TZVETKOVA & PARTNERS
LAW FIRM

E-CONTRACT. DISTANCE CONTRACT

I. A CONTRACT BETWEEN ABSENT PARTIES. ELECTRONIC DOCUMENT - NATURE OF THE DOCUMENT, CONCLUSION AND BINDING POWER, CONSEQUENCES, SIGNATURE.

II. DISTANCE CONTRACT. OFF-PREMISES CONTRACT.

Part I - Civil and commercial contracts

1. Civil aspects of the contract between absent parties (concluded between individuals and not constituting an absolute commercial transaction)

The conclusion of an oral contract is subject to several essential prerequisites. One is the sending of two counter declarations of intention to negotiate and another is the internal intention to conclude a contract by the parties. At the moment of concurrence of the two prerequisites we can talk about an oral contract. This legal obligation is differently attained in the written contract - the contract is considered concluded with the signature of each of the parties to it.

When we talk about a contract between present parties, we consider the contract to be concluded with the acceptance of the proposal. This means to accept it immediately, since both parties are in direct negotiation and there is no condition for acceptance. However, when we talk about a contract between absente parties, then there are two stages separated from each other.

In the first stage, a proposal is made to one party containing the essential elements of the contract and the conditions, if any. Such a proposal binds the offeror "until the expiration of the time period which is specified therein or is usually required according to the circumstances for the acceptance to reach the offeror", reads Art. 13, para. 1 of the Obligations and Contracts Act (OCA). On the one hand, the term can be set in the form of a condition by the offeror, and on the other, it can be legally fixed (e. g. Public Procurement Act, Concessions Act, Public Offering of Securities Act). Next, the offeror is bound by the expiry of the time limit, which is "usually required by the circumstances". The law does not specify what they would be, because they depend on the specific situation - mode of communication, form of proposal, distance between negotiating parties, time for consideration of the proposal, decision making period, factual objectification of the intent, etc. The proposal itself may be withdrawn, amended or supplemented before or at the same time as the proposal arrives.

The second stage of negotiation between absent parties is the acceptance of the proposal. The acceptant may agree to the proposal and express his intent/will to the offeror, but may also make a new proposal, which in turn means not accepting the original proposal. In this second case, there is a new proposal that needs accepting.

2. Commercial aspects of the contract between absent parties (concluded between merchant)

The above is a principle that applies irrespective of the type of transaction and despite the fact of the legal regime and the applicable will be different provisions in the commercial transactions - thus Art. 288 of the Commerce Act. Such subsidiary application exists insofar as there is no explicit provision in our Commerce Act.

3. Electronic contract - nature and context

The development of information technology, e-mail, encryption and other innovations require a new reading on how contracts are concluded. When the legislature drafted the Obligations and Contracts Act in 1951, it was mainly referring to the oral and written form of contracts (contract between present parties). Nowadays, however, these forms are increasingly shifting toward mediation by third parties in the transmission of the declaration of intension to contract - telecommunications companies, e-mail providers, electronic trust service providers etc.

All this stipulates the need for a law to integrate the issues when concluding a contract electronically and to upgrade the existing OCA. In this context, the Electronic Document and Electronic Signature Act (EDESA) (in force since October 7, 2001), which is now called the Electronic Document and Electronic Trust Services Act (EDETSA), was created. An Electronic Commerce Act was also created (in force since December 24, 2006).

The conclusion that can be drawn from the above is that the electronic conclusion of contracts does not violate the fundamental legal principles of civil law. They are only a special means of contracting, which does not change the stages in which the contract must go before it can be concluded.

4. Electronic contract - terminology, binding force and signature

The two acts mentioned above, as well as the related European acts, do not comment on the moment of the conclusion of the contract by electronic means, nor do they implement known terms such as "proposal" and "acceptance" (in the case of a contract between absent parties). In this regard, when we talk about an order made electronically, including in the case of an electronic contract, we are referring to a proposal/statement for conclusion of a contract - the first stage of concluding a contract between absent parties. When we talk about confirmation from the service provider, we are referring to an acceptance of this proposal - the second stage of concluding a contract between absent parties, without which we do not have a valid contract.

The electronic statement, in turn, is a statement of will in the virtual environment; the law describes it as verbal. However, such a statement can only be made with the assistance of an intermediary (service provider), that is, a person who processes the statements by virtue of an assignment by the applicant. The role of these intermediaries is essential because it is they who provide the hardware and software technology, the support staff, the expertise, etc., on which the timely and accurate actual transfer of digital information between the participants depends on.

Another idiosyncrasy of the electronic statement is the person from whom the statement actually originates with regard to whether it is its direct perpetrator, which is the signatory. The law talks about a principal when referring to the person "on whose behalf the electronic statement was made" - the person who only owns the electronic address and sends the electronic statement. In most situations, one person will combine these two roles, but it is possible and permissible two persons execute the roles - in which case the signatory has made the order or is holder of the right, but the principal bears the risk of errors in the submission of the electronic statement.

"The statement for conclusion of the contract and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them." – reads Art. 11 of Electronic Commerce Act. That is, the receipt of these electronic statements is connected to the possibility of their availability and reproduction by the addressee (received in their information system) without being interested in whether this has actually happened - this is the respective interpretation of Art. 10 of EDETSA. Corresponding application on the binding force of the proposal are also found in the rules of Art. 13 and 14 of the OCA.

The certification of private acts by electronic means also has its specifics regarding the operation of law. The handwritten signature in the written form has been replaced with an electronic signature (e-signature) and other equivalent means for electronic authentication of statements and documents, referred to in the general term electronic certificates. Such certificates can achieve a high level of security in electronic identification and linking to electronic statements. With the development of technology, they are already extremely accessible and smart cards and card readers are taking all kinds of forms. The trend in this sector is to use our mobile devices, and through automated 3D identification and verification systems, valid e-signatures are issued directly to the mobile device. Such services offer cloud-based storage of documents, authentication of signing time, service of documents and statements, and integration with e-mail and applications for e-communication.

The law recognizes three basic types of e-signatures - ordinary, that is, one that is added to the document or is logically related and does not require special knowledge and skills; advanced – one that builds on the ordinary by being uniquely associated with the titular of the signature and can be identified but it requires special knowledge. Both signatures were given legal force equivalent to a handwritten signature, however, only when agreed by the parties. The third type of signature called Qualified connects in a unique way the titular and his e-identity as in the case of advanced one. The new element here being the specifically regulated requirements for e-signature providers, which offers a maximum level of security for the certificates.

5. Electronic contract - international element

The question of the validity of contracts concluded electronically and the measures that Member States must take in this regard has not only a substantive but also a procedural dimensions (will they be recognized as evidence in a process).

Electronic negotiation often involves an international element. In addition to the Private International Law Code as a Member State of the European Union, we should also bear in mind the Rome Convention on the Applicable Law of 1980. The parties have the right to choose the applicable law that would regulate their contractual relations. In the absence of such a choice, Art. 4 determines that the law of the state with which the contract is most closely related will apply. The contract is presumed to be most closely related to the country where the party who owes the characteristic performance for the contract has his/her habitual residence or place of business for the merchant. When a contracting party is a consumer, it may enjoy consumer protection, which implies the application of the mandatory rules of its national law.

Another international source in this field is the Vienna Convention on the International Sale of Goods, which is in force for the Republic of Bulgaria since August 01, 1991. The Convention is applicable for civil and commercial trade when the parties have place of business within countries outside EU or the rules of private international law recognizes the application of the Convention (Art. 1, para. 1). Consumer sales are excluded from the scope of the Vienna Convention.

Part II - Consumer contracts

1. What is a distance contract?

A distance contract is a type of commercial practice which, in its meaning, is the conclusion of a consumer contract aimed at the sale of a specific good or service outside the usual place of business by the merchant - concluded through various technical means such as telephone, e-mail, website and others. In order for such a contract to be in place, it is necessary to fulfill the conditions of the Bulgarian legislation protecting the fundamental rights of consumers when entering into relations with the merchants (suppliers of goods and services).

First, one of the parties to the contract should be a consumer, that is to say, any natural person who purchases goods or services outside their commerce or business, craft or profession and aims to meet personal and non-commercial needs. Secondly, on the other hand, there should be a merchant, that is, any natural person or legal entity who sells goods or services wholly in the sphere of his professional activity, in order to satisfy the commercial objectives of his enterprise. It is only with the cumulative presence of these two specific conditions that we can talk about consumer law and contracts concluded under the terms of a stronger party.

The distance contract is an acceptable form for concluding consumer transactions, and for this purpose it is regulated under the Consumer Protection Act (in force since June 10, 2006) particularly Art. 45 and Directive 2011/83 / EU reads as follows:

'A distance contract is any contract concluded between a merchant and a consumer as part of an organized system for distance selling or the provision of distance services without the simultaneous physical presence of the trader and the consumer, through the exclusive

use of one or more means of distance communication to the conclusion of the contract, including at the time of the conclusion of the contract."

2. What is an off-premises contract?

The off-premises contract is again of a consumer nature and is subject to the same rules as the distance contract.

An off-premises contract is any contract between a merchant and a consumer that fulfills one of the following hypotheses:

"1. concluded in the simultaneous physical presence of the trader and the consumer, in a place which is not the business premises of the trader;

2. for which the consumer made an offer in the same circumstances as those referred to in Item 1;

3. concluded on the business premises of the trader or through any means of distance communication immediately after the consumer was personally and individually addressed in a place which is not the business premises of the trader in the simultaneous physical presence of the trader and the consumer;

4. concluded during an excursion organized by the trader with the aim or effect of selling or promoting the sale of goods or services to the consumer."

3. What are the ways of concluding a distance contract?

In the modern world, this type of contract is most often concluded electronically through the website of the merchant himself, which is specifically oriented to contain all the information the consumer needs when making a simple purchasing decision. The submission of an order through such type of platforms must be bound by explicit confirmation of the general terms and conditions of the merchant for this type of orders/contracts, and that it unambiguously binds the consumer to a payment obligation. In most cases, a written contract is not required due to the nature of the transaction, so an invoice/receipt is sent to the consumer upon receiving of the delivery of the goods (payment by hand to a supplier) or electronic notification prior to commencement of the service (payment by virtual POS terminal directly to the merchant). In the case of using the electronic method, the contract is considered concluded at the moment when the will of the subjects coincides - the moment of agreeing to the terms of the merchant and pressing the button by the consumer.

The other main method of entering into this type of remote contracts and recognized by law is through a telephone call, which is accompanied by the same legal requirements for the main characteristics of the contract as are applicable to all other consumer contracts, of course in accordance with the specific form of initiation - clear and concise telephone conversation, understandable and detailed when signing the contract. However, the mere call of a merchant representative is not enough to oblige the consumer. The law explicitly regulates the obligation of the trader to confirm the offer made to the consumer in

permanent/physical medium within a reasonable time after the conversation has taken place, or at the latest upon receipt of the delivery of the goods or before the service begins.

Contracts supplying digital content (most commonly via mobile platforms and professional software) that are not delivered on a physical medium imply explicit confirmation and acceptance of the merchant's terms at the start of the trial period. The law requires explicit confirmation before expiration the term for exercising the right of cancellation of the contract and the actual obligation of the consumer and his means of payment.

4. What are my rights to refuse a distance contract?

According to the European practice, in Bulgaria the consumer has the right to withdraw from the contract out-of-court without owing compensation or forfeit and without giving a reason for refusal within 14 days - from the conclusion of the contract or acceptance of the goods. This is the general rule applicable to all consumer contracts, including distance and off-premises contracts. In fact, the merchant is obliged to provide its customers with a standard withdrawal form, the content of which is expressly provided for by law, and to inform the consumer of the circumstances in which they lose their right of withdrawal (Annexes 6 and 7 of the Consumer Protection Act – CPA).

The binding force of the distance contract is derived from the timely awareness of the consumer about the merchant, the product/service and the price of the potential transaction (exhaustive listing of the necessary information see Art. 47, Para 1 of the CPA). The merchant is obliged to observe the law, to inform its consumers in a timely and appropriate manner and to act in accordance with the principle of good faith in commercial transactions and good commercial practice. In the case of telephone communications, the merchant is obliged to notify the consumer at the beginning of the call about the identity of the caller and its commercial purpose.

In the case that the merchant has not provided the consumer with the necessary information, the consumer shall have the right to withdraw from the concluded contract within one year and 14 days from the date of receipt of the goods or from the conclusion of the service contract.

5. Who is the body that regulates such relationships?

The competent court and the Commission for Consumer Protection (CCP) are responsible for regulating these contractual relations.

Unfair practices are forbidden, and the CCP is the body in charge of enforcing the ban. However, the Commission itself is not competent to decide on the validity of individual contracts. It itself summarizes the following:

"The Commission for Consumer Protection can inspect, impose sanctions for violations found or a prohibition measure, but not break contracts. This is wholly within the jurisdiction of the court or the good faith of the merchant. "

That is to say, although the disputed practices in question are prohibited, individual protection of each individual consumer is only possible through a general claim, namely through court.

It is important to note the inverted burden of proof in distance contract selling, in accordance with Art. 47, para. 8 of the CPA. That is, the obligation to prove under the terms of the dispute in the general claim is not the claimant-consumer, but the defendant-merchant. The latter is obliged to provide information to the consumer, after which to prove the reception of the consumer's consent to conclude and perform the contract remotely, if necessary.

There are some goods and services for which the law prohibits distance contracts. The more significant ones relate to social, health or financial services and the sale of medicinal products.

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