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CONCEPT AND CONCLUSION OF CONTRACT ON TRADE OF GOODS WITH FOREIGN ELEMENT

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Abstract:
International exchange of goods is performed through a contract on trade of goods with a foreign element. The conclusion of a contract on the international sale of goods is based primarily on the autonomy of the will of the parties, unless that autonomy of the will is limited by the compulsory regulations of the states. All sources of law cited in the article, such as international conventions, autonomous sources of law and even customs, can be changed by the disposition of the will, because they are of a dispositive character. The contracting parties most often agree on the application of the United Nations Convention on Contracts for the International Sale of Goods, the so-called Vienna Conventions. The offer and acceptance of the offer are necessary for the conclusion of the contract. The offer is a final act, and the acceptance of the offer is a statement of the offeree agreeing with the offer.
Key words: *contract on trade of goods with foreign element, Vienna Convention, offer for the conclusion of a contract, acceptance of an offer, conclusion of a contract*

Introduction

In order to consider the conclusion of a contract on the international sale of goods, it is necessary to indicate the sources of law that regulate this contract. This will be presented through a comparative overview of national legislation and international sources, and within them both offers and acceptance of the offers. These sources of law can be divided into international conventions, autonomous sources of law and customs. The main aspect of this article will be directed towards the offer and the conclusion of the contract on the international sale of goods. The acceptance of the offer will be presented as a whole through an analytical consideration of the notion of acceptance of the offer, time and place of concluding the contract, and as a form of international sales contract.

Within the conclusion of the article, the conclusions reached during the study and research of this topic will be summarized. For the elaboration of this article, the methodologies used will be historical method, method of comparative law, comparative-theoretical method and other legal methods used in the analysis of the topics such as this one. Analytical-descriptive and synthetic methods will be used as the basic approach.

This application of the methods should enable a systematic presentation of the existing conceptual and empirical knowledge.

1. Sources of international trade law

1.1. Division of sources of international trade law

Sources of international trade law can be divided into international conventions (so-called *hard law*), autonomous sources (so-called *soft law*) and customs.

a) international conventions

The need for unification of the law was imposed very early, with the establishment of the International Institute for the Unification of Private Law in Rome in 1926. UNIDROIT. Its significant result was the drafting of the Uniform Hague Law in 1964. The necessity for the unification of the law was imposed in order to create modern and harmonized rules of private law that would be widely accepted and understood.

In order to overcome different views on some key issues between the two major European civil law systems of that time, the one based on the French Civil Code and the other based on the German Civil Code, it was concluded that the English law, as well as the law of the United States of America should be considered, because the Uniform Commercial Code of the United States was adopted in that country. Based on a comprehensive view of these legal systems, the Hague Convention was adopted in 1964, and more specifically, two Hague Conventions: a) the Convention enacting the Uniform Law on the International Sale of Movable Goods and b) the Uniform Law on Formation the Contracts for the International Sale of Movable Goods.

The efforts of the international community have led to the establishment of the United Nations Commission on International Trade Law in 1966 (UNCITRAL). The commission is headquartered in New York, while the secretariat is located in Vienna. Namely, the need had been arisen to revise the already adopted Convention on the Uniform Law on the International Sale of Goods, which has been ratified by a number of countries. The UNCITRAL Commission, after obtaining the opinion of the states on the Hague Uniform Laws, at its second meeting in Geneva in 1968, formed a working group

whose task was to draft a new text, which in practice signified a revision of the Hague Uniform Laws. After the task was done, the UN General Assembly, with its resolution 33/93 in 1978., made a decision to convene a conference in Vienna. At that conference, the United Nations Convention on the International Sale of Goods was adopted - the so-called **Vienna Convention** [1]. The conference was attended by 62 countries, including the SFRY.

In the following text, the author opted for the abbreviated name of the Vienna Convention, the VC.

b) autonomous sources

These sources are named autonomous owing to the common characteristic of all autonomous sources because they originate outside the states. These sources are created by economic entities, international organizations, etc. Autonomous international trade law usually signifies formal, standardized contracts and general terms and conditions.

Formal contracts and general business conditions coincide in time with the emergence of standardization of contracts in the economy. Namely, on the basis of a large number of similar and the same situations, it was possible to compile a form to be used in the same or somewhat modified form when concluding the contract. These contracts, which were based on the autonomy of the will of the contracting parties, gained their full significance only in international trade. Namely, they represent codified customs that govern certain markets. Formal contracts and general conditions in the international trade of goods were initially drawn up by private trade associations, and later by international organizations.

The efforts of international organizations led to the formation of the United Nations Economic Commission for Europe in 1947. This commission passed a number of formal contracts in international trade. Among others, some of the contracts are the Geneva general conditions and standard form contracts. Typical international sales contracts are intended for the sale of industrial goods, etc. Also, standard form contracts are used for the sale of cereals, coffee, sugar, wool, leather, soft and hard-cut materials, etc., but there is no obligation to apply them, unless the contracting parties agree on their application.

In 1994, the International Institute for the Unification of Private Law adopted the UNIDROIT principles of international trade contracts. In the following period, these principles underwent significant changes and amendments.

UNIDROIT principles must be applied if the contracting parties explicitly agree on their application. Also, arbitration or court may apply them when the parties determine the *lex mercatoria* - the law of trade, general legal principles or introduce another clause of similar meaning as the applicable law for their contract. Their application is also possible when the parties of the contract have not determined the applicable law [2]. These principles can fill in the gaps in international legal instruments and can also be used for the same purposes in national legal systems.

In addition to the formal agreements, it is important to note that the work of the International Chamber of Commerce, founded in Paris in 1919, also contributed to the codification of legal rules intended for international trade. Namely, the Chamber of Commerce, among other basic activities, has adopted a large number of INCOTERMS clauses to date. The first clauses were passed in 1936, and to this day they have undergone several amendments. The last edition of the INCOTERMS clauses is the one for 2020. These clauses are contracted for the sale of goods and their aim is to facilitate international sales by using certain provisions of the clauses to regulate the issues of importance to the trade.

Along with the autonomous sources of law, the principles of European Contract Law should be noted, which are currently in a draft form, having not entered into force to date. These principles are the result of the European Parliament of the European Union, which adopted two resolutions of 26 June 1989 and 25 July 1994 emphasizing the need to adopt the European Civil Code as the most effective method of harmonization in order to establish a single market without borders within the EU. The long-term work of the Commission on European Contract Law has resulted in the Principles of European Contract Law, which are the result of the convergence of different legal systems of the EU countries. There is no obligation to apply these principles - in order for it to enter into force and to be applied by the EU countries - it is necessary for all EU members to accept the application of these principles.

c) Customs

Customs are defined as a commercial practice that is so widely used that traders expect the contracting parties to act according to that practice. The contracting parties do not have to refer to customs because they are applied as such. However, customs take precedence over dispositive regulations governing a particular matter [3].

2. Conclusion of the contract

2.1. The offer to conclude a contract

A contract is, by definition, an agreement of the contracting parties, and this presupposes the consent of the will. Concluding contracts in domestic, and particularly in international legal trade of goods is usually a difficult and complex task. In international trade, these difficulties arise because there are different understandings about the legal significance of the offer and acceptance of the offer, the moment of concluding the contract, the deadlines by which the offer is binding and whether it is binding at all. Most often, once the offer has been made, the conclusion of the contract has gone through the phases of nonobligatory contacts and reached the stage in which certain legal actions occur.

The main obligation of the offeror is to maintain the offer, and the acceptor, on the other hand, to conclude the contract with consent. In order to define the offer in general, it must be clearly differentiated in relation to other proposals for concluding a contract.

Any initiative to conclude a contract is not an offer. In order for a proposal, i.e. the initiative, to produce a certain legal effect - it must contain certain elements that distinguish it from other forms of initiative. A call for tenders should be distinguished from a proposal for concluding a contract, which is usually sent to an indefinite number of persons.

The offer for negotiations aims only at establishing contact between two or more persons and it, in its essence, represents only the will which is subject to changes in order to reach the essential elements of the contract, but also, possibly, less important elements of the contract. The concept of the invitation for negotiations determined in this way differs from the offer because at that stage there are no conditions for concluding a contract. In other words - there is no possibility of acceptance. The invitation for the offer is, therefore, only a contractual initiative. It is, thus, imprecise, while the offer for the conclusion of the

contract leaves the offeree only a limited choice between rejecting and accepting the invitation for the offer and leaves a certain space for negotiation.

Almost all national legislations recognize the difference between an offer that becomes a contract through negotiations and other initiatives that create the possibility of acceptance. When a proposal is reached, the proposal must be specific, detailed and final. The finality of the proposal makes it possible to reach an offer for the contract. Achieving the proposal in all its essential elements that the contract should contain is an offer to conclude a contract, which represents the result of both parties in the negotiation. Whether the contract will be concluded is usually uncertain because the contracting parties consider this text of the proposal as an offer, since the contracting party that sent the offer expects that the offeree will accept the offer with an unambiguous statement that is sent in the agreed or customary way. It is understood that the offeree may, instead of accepting, declare about the offer, or may submit a counteroffer in order for the original offeror to declare about it. Only when the contracting parties accept the offer in the customary or specially designed manner - the contract is created.

An invitation to conclude a contract, sent to one or more specific persons, represents the offer if it is sufficiently specified and if it indicates the intention of the offeror to commit in case of acceptance of the offer. A proposal is sufficiently specific if it indicates the goods, explicitly or tacitly, determines the quantity and price or contains the elements for their determination. A proposal sent to an indefinite number of persons will be considered only as an invitation to make offers, unless the person making such a proposal clearly indicates otherwise. “If we attempted to analyze the definition of the offer more comprehensively, we would come to the conclusion that it does not actually contain a personal element of the offer” [4]. The reason for this is, presumably, the fact that the offer is usually made by the seller, but the offer for concluding the contract can be made by the future buyer because, for example, after the negotiations, the seller took a certain position regarding the goods, price and other elements, and in some cases obtained data on goods on the basis of a catalog or otherwise. “The element of the offer, the intention of the offeror to commit, is a proposal made by the offeror in order to commit in case of its acceptance. Consequently, there must be an intention to conclude a contract (*animus contrahendi*)” [5].

Intention is observed objectively, which means it must be known. Objective behavior, observed from the aspect of the offeror's intention, is interpreted by the offeror's behavior - whether the offeror knew about that intention or that intention could not remain unknown to him. If the offeree did not know about the offeror's intention - then the intention is observed from the point of view of a reasonable person of the same characteristics, i.e. in what manner the other party would understand that intention in the same circumstances.

Given that, in legal theory, there are different understandings as for the acceptance of the offer, such as the theories of sending, reception and finding, it seems necessary to indicate towards which of the mentioned theories the international rules, that are interpreted as additional elements in the contract on the acceptance of the offer, are directed, and what is the attitude towards the revocation of the offer.

Thus, for example, the time when the offer is considered accepted in comparative law in the countries with *common law* legal system is considered to be the time when the offeree sent the response on the acceptance of the offer, while in most countries with *civil law* legal system it is considered to be the time when the offeror receives a response from the offeree about the acceptance of the offer. International sources of law, such as the VC and most Geneva standard form contracts, have approved the theory of reception because it corresponds to the security of international trade of goods.

In order to conclude a contract based on the offer - it is necessary for the offer to be accepted. Often in practice, before the offer, which is the basis for concluding the contract, the possible contracting parties, which is most frequently the buyer, and possibly the seller, send an invitation for negotiations, in order to reach a final agreement on the possible conclusion of the contract. The purpose of the negotiations is to reach an agreement primarily on the essential, but also on the possibly irrelevant components of the contract. Therefore, the invitation for negotiation does not contain all the essential elements of the contract. It has yet to lead to an offer that will include those elements.

Of course, there is a possibility that the offeree received the offer and did not accept it, but started negotiations with the offeror on the modification of the offer. However, even in such cases, after the negotiations are over, they will formulate a new offer (definitive offer), which from the legal aspect is the same as if the negotiations were

not preceded by an offer. Negotiations for concluding a contract do not bind the participants in negotiations. Negotiations will be binding only if the contract is concluded, and on the basis of negotiations, i.e. they will be contained in the concluded contract. Negotiations do not bind any of the persons in the negotiations because each of them can withdraw from the negotiations at any time.

It is expected that one of the contracting parties can make the offer on the basis of negotiations, and that is, most often, the offeror. The person who initiated the negotiations may simultaneously negotiate with another person or with several persons. In case of the offer, however, the situation is different, because it is sent only to one person or to certain persons. If one of the participants in the negotiations submits an offer - this offer, regardless of previous negotiations, is considered as the offer, although it may contain new elements that were not the subject of negotiations. Based on the negotiations, if the contracting parties concur with the agreed, the day and time when the contract will be concluded is scheduled.

In certain cases, regardless of the fact that negotiations do not produce any legal effect, i.e. that no legal obligations arise for the negotiators, the party that conducted the negotiations without the intention to conclude the contract will be liable for the damage caused by the negotiations. The party who suffered this damage may claim compensation from the other party, and if the other contracting party does not accept the compensation or does not reach an agreement on compensation for the damage - a claim for damages must be submitted to the court to exercise the subjective right.

If one of the contracting parties sends a letter of intent to negotiate the contract, this letter of intent which represents the intention to conclude the contract will not be considered an offer, even though it contains certain elements of the offer, but the negotiations, if they yield concrete results, will be followed by the immediate conclusion of the contract. About possible details, such as the time of concluding the contract, if all other elements of the contract have been agreed on, whether they are important or irrelevant elements – are scheduled on the day and hour when the contract will be concluded.

It should be particularly noted that most contracts applied in trade practice (and this is often the case with standard form contracts) contain the offer of the text of the

contract, and as such are not considered to be the offer of the offeror, and therefore do not oblige to conclude the contract. Namely, there is no contract yet, but it is necessary for the offeror to accept this text of the contract in order for the contract to be concluded.

Under the general conditions of the UN Economic Commission for Europe (in almost all areas of buying and selling), the case of a *firm offer* is foreseen first, and only then, if the offer is not indicated as firm, it is pointed out that it is not binding. "In the case of a firm offer with an indication of the deadline for acceptance, the contract is considered concluded at the moment when the seller receives the buyer's notice of acceptance of the offer by a registered letter. In the event that a firm offer does not provide for a period within which the contract is to be confirmed, it shall be deemed concluded at the time when the seller receives notice of acceptance of the offer in a safe manner within a reasonable time which may not exceed 15 calendar days [6].

In modern foreign trade, given that modern internet-based communication is increasingly used, most offers, acceptances of the offer or sending the text of the contract are considered credible correspondence that does not need to be proven unless the other party claims that it did not receive the offer, the acceptance of the offer or the standard form contract that is considered an offer. The pandemic of the COVID-19 virus has shown how the world trade is fragile and subject to unforeseen events that can significantly slow it down and even stop it at times. Restricting physical contact between people has led to a very large increase in online transactions. These transactions are not only transactions of consumer goods for everyday use, but also goods necessary for the functioning of complex business systems, companies, corporations and even the state. Therefore, it is certain that in the future, modern trade will increasingly be conducted via the internet (e-mail, specialized sites for the sale of goods, etc.). This will require a revision of the existing legal rules of international trade and most likely creating new ones.

2.2. The effect of the offer

The bid is, by its legal nature, a unilateral declaration of will that binds the offeror. It is a causal statement of will. It reflects the importance of the cause as an economic effect that is to be achieved in economic turnover. A declaration of will establishes a certain legal business. In the case of the subject of our analysis, the acceptance of the declaration

of will creates a contract. According to the VC, the offer produces legal effect when it reaches the offeree. "It is considered that the offer has reached the offeree if it was communicated to him orally or in another way and delivered to his headquarters or to a postal address, or if he does not have a registered office or a postal address, to his regular residence" (Vienna Convention, Article 24).

It remains questionable until what point the offer produces legal effect. The offer produces legal effect until the moment when the offeree rejects it, while the statement of rejection must be clear and sent or communicated to the offeror in a safe manner. The so-called conclusive actions, i.e. actions that are indicated by signs or in general by the behavior of the authorized representative of the economic entity that received the offer, cannot be interpreted as rejection of the offer. If the offer has a deadline for the acceptance - it ends when the deadline expires. In those cases where there is no deadline for acceptance of the offer, situations when the contract is concluded between the present and the absent persons are regulated differently. If the offeror has not left a deadline for the offeree, in which the offeree will state whether he accepts the offer or not, the offeree is obliged to immediately state whether he accepts the offer. Of course, the offer ceases to be valid after the expiration of a reasonable period, and it is determined taking into account the circumstances of the business and the communication used by the offeror.

The acceptance of the offer, therefore, takes effect from the moment the statement of consent reaches the offeror, unless it arrives after the deadline specified in the offer. If the deadline is not determined, and the offer has arrived to the offeree, then it produces effect within a reasonable time, taking into account the circumstances of the business and the speed of the means of communication used by the offeror.

An oral offer must be accepted immediately, unless circumstances indicate otherwise (Vienna Convention article 24).

3. Time and place of concluding the contract

Since the conclusion of the contract is preceded by a series of factual actions, the contract is considered concluded when the last act leading to the consent of the will is made. According to the VC, the contract on sales was concluded at the time of

acceptance of the offer in accordance with the provisions of this Convention. The time of concluding the contract depends primarily on whether the contract is concluded between present or between absent persons.

If the contract is concluded between the present persons - the offeree is obliged to declare himself about the offer immediately. If the offeror leaves him a deadline - then the contract is created if the offeree accepts the offer within the deadline.

Conclusion of the contract between the absent persons, in national legal systems, depends on the time of the conclusion of the contract (surely, if the provisions of the VC do not apply.)

The VC applies to contracts on the sale of goods concluded between parties having their registered offices in the territories of the states, while it is necessary that alternatively one of the following conditions is met:

a) that those states are the contracting states

b) that the rules of private international law refer to the application of the law of one of the contracting states.

Article 1 of the VC appears to be particularly important because it resolves the issue of the time when a transaction can be considered international. In theory, one starts from a subjective criterion, an objective criterion or a mixed criterion.

The subjective criterion is determined by the citizenship or domicile of the contracting parties. The objective criterion, on the other hand, starts from the fact that the transfer of goods takes place from one state to another. The mixed criterion, in the end, contains both subjective and objective criteria in itself.

The provisions of the Convention shall always apply if both contracting parties have their seats in the countries that are parties to the Convention. An exception is the case where the nationality of a contracting party shall not be taken into account where the rules of private international law refer to the application of the law of a contracting country. However, if the contracting parties have their seats in the countries that are not signatories to the Convention - the application of the VC will be taken into account if the contracting parties have provided for it in the contract or it can be determined on the basis of their previous business.

It is worth noting that the provisions of the Convention will not apply to goods purchased for personal or family use or for household purposes. Exceptionally, a different solution is provided in the event that the seller at any time before, or at the time of concluding the contract, did not know, nor could he have known that the goods were being purchased for such use. The provisions of the Convention shall not apply to the sale of goods carried out at public auction or to seizures of property or executions carried out by the judicial authorities, to securities and money, to ships, hydrofoils and aircraft, and to electricity.

There are four different theories in national law: the theory of statement, the theory of transmission, the theory of reception, and the theory of finding. According to the theory of the statement, the contract arises at the moment when the acceptance of the offer is declared. In international sales, the acceptance of the offer is also considered when it is tacitly accepted, and that is the case when the offered person performs certain actions, such as paying the price or accepting the delivery of goods. The transmission theory states that the contract is concluded the moment the acceptance is sent. According to the theory of reception, the contract arises when the offeror receives the acceptance.

As already mentioned, the VC accepts the theory of reception, which is dominant in most legal systems of European countries.

The place of conclusion of the contract is important when concluding a contract on international sale because the place of conclusion is taken as a point of attachment and serves to determine the applicable law. The Convention does not regulate the place of concluding the contract, but since the theory of reception is accepted, the place of concluding the contract is considered to be the place where the acceptance of the offer was received, and that is the place of the offeror's business.

4. Form of the contract for the international sale

Starting from the principle of autonomy of the will of the parties, the will of the parties regarding the method i.e. the form in which the contract will be concluded is decisive in concluding the contract. Of course, in most cases, in order to avoid proving that the contract has been concluded, the parties will apply a written form and a rule on informality, i.e. the freedom of autonomy of the will, which also refers to amendments to

the contract. Autonomy of the will is encompassed by the VC. The contract on the sale of goods does not have to be concluded or confirmed in writing nor is it subject to any other requirements regarding the form of the contract.

In the case of most conventions, which represent a compromise solution of different legal systems, certain reservations could be made to this one as well. These reservations may also relate to the form of the contract. The reservation implies that certain provisions of the Convention will not apply, but the provisions of the national legislation of the countries that have made that reservation will apply. The VC stipulates that no reservations other than those expressly permitted by this Convention are permitted.

Conclusion

International exchange of goods is performed through a contract on trade of goods with a foreign element. The basis for concluding the contract is based on the sources that regulate it. These sources can be divided into conventions, autonomous sources of law and customs.

In order to conclude the contract on international sales, the offer and the acceptance of the offer are necessary. Form and type, on the other hand, contain the text of the contract, so that the buyer has the flexibility to accept or not to accept the text of the contract, and if he accepts it - the obligations of the contracting parties arise. The offer for concluding the contract, whether given orally or in writing, directly or through a representative, or through means of communication, is a unilateral declaration of will and contains important elements, and possibly some of the irrelevant elements on the basis of which the contract would be concluded. An invitation to negotiations is not an offer at the same time. If the offeree accepts the invitation for negotiations - the result of the negotiations could be an offer to conclude a contract.

Acceptance of the offer in the case of the contract on international purchase and sale must correspond to the offer in all respects. In other words, it must be in accordance with all the elements of the offer. The essential elements of the offer are the object (goods) and the price. The offer can be accepted under certain conditions, withdrawn and revoked.

The time of concluding the contract appears to be particularly important because the time of concluding the contract depends primarily on whether the contract is concluded between the present or absent persons. The place of conclusion of the contract is also important because it is determined by the seat of the contracting parties and it represents a point of attachment that serves to determine the applicable law that will be applied. The VC defines in which cases it will be applied on the basis of the point of attachment, unless it is a matter of the standard form contracts.

The contracting parties determine the form of the contract on international sales. It is usually a written form in order to avoid later proving the content of the contract and its legal validity.

References:

[1] The United Nations Convention on Contracts for the International Sale of Goods (CISG), sometimes known as the Vienna Convention, is a multilateral treaty that establishes a uniform framework for international commerce. As of 2021, it has been ratified by 94 countries, representing two-thirds of world trade.
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