

INTERNATIONAL TRADE SALES CONTRACT

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Abstract: the international commercial sales agreement is a legal instrument, with a central role in achieving international commercial transactions. The commercial sales agreement is governed in civil and national laws and requires an international regulation, such as to unify the statutory provisions. International law, the transformation of international commercial sales contract into an universal agreement was achieved in time through sustained efforts of the states, materialized by various means and tools to unify the law, such as drafting type contracts, standardizing commercial terms and the adoption of international conventions. The international commercial agreement, in addition to the effects which any contract produces, generally presents some specific effects related to the time of submission of ownership from the seller to the buyer and the transfer of risks regarding the loss, destruction or damage of the sold goods.

Key words : contract for the international commercial sale, legal instrument, civil laws, national laws

I. General aspects of the legal characteristics of the sales contract

I.1 Concept

Article 1650 of the New Civil Code defines the *sale* as a "contract by which the seller transfers or where applicable, undertakes to transfer the ownership of a good to the seller in exchange of a price, which the buyer undertakes to pay."

Although the Civil Code refers to the transmission of property, he is to be qualified as sales contract and contractual whereby, for a price, another right/title than that of ownership is transferred, since the transmission of property is not the essence, but only the nature of the sales contract¹.

The sales contract may not have non property personal object rights not strictly personal patrimony rights and any other rights provided by law or resulting from unilateral acts or acts agreed by personae intuit agreements.

¹ Treaty of civil law. Special Contracts, Edition III updated and completed, Francis Deak, universal legal Bucharest, 2001, p. 9

I.2 Legal Characters of the sales contract

The sale contract is a consensual agreement, bilateral (mutually binding), for good and valuable consideration, commutative and with ownership transfer.

a) consensus – for it validly ends by mere consent of the parties (solo consensu). This was expressly provided by the provisions of the old Civil Code, according to which "selling is perfect ... once the parties have agreed on the thing and the price ..."

From the principle of mutual consent, however there are some *exceptions* expressly provided by law, situations when the contract of sales, in order to be valid, must take a certain form. In these cases, the sale is solemn, they are strictly and exhaustively provided by law.

b) The sales contract is a *mutually binding* contract because its conclusion gives rise to mutual obligations between the contracting parties. The seller is obliged to deliver the sold good and to guarantee the Buyer against eviction and hidden defects of sold goods and the buyer is obliged to pay the agreed price and take the good. Thus the obligation of each party has its legal cause in the obligation of the other party.

c) The sales contract is essentially a contract *for good and valuable consideration*, as both sides seek certain ownership interests, is receiving a consideration in return to the benefit to which they undertake. Therefore, the seller seeks to receive the price and the buyer seeks to receive goods purchased in exchange for the agreed price.

d) The sales contract is a *commutative* contract, because the existence and extent of reciprocal rights and obligations are known by the parties at conclusion and are not depend, as in the case of aleatory contracts, by a future and uncertain event that would result in existence of chances to win and loss for either contracting parties.

e) The sales contract is a contract of *ownership transfer*. This means that from the moment of the agreement, regardless of the delivery of the asset and of the pay the price, operates the transfer of ownership from the seller to the buyer simultaneously with the conclusion of the contract.

Since the acquiring of ownership, the buyer also bears the risk of loose of the good, according to the principle *res domino*.

Transfer of ownership and risk of the seller to the buyers occurs if the following conditions are met:

The seller must be the owner of the property sold, except for the sale of the other good and the contract valid concluded.

Object of the contract shall be formed only of specific assets individually determined because in case of generic determined properties, the ownership transfer cannot occur at the time of conclusion of the contract, since there are no known effective goods to be acquired by the buyer.

In the situation of the generic determined goods, the transfer effect occurs only at time of their individualization, this operation is usually performed by giving the good sold to the purchaser.

In case of alternative obligations, if the object of the sale is one good of the two determined but only alternative, the property is transmitted at the moment of the choosing.²

² Roman Civil Law Treatise, vol. II, C. Hamangiu, I. Rosetti Balanescu, Al. Baicoianu, Bucharest, 1929, p. 685, General theory of obligations, T.R. Popescu, P. Anca, Scientific Publishing Hose, Bucharest, p. 372, Civil Law. General theory of obligations, All Bucharest Publishing House, p. 358

In case of *future goods*, the transferring effect occurs generally at a different time than that of the conclusion of the contract.

It is necessary that the parties should not delay the transfer of ownership of real right or of claim by means of a special clause until the delivery of the good or until the end of a term or condition.

Such clauses can be specified in the contract, as the rule of transfer of property rights at the time of the agreement will not be removed by the will of the parties.

II. International Sale

II.1 Fundamental aspects (concept and legal character)

The international sales contract is a separate contract with specific characteristics to internal sales contract. The concept of international sales is more comprehensive than the concept of contract of sales and involves an amount of economic activity and legal relations.

The external contract is a bilateral agreement by which one of the parties, usually the seller, in a given country, undertakes to deliver to the other party, usually the buyer in other country, one of his properties, by quantity or quality determined, in a certain place and at a certain time, under conditions agreed, for a price.³

An extraneity element appears in the international agreement, an element that gives the parties the right to determine the law to govern their contract. The contracting parties may choose the law of the land of the seller, the law of the country of the buyer, the law of a third country, filled with rules arising from international conventions and rules of interpretation of international practice.

Part of the legislation has provided that if the parties do not agree on the law applied to them, shall be applied to the contract. In case of international contract, the entire assembly of normative regulations of a state and not a single act or a single law is applied.

Lex contractus governs all legal transactions on training, effects, performance and redemption of contractual obligations, not having the ability of the parties as object, the establishment of real rights, the external form of the legal act.⁴

The contracting parties shall determine the elements of the contract, adopting international usages and practices by registration of clauses in the contract referred to these or by the formulation of type-clauses, integrated in the contract. The contracting parties shall have legal capacity, the consent is not flawed and the conclusion of the sales contract must stand on a legal and moral question.

The capacity of the contracting parties is determined by the *lex patriae* (national law) and the establishment of real rights falls under the law of the place where the goods are situated (*lex rei sitae*).

The contracting parties under the freedom granted to them, determines the elements of the contract, assuming mutual obligations and adopting the international use and

³ International Commercial Contracts, Constantin Fota, Luminita Degeratu, Loredana Nita, Publisher of University of Craiova, 2001, p. 9

⁴ International Commercial Contracts, Constantin Fota, Luminita Degeratu, Loredana Nita, Publisher of University of Craiova, 2001, p. 11

practices by adopting the registration of clauses in the contract referred to these or by formulation of type-clauses, registered in the contract.

The contracting parties shall have legal capacity and their consent must not be vitiated.

Do not have legal capacity: minors, mentally insane people and persons under judicial interdiction.

The vitiation of consent can be done by: error or false presentation of reality by the time of conclusion of contract, fraud, which consists of cheating the contracting party by using unfair means, violence, that is signatory threat by something that produces fear, eviction, exercise of rights by a contracting party, which do not belong.

The object of the contract must be lawful, must exist at the time of conclusion of the contract or must be established in the future, to be determined or determinable.

The object of the contract of international sale can be further classified as follows:
movable tangible property, a category that includes all the goods for export.
intangible property (patents, know-how etc.)
real property or immovables by destination.

The same contract may be civil or commercial, as the law applicable to it and according to which its nature is determined, it qualifies it as an act of trade or not. A contract may be considered as commercial in a country and as a civil in another country.

Qualification of a contract as commercial or not is of great importance because the application involves a special legal regime.

Thus, on the commercial contract the following special rules are noticed:

The capacity to contract. For a person to contract, he must meet certain administrative tasks required by law (obtaining special permits, registration at Trade Register, performance of certain forms of advertising etc.).

Commercial usage. Only in the commercial contract, the clauses omitted from the contract shall be governed by the application of commercial usage.

Contract's test. The test of the contract may be performed by any means and not only by single documents.

Effects of the contract. In case of commercial contract, the debtor is in default without any prior notice and in the laws systems requiring such notification, it can be done by any means.

The principle of intentionality derives from the fact that such contract contains elements that objectively establish contact with many legal systems.

II.2 Conclusion of contracts.

On the conclusion of the contracts, most international commercial contracts are concluded based on draft contracts, on forms or models with standard clauses. The parties can freely determine the content of the contract within the limits imposed by mandatory rules, morals and public order. Also according to the legal provisions in force on private international law, the parties are free to choose the law applicable. This choice must be expressed or resulting by contractual terms or the circumstances of the case. By their choice the parties can select the law applicable for the entire contract or only for part of it. The parties may agree to submit the contract law to other law than that which previously governed. Any change made by the parties regarding the applicable law, that is made after conclusion of the contract shall not affect its formal validity. In the absence of a choice, when the applicable law cannot be determined either by framing the contract in one of the specified types or as the law of the country, where the party that has to perform the

characteristic performance of the contract, has its premises, the contract should have applied the law of the country, to which is most closely connected. At the formation of the contract, parties must comply with the requirement of fairness and information.

Parties of the contract shall be obliged to correctly inform about the validity of any act or fact on the validity of the concluded contract.

II.3. Nullity of contracts of sales.

The nullity is the instrument required by law in order to provide meeting of the conditions of validity of the contract.

If a contract is concluded without meeting the validity conditions, it may be ineffective by invoking nullity. Depending on the nature of the right protected by the legal provision violated at the conclusion of the contract, its nullity is classified into absolute and relative. The absolute nullity supports the non-compliance at the conclusion of the contract, of a rule which protects a general, public interest and the relative nullity in the contract supports the non-compliance at the conclusion of the contract, of a rule which protects a particular interest.

The absolute nullity may be invoked by any interested person and relative nullity by the person itself, in whose interest the sanction of relative nullity is established.

The absolute nullity has the following characteristics:

action for establishing absolute nullity is not prescriptible

the court may invoke absolute nullity ex officio;

absolute nullity cannot be covered by confirmation;

Relative nullity has the following essential differences to absolute nullity:

relative nullity may be covered by the confirmation by who is entitled to invoke.

the court may not invoke relative nullity ex officio;

relative nullity may be covered by the confirmation by who is entitled to invoke.

Some legislation allow the possibility of annulment by the parties, amicably, without the intervention of a judicial body. If the contract under nullity cannot be terminated amicably, the interested party in nullity must submit the declaration in court.

As to the consequences of the nullity of the contract, the nullity must restore the legal situation of the parties existing at the time of conclusion of the contract, with retroactive effect.

The retroactivity is the removing of the effects of contract occurred between the time of conclusion of the contract and nullity of the contract. The basic principle in this matter is restitutio in integrum - so that the parties of the contract would reach the conditions existing before the conclusion of the contract.

II.4. The formation of international commercial contract

International Commercial Contract takes place based on the will agreement of the contracting parties on key terms.

The will agreement will be accomplished by an offer to conclude a contract made to a person, followed by acceptance of this offer by the recipient.

In other words, the formation of the sales contract involves two main elements: offer and acceptance.

A characteristic feature of international commercial contracts is that, around two elements usually take place discussions, negotiations, proposals for changes to contract terms and other actions that make up the preparation and conclusion of the contract.

Formation of the sales contract is based on the principle of negotiation and good faith.

Offer of the contract

The offer to contract is the proposal addressed to one or more persons, which contains all essential elements of future contract and reflects the will of the tenderer to be bound by the acceptance of the offer.

The offer to contract has the following defining features:

it must be certain.

it must be accurate and complete.

it must be firm.

The offer to contract is an unilateral act of will with the following information:

if the recipient has received the offer, it cannot be revoked.

does not produce effect unless it reaches the addressee.

may be revoked if it has not reached the addressee without consequences

if the offer is within a deadline, the tenderer cannot revoke it until completion of the term/ deadline.

if the offer is within a deadline, the tenderer must wait for an answer for a reasonable time.

if the bidder dies after making the offer or has become incapable thereafter, the offer lapses.

Regarding the revocation of the offer, laws differ:

some laws do not admit rescission of the offer.

the rescission is allowed in most legislation even if the parties have expressly stated otherwise

some laws allow the rescission but is justified by the lack of the element of consideration element which in some legal systems is considered an essential element.

Acceptance of the offer

By accepting the offer, we mean the manifestation of the will of the recipient to accept the offer made.

The acceptance of the offer may be expressed (written, verbal, etc.) or tacit. The acceptance is silent/ tacit when it unambiguously results from the behavior of the addressee of the offer.

Usually, the silence is not considered as an acceptance, but in exceptional circumstances may have this value.

The acceptance must meet the following conditions:

must be according to the offer.

must be questionless.

must be made within the period stipulated by the bidder.

must be made before the application becomes obsolete.

must be made by the person to whom the offer was addressed, if addressed to specific people.

The conclusion of the international commercial contract occurs when the offer and acceptance meet, the will agreement being thus formed.

The importance of this moment lies in:

from this moment, the contract becomes effective.

conflicts of laws are solved taking into account the time of conclusion of the contract.

flows of consent and ability of the parties are related to this moment.

the rescission of the offer or acceptance is reported at this time.

Regarding the revocation/ rescission of acceptance, laws differ:

some laws allow the revocation of acceptance immediately after delivery, no later than the reach of the acceptance the bidder.

allow the revocation of acceptance provided that to be done until the moment considered by every theory as the time of conclusion.

II.5. Time and place of conclusion of international commercial contract

Time of conclusion of the contract is that in which offer and acceptance meet, thus the will agreement being formed.

The importance of determining the moment of conclusion of the contract lies in the following:

depending on the time of conclusion of the contract is estimated the capacity of the parties to contract.

the time of conclusion of the contract is the criterion according to which the applicable law in of conflict of laws in time shall be applied.

in the case of an offer made to several people and was accepted successively by several recipients, only the first contract will be considered validly concluded;

the time of conclusion of the contract is the start point of all its effects, unless the law or the parties do not set another term.

the moment of conclusion of the contract is the point from which certain legal and contractual terms begin to run.

the time of conclusion of the contract also determines the place of its conclusion

in relation to this point it can be found reasons for nullity of the contract, including the existence of flaws of consent.

Determining the time of conclusion of the contract according to the two cases:

The contract is concluded between the present - the parties are in the same place, face to face.

The contract is concluded between absent - the parties are in different places, and the contract is concluded by correspondence.

In the case of point A) determining the time of conclusion of the contract does not raise special problems, so that the time of conclusion of the contract the parties will be that in which the parties agree on the conclusion of the contract.

In the case referred to in point B) the problem of determining of the moment of conclusion of the contract is that the time of acceptance by the bidder of the offer does not coincide with the knowledge of acceptance by the bidder.

Several theories were outlined in the laws of different countries, and international regulations.

According to the theory of acceptance (declaration) the contract is considered as concluded when the offer is accepted.

Another system is that of reception of acceptance. According to this system, the contract is concluded when the acceptance reaches the bidder.

Our legislation has adopted the reception system of acceptance, for the contract is concluded upon receipt of the acceptance by the bidder.

III. Conclusions

The international sales contract is an essential instrument by which the commercial operations are performed, finding the regulation in various civil and national laws, often called to be applied as *lex causae* to international legal relations.

With a great practical importance, this tool depends on mechanisms that provide the regulation and enforcement of contractual provisions.

International sales contract, unlike civil contract has specific features for providing contracting parties a certain speed and efficiency in the execution and contractual benefits.

References

1. Francis Deak Treaty of civil law. Special Contracts, Edition III updated and completed, universal legal Bucharest, 2001;
2. C. Hamangiu,
I. Rosetti Balanescu,
Al. Baicoianu Roman Civil Law Treatise , vol. II, Bucharest, 1929
3. T.R. Popescu, General theory of obligations, Scientific Publishing
P. Anca, Hose, Bucharest
4. Constantin Fota, International Commercial Contracts Publisher of
Luminita Degeratu, University of Craiova, 2001