicked upon the mouse, he was not aware that he was closing a deal. For a consumer who had signed a paper-supported contract, this would not be possible. To avoid such a situation, on-line the offer ought to be much more concise and brief than for the contracts actually used.

The lecture of on-line offers should also be facilitated through a judiciously spaced presentation, the use of current words and the use bolds to underline what is really important in the offer. Further, the concerned business people should be more careful about formalities, when they conclude contracts with cyber-consumers, indicating explicitly to the possible buyers the fact that they are on the edge of ratifying a contract. They might ask for more than a simple click for the offers accept. For example, the purchaser should be asked to inscribe his name into a text-case or a dialogue-case. This action might indicate to purchasers that their own action could produce juridical consequences. The person who distributes on-line a product or a work ought to be able to demonstrate that the stipulations proposed by her contract have been pointed out clearly enough, so that the user could become aware of them the easiest way possible. Otherwise, the conclusion might be drawn that the respective external clauses or annexes through reference are not valid. The same way, references made to stipulations of common law are not valid, as long as they are not explicitly reproduced into the online contract.

2. On the accept given online

The second element of the contract's conclusion is the unequivocal accept of the offer, because any modification brought to the offer constitutes itself as a counter-offer.

Online, where the sides are acquainted only through this electronically medium, the given accept may be found under the following forms:

- most often, as a simple fact of clicking on the mouse, over a button which indicates the accept;
- through a pattern-type form, that has to be filled in and transmitted;
- by e-mail.

The contracts concluded on-line through web pages are adhesion contracts, because the stipulated conditions are, generally, compulsory. Unlike them, the contracts concluded through e-mail are, generally, negotiated contracts.

² B. Bizeul, *Le télé-achat et le droit des contrats*, Ed. CNRS Droit, Paris, 1998, p. 97.

³ For example, in France, the goods and services sale at distance is forbidden for the cases of: pharmaceutical products, weapons, objects serving to purposes violating public morality, or objects through which human dignity could be prejudiced, immobile estates, for which, insofar, a duly elaborated act is required from a notary's office. The sale at a distance is also restricted for: medical interventions, tobacco products, alcoholic products, alimentary products.

a) The accept given by clicking over a button. In this case the principle is relatively simple: once the offer has been issued upon a site, the procedure of a purchase at a distance is as well proposed. Consequently, there is a button that, if clicked, does confirm the purchase wish. Sometimes, the opposite button exists as well, which, rejecting the offer, allows by its presence to co-contractor, to really choose, to purely and simply express his own will. If this latter would wish to modify the contract's terms or would have some reserves towards the contract, he should send, by e-mail, a counter offer. Anyway, it is highly improbable that such an offer should be taken in consideration, in a commercial site, where there are millions of clients. In fact, such on-line contracts are seen more like adhesion contracts.

The problem rises: should the simple click from the mouse on an accept button from a web page be enough to express the user (acceptant's) intention, once surfing on-line, to agree upon the essential terms of the contract submitted to his attention? Since the accept is not given verbatim, neither written, the operated click could hardly be taken for an expressed accept.

Still, the made movement is the click on the accept button, having as result the transmission, towards the trader; and an active behaviour, or an unequivocal gesture, might be considered an expressed attitude of the acceptant's will⁴.

On the other, hand for the valid conclusion of a contract, the user (acceptant) should be indeed aware of the fact that his gesture means the effective agreement upon the proposed adhesion contract's stipulations. This is why the offer should contain all the contract's particular data. A supplementary accept could be also imposed, in the sense that, at the click over the accept button, the screen would display a new case, allowing to confirm the given order. This new window might contain explicit information, indicating to the user the results of his gesture and proposing a new confirming request (for example: "You have ordered the item X, please confirm your order!").

Other sites do oblige the user to stroll over the whole page containing the offer, in order to reach for the accept button that is placed in its underground. This precaution might reduce the purely formal aspect of the given agreement, even through the relevant index of the screen's rolling speed.

b) The accept given through a filled-in form. There are situations when the web page offers a standard form in view of accepting, to be filled-in. Problems might raise in this case too, if the transmission modality of the respective form should not be explicitly indicated. It happens because the form might be sent straight through a connection sited on that very page (for instance, through a forwarding button) or either by e-mail or by ordinary mail. Thus, for the trader, it is advisable to expressed indicate the modality and the mean of communication which should be used by the acceptant. Taking into account the linguistic differences, if consent should be given through a foreign language, the problem of its validity might rise, Internet seldom makes use of the written agreement, but this is the only way to be certain, for the trader as well as for the consumer.

To impose the concept of implicit consent on-line would have no juridical validity for the relationship seller-client, since the mention according to which, if no answer should be communicated, the offer would be seen as accepted bears no juridical effects at all.

3. The moment of the conclusion for the on-line contract

In the case of on-line contracts, the conclusion procedure is similar to the one used for the contracts closed by telephone. The two sides are considered to be present. Consequently the wills' agreement is expressed simultaneously. In this case, the same rules as for the contracts' conclusion between present sides should be applied.

For off-line contracts, the sides are not simultaneously present at the contract's conclusion. In this case, one of the two theories about the moment of concluding contracts might be chosen. If the emission system is elected, the intervention's moment and place ought to be precisely determined. So, the respective moment is the one when the forwarder of the message clicks on the accept button or on the one for sending messages. So the message is launched on-line.

⁴ It is the case of a person who steps into a bus or a taxi cab: this gesture is considered to signify the expressed accept of the transportation contract.

The problem might rise from the fact that the hour indicated into the message might be falsified (for instance, by changing the hour at the used computer). The real hour's item, as a matter of probation, might be found out through the comparison with the hour when the message has transited the server of the access' supplier. But this could happen only when forwarder and recipient are linked through a supplier, and if this latter would be a third side.

If the recipient's system is elected, the problem rising is the one of the real receipt's time. There is the opinion⁵ according to which the statement of willing on-line is receipted when it arrives into the mailbox and could be accessible. For professional activities, this means during the normal duty's time. For a non-stop activity, it means at any moment. For private activities, this means the next day, because the permanent mailbox's control during the day is not compulsory.

Independently from these considerations, the principle suiting which the will statement has been accessed at the very moment when the recipient has effectively read the information remains valid, even if this might have happened in a prior moment (for example, if someone should read the information before the start of the normal duty program).

The Law nr. 365/2002 on trading online⁶ has ruled on the possibility to conclude, *inter absentes*, a contract through electronically means, considered to be: "electronic equipments and networks made of cable, optical fibres, radio, satellites and kindred, used to process, to stock or to transmit information" (art. 1 item 2). The law does regulate, however, on a larger field, because it concerns electronically trading, but, in the present paper, we are concerned only by the aspects related to the enforcement of contracts concluded through electronically means.

These are a form of the contract concluded at a distance⁷, which receives a regulation apart, due to the specific features of the electronically medium. This contract produces the juridical effects of whatever contract duly concluded. The sides' previous consent about the use made of electronically means is not necessary for its validity (art. 7 par. (2)). The proof of concluding such a contract is submitted to common law on the matter of probation and, as well, to the stipulations of the Law nr. 455/2001 on the signature on-line (art. 7 par. (3))⁸.

The legislator has granted, in this matter too, a particular interest to the consent's protection in regard to recipients of on-line offers, through ensuring them a correct and complete information. So, the services' supplier⁹ is obliged to place, at the recipient's disposal, before this latter should send the contracting offer or the accept of the firm contracting offer made by the services' supplier, a set of information that should be expressed clearly, unequivocally and into an accessible language (art. 8 par. (1)), concerning:

- the technical phases that should be followed in order to conclude the contract;
- if, after its conclusion, the contract is or not destined to be saved somewhere by the services' supplier, and would it or not be accessible?;
- the technical means provided in order to identify the possible errors which occurred when inserting data and to remedy them;
- the language into which the contract might be concluded;
- the relevant behaviour codes to which the services' supplier has adhered and information about how these codes could be accessed electronically.

The services' supplier is obliged to offer to the recipient the possibility of using an adequate, efficient and accessible technical procedure, that could allow him to identify and remove the errors

⁵ R. Arnold, *Droit d'Internet: un nouveau Droit entre le Droit communautaire et le Droit national*, <http://droit-internet-2000.univ-paris1.fr/dossier4/Rainer-Arnold.doc>.

⁶ Republished in the Off. Monit. nr. 959, of November, 29-th, 2006.

⁷ The Law nr. 365/2002, by its art. 31, abrogated the art. 6 letter f) of the Ordinance nr. 130/2000 on the juridical regime of the contracts at a distance. According to this article: "The stipulations of the present Ordinance are not to be applied (...) letter f), in the case of electronical trading". These stipulations were considered to be contrary to the mentioned Law.

⁸ Published in the Off. Monit. nr. 429, of July 31-st, 2001. See, especially, the Chapter II: "Juridical regime of written documents under electronical form", namely arts. 5-11 of this Law.

⁹ The person that would place at the disposal of a number (determined or not) of persons a service provided into the information' society.

that happened while inserting data, prior to the offers' forwarding or to the given accept for it (art. 8 par. (2)).

The clauses and general conditions of the proposed contract should be placed at the recipient's disposal, in a way that could enable him to save them in order to reproduce them (art. 8 par. 4)).

The law states that the contract concluded by electronically means should be considered as effectively concluded at the moment when the accept given to the contract offer *has reached to the conscience of the proposer*)art. 9 par. (1). Let us notice that these legal stipulations are resembling to the ones of art. 35 Trading Code. At least at first glance, we might thus say that *the information theory* has been adopted. In the situation when, due to its nature or to the beneficiary's request, the contract should impose an immediate execution of its specific object (delivered service), it would be considered as concluded at the moment when the debtor has initiated its execution, except for the case when the supplier has previously asked for the accepts confirming (art. 9 par. (2)).

For the service' supplier, the law institutes the obligation to confirm the offer's receipt or, suiting the case, its accept, when the recipient does send, electronically, the contract offer or the firm accept given to the contract offer made by the service' supplier, in one of the following ways:

- by sending a receipt acknowledgement, online or through another equivalent mean of individual communication, at the address indicated by the recipient, in a 24 hours' delay from reception of the offer or of given accept. Let us remark the very short term into which the answer is due to come;
- the receipt' acknowledgement, or the one for the given accept, sent through a way that is equivalent to the one used for their reception, at the very moment when the service' supplier has been aware of the respective offer or accept, but this under the condition that the recipient could be able to save and reproduce this acknowledgement.

The offer, the accept and their receipt' acknowledgement, so performed, are considered as receipted when the sides to whom they are addressed could be able to access them (art. 9 par. (4)). By these stipulations *the reception's theory* becomes involved, since a legal presumption is instituted, which is quasi-twin to the one stated by it.

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