

# GOOD FAITH TO CONCLUSION OF THE SALE

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*Abstract: The contract of sale means that the willing agreement will be realised over the contractual clauses. This agreement is realised fully consistent with meeting all aspects of a sale offer and the same offer accepting. Training agreement mechanism will be triggered by formulating an offer to sell and ends when its acceptance. In this negotiations period, when the parts establish by contractual clauses the rights they will achieve and the obligations that they will be hold closing the selling contract, the doctrine has shown us there is a loyalty obligation regarding the partner, which obligates the parts to present all the data and necessary elements for colcluding the contract. Our porpouse is to present the details about good faith to conclusion of sale.*

## **1. Preliminary.**

The contract of sale means that the willing agreement will be realised over the contractual clauses. This agreement is realised fully consistent with meeting all aspects of a sale offer and the same offer accepting.<sup>1</sup>

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This requirement may relate to the following:

- Sincere declarations of intent - the partner should not be the victim of a false impression generated by statements made without serious intention to conclude a contract. Proof of lack of sincerity can be made with any evidence.
- Respecting the interests of other parts, this should not be taken by surprise by the unreasonable offers.
- The Parts should not make use of personal informations received from partner and not disclose them to third interested parts.

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<sup>1</sup> I. Dogaru, D.C. Dănișor, Gh. Dănișor, *The General Theory of Law*, Ed. Științifică, București, 1999, p. 330-338

<sup>2</sup> Ion Dogaru, *Civil Law. Ideas producing legal effects*, Ed. All Beck, București, 2002, p. 88-89

- Communication of accurate informations - communication of inaccurate information, may result in damages and even order the cancellation of the contract for fraude.
- Not to keep silent about information that might be conducive to the other part, in making its decision to conclude the contract.<sup>3</sup>

Offer to contract is the first manifestation of will, the opening negotiations related to a contract of sale. As one side of consent, offer or *pollicitatio* must meet all generally conditions of the contract.<sup>4</sup>

It must be an expression of genuine, serious, aware, unfoul and with intention to commit a legally point of view.

An iocandi causa or simple courtesy offer, without the intention of a legal commitment, it can not lead to a contract.

The offer must also fulfill certain conditions related to its specific: it must be strong and unambiguous, accurate and complete (containing all the necessary elements for the conclusion of a contract).<sup>5</sup>

Question is whether the offer once made, give rise to obligations on the tenderer. In Roman law the unilateral promise of will was valid exceptionally, in some cases:

- When it was made to a city, provided that the offer to be taken under a just cause,
- When the promise was made to a goddess, votum,
- It consisted of a promise made by a master that will reward the one that will bring escaped slave, a thing lost, *indicium*<sup>6</sup>.

It is necessary to distinguish as the offer has reached its recipient or not. As long as the offer has not reached the addressee, the offer can be withdrawn freely without its author to bear any legal consequences. But, if the offer has reached the addressee must distinguish between two situations:

A: The offer has term, in which situation the tenderer must maintain it until its expiry. If it's not accepted by that deadline, the offer shall lapse;

B: The offer has no time limit, in which situation the tenderer is required to maintain a reasonable time, considering the nature, the object of contract or other circumstances of fact, to enable the recipient to decide on it. If bidder is unable or dies, before accepting the offer, it becomes obsolete, so its acceptance, even within, can lead to the conclusion of the contract.<sup>7</sup>

Withdrawal of the offer before the expiry or its unmaintenance for a reasonable time, attract tenderer liability for any damage produced to the recipient, the situation of good or bad faith of the tenderer will influence his responsibility.

In theory there are several theories about the legal basis of liability of the bidder for withdrawing the offer:

- a. liability theories based on the legal document supply:
  - based on a pre-contract liability;
  - liability is based on unilateral legal act of supply.
- b. liability theories based on a factual basis outside the offer:
  - tort liability,
  - responsibility for the abuse of the right to revoke the offer.

The solution should be the responsibility of tenderers to explain the idea of abuse of rights. It is true that he has the opportunity to withdraw the offer, but this right shall be without prejudice to the

<sup>3</sup> Ibidem, 2002, p. 89

<sup>4</sup> T.R. Popescu, P. Anca, *The general Theory of the obligations*, Ed. Științifică, București, 1968, p. 70 and next.

<sup>5</sup> Liviu Pop, *Civil Law. The general theory of the obligations*, p. 48 and next.

<sup>6</sup> Ion Dogaru, *Civil Law. Ideas producing legal effects*, Ed. All Beck, București, 2002, p. 89

<sup>7</sup> Ibidem, p. 90.

rights of other topics of interest as the offer made. Revocation of the offer in bad faith always looks abusive exercise of this right.<sup>8</sup>

In turn, acceptance of the offer is the manifestation of willingness to enter into a contract under the terms of the tender. It can be explicit (in writing or orally) or tacit, when doubt arising from certain actions or attitudes (early implementation of the mandate by the Trustee is worth accepting the offer made by the mandate). Silence is not worth than that in exceptional circumstances when required by law (art-. 1437 C. Civ.), or it is done solely in the interests of the recipient (as the offer of forgiveness of debt). In addition to these general conditions of background on consent, acceptance must meet also specific conditions:

- being consistent with the offer
- being undoubted,
- not being late.

If the offer was made to some person, only this person may accept it, and if it was made public, it can be accepted by any interested person.

The moment of conclusion is therefore the time the offer meets acceptance, so the consent is formed. The determination of this moment is not a problem when the parties are present and when they decide the conclusion of the act, or when, without being in the same place, they are concluding the contract by phone. There are times when the offer is made by mail, being separated in time of acceptance.<sup>9</sup>

Jurisprudence considers that the mere receipt of correspondence sent by the bidder to accept is a rebuttable presumption of the acceptance. In this way, the system information is identical to that of receiving acceptance.<sup>10</sup>

## **2. Breach of good faith when vitiated consent exists.**

The consent is the essential, substantive and general condition, of the civil legal act that is the decision to end a civil legal act, manifested externally. To be valid, consent must meet certain conditions, including why that should not be altered by any defect.<sup>11</sup>

Vices of consent are those circumstances that affect the nature of conscious and free will incorporated into a legal act to an extent that constitutes grounds for sanction act with relative nullity<sup>12</sup>. The issue of contractual breach of good faith arises when fraud and violence exist. The error that is the false representation of reality at the end of the act does not require action by the other party to denote its bad faith. As regards injury, as a defect of consent, we must show that the problem of bad faith may occur on a subjective design defect of consent. According to this concept, lesion involves two elements:

- an objective one, involving value disproportion between rewards,
- a subjective one, consisting in taking advantage of the state need of the other part.<sup>13</sup>

## **3. The fraud - an expression of bad – faith.**

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<sup>8</sup> Idem.

<sup>9</sup> The problem existed in Roman law, where a contract is concluded between absent, in a letter or authorized persons (per epistulam vel nutium) - V. Hanga, Roman Law, p. 354.

<sup>10</sup> Ion Dogaru, *Civil Law. Ideas producing legal effects*, Ed. All Beck, București, 2002, p. 92.

<sup>11</sup> G. Boroï, *Civil Law. The General Part*, Ed. All Beck, Bucuresti, 1999, p. 161-163.

<sup>12</sup> Ion Dogaru, *Civil Law. Ideas producing legal effects*, Ed. All Beck, București, 2002, p. 92.

<sup>13</sup> Gh. Beleiu, *Romanian Civil Law. Introductory part. The subjects of civil law*, Casa de editura si presa "Sansa" SRL Bucuresti, 1992, p. 137

The fraud or cunning is all fraudulent issues (false or deceptive) that one party is using in a civil act for misleading the other part and lead it to conclude the civil legal act, without which the part would never conclude the act. In other words, the fraud or cunning is misleading a person, using cunning means, in order to make it enter into a legal act. Undoubtedly, in essence, is an error caused the fraud in bad faith by a Contracting Party. This defect has its rules in Article 962 Civil Code, provisions under which "the Fraud is a cause of invalidity when the cunning means employed by one party, are such, that is obvious that without these ways, the other party would not be contracted." Starting from the Roman law distinction between DOLUS malus (seriously fraud) and DOLUS bonus (easy fraud) as it has consequences for the validity of the legal act or not, we distinguish between primarily fraud and incident fraud.<sup>14</sup>

Main Fraud (DOLUS dans causam contractui) is the fraud that is falling on some crucial elements to end the civil legal act in the sense that without the error, it causes the legal document that would not be completed. Main fraud attracts the sanction of relative nullity of the act. Incident fraud (DOLUS incidens) or incidental or ancillary (secondary), is on indefinite elements at the end of the legal act. The cunning not give the sanction of the relative enhancement of the legal act, but gives only entitled to a damages claim, which requires, for example, a corresponding reduction in price. There is also the view that the distinction between primary and incident cunning has a solid foundation to be maintained. The cunning exists indifferent to the contract terms would refer principal or accessory, and whether it is only the appearance of false statements or other shades gets more complex by using complicated misleading ways.<sup>15</sup> Cunning is always bad-faith expression of the conclusion of the contract.

To be in the presence of cunning - defect of consent are required cumulatively met two elements:

- the objective element (material) which is to use cunning means (deceptive, false) to mislead the other party
- the subjective element (intention) which is the intention to deceive in order to induce a person to enter into a legal act.

Furthermore, to be considered defect of consent, cunning must meet the following conditions:

a) to be decisive for the conclusion of the legal act

- to fall on some crucial elements for the conclusion of that legal act,
- to be about the object, person or any other elements which could lead to the conclusion of the legal act,
- the question of determining character of cunning is assessed and resolved from case to case (in concreto).

b) cunning must come from the other side, namely:

- this condition regards only contracts for pecuniary interest
- the care of the will of the disposer principle in free contracts must take precedence over stability of legal relations
- if that is required condition is considered satisfied even if cunning not come directly from the other side, but from a third party if the party to which use is aware of this fact.

The cunning is not assumed, so who claims to have been misled has to prove it, having to hand any evidence. From the evidence provided must clear that the facts relied upon as cunning are likely to deceive a person of ordinary intelligence. Cunning does not always involve the commission of acts

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<sup>14</sup> Ion Dogaru, *Civil Law. Ideas producing legal effects*, Ed. All Beck, București, 2002, p. 93

<sup>15</sup> D. Gherasim, *Good Faith in Civil Juridical Relations*, Ed. Academiei, Bucuresti, 1981, p. 70.

involving positive or cunning maneuvers lies in, the intention to deceive can be found also in case of resistance. In this case, the interested part must demonstrate that voluntary silence was likely to create a decisive error in the conclusion of the act. Case law has upheld the cunning's reluctance for the marriage, when hiding a serious illness and time by submitting a false medical certificate.<sup>16</sup>

In bilateral acts the cunning does not have to be, it's enough to exist only for one of the parts. If, however, the cunning is common, either party may request annulment of the act legal. The cunning attracts civil sanction as relative nullity<sup>17</sup>.

#### 4. Violence – form of the bad faith.

Violence - defect of consent is that to instill a person under threat influence, fear of harm likely to induce it to enter the legal document which, without such fear, would not be completed. Violence - finds defect of consent legislation in a number of texts such as the provisions of art. 955 ind. 1 (*violence against one who has committed is the question of invalidity, even when performed by someone other than the benefit of the Convention*), 956 ind. 2 (*it is always violence when, to make a person to contract, was inspired after she rational fear that the person or property will be exposed to a considerably worse today. This is taken into account in terms of older, sex and condition of persons*), 957 ind. 3 (*violence is the question of invalidity of the agreement and when he exercised the husband or wife, the ascendants or descendents*), 958 ind. 4 (*simple polite fear, without violence, can not cancel agreement*).<sup>18</sup>

Regarding the effects on the will of individuals, violence is classified as:

1. Physical (VIS), which is to reduce the victim to the role of simple instrument to conclude the legal act (eg. leadership forced the hand to sign). In this case violence is characterized as follows:

- is destructive of consent and therefore is not defect of consent, equivalent to lack of consent,
- draws the penalty of absolute nullity of the legal act in question.

Psychological (metus) or moral. We are in the presence of violence as a defect of consent which is the threat of moral evil, such as to cause a fear that the parties to conclude the act that otherwise would not be completed. Metus, The definition that is of two kinds:

- Illegitimate violence (unfair), that made no right and which is therefore related to the sanction of the legal act.

- Violence legitimate (fair), that made the exercise a right, without being able to attract the sanction of nullity.

To be in the presence of defects of consent is required violence met two conditions:

- a) violence must be determined at the concluding of the act;
- b) violence is unjust (illegitimate, illegal).<sup>19</sup>

If the violence exercised by one party over the other parties is not decisive to conclude the civil legal act, it will have relevance in terms of legal consequences in the sense that they attract the sanction of nullity.

For violence to be determined at the conclusion of the civil legal act, is required:

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<sup>16</sup> I. Dogaru, S. Cercel, *Family Law Elements*, p. 28

<sup>17</sup> Ion Dogaru, *Civil Law. Ideas producing legal effects*, Ed. All Beck, București, 2002, p. 94

<sup>18</sup> Ibidem, p. 95.

<sup>19</sup> Ibidem, p. 96

a) fear caused to be rational in assessing the victim of violence, that is sufficiently strong to conclude the act,

b) fear is assessed according to factors such as: age, health, level of culture, nature, power, etc.,

c) bad product can be of three kinds:

- Patrimonial - the threat of destruction of property,

- Physically - the threat of injury to health or limb,

- Morally – the threat of compromising the reputation, leaving, etc.

d) The damage can regard the person in discussion, the husband, the wife, ascendants and descendants<sup>20</sup>, or other relevant persons, if they are related to the victim by strong affection.

The violence, to receive legal consideration of defect of consent has to be unfair, means illegitimate, unlawful.

In connection with this condition shall require the following information:

a) Currently violence - defect of consent if:

- use illicit means to achieve a goal then is right after all

- use legal means to achieve an illegal purpose (as far as that the conditions of violence)

- we are in the presence of violence - even when the defect of consent comes from a person other than the party benefiting from it<sup>21</sup>,

- also we are in the presence of violence - defect of consent, even when it is actually exercised by a man from outside, such as state of necessity.

b) are currently not in presence of the violence - defect of consent, even if the violence is there, but consist in:

- the existence of injury, putting on trial of the part that is guilty<sup>22</sup>,

- fear of legal and natural consequences of the execution of a right of the person injured by a crime or by other interested person, is not violence and therefore can not be claimed as a defect of consent. Case law has held that the only concern that would result from unjustified threats of violence or illegitimate is likely to lead to this result, otherwise it would mean that all transactions entered into by criminals with the injured parties in criminal cases, regarding the civil damages, to be vitiated by the moral coercion of the will of the offender, which is unthinkable.<sup>23</sup>

- If there is present the simple reverence fear, which is worth rather respect than fear. The provisions of art. 958 Civil Code expressly states that "the mere reverence fear" is not defect of consent. Jurisprudence unanimous in assessing the legal text refers to persons exercising legitimate authority over others. We can assume that there is fear regarding children to parents, of a minor to his guardian, a hierarchically superior to his superior.<sup>24</sup>

As the penalty, should be awarded as follows:

a) if the destructive violence of consent exists, the penalty is an absolute nullity of the legal act.

b) b) if violence defect of consent exists, the penalty is relative nullity of the legal act.

As physical violence as cunning, be attached to a defect of consent, and a civil offense, the victim has, near the nullity sanction, the action for damages and other conditions are met thereof.<sup>25</sup>

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<sup>20</sup> Art. 957 Civil Code

<sup>21</sup> Art. 955 Civil Code

<sup>22</sup> The County Tribunal of Timis, Civil Decision no. 1641/ 22.12.1971, RRD no. 2/1973, p. 162.

<sup>23</sup> Supreme Court, Civil Decision no. 1107/9.09.1962, CD 1962, p.152.

<sup>24</sup> D. Gherasim, *Good Faith in Civil Juridical Relations*, Ed. Academiei, Bucuresti, 1981, p. 75.

<sup>25</sup> Ion Dogaru, *Civil Law. Ideas producing legal effects*, Ed. All Beck, București, 2002, p. 99.