THE EFFECTIVENESS OF CERTAIN CONTRACTUAL CLAUSES IN A TRANSNATIONAL ELECTRONIC CONTRACT OF ADHESION

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Abstract

In this paper it is examined the effectiveness of two specific clauses in a transnational electronic contract of adhesion: the competent authority for disputes resolution clause and the applicable law clause. There are two scenarios taken into consideration: the first one, in which the electronic contract is concluded between a Romanian consumer and a professional established outside Romania (1) and the second one, a case of an electronic contract concluded between professionals with the service provider established outside Romania (2).

Key words: electronic contract of adhesion, competent authority for disputes resolution clause, applicable law clause, consumer, professional

Conclusion of contracts by negotiating their terms and thereafter by drafting and signing a document using a handwritten signature, became in recent years, increasingly less used. In today's society, the parties no longer meet face to face, especially in the case of contracts where one is the consumer; contracts negotiation is used, especially for contracts concluded between professionals with economic, financial and legal power. Thus, the vast majority of contracts are adhesion contracts (See Carmen Tamara Ungureanu, *Electronic contract*, in "Dreptul" no. 9/2015, p. 158.).

MATERIAL AND METHOD

According to art. 1175 Romanian Civil Code (Law no. 287/2009 regarding the Civil Code, published in Official Gazette of Romania, Part I, no. 511 dated 24th July 2009, with subsequent changes and modifications), "A contract of adhesion is a contract in which the essential stipulations were imposed or drawn up by one of the parties, on his behalf or upon his instructions, and the other party accepting them as they are.". The parties, i.e. stipulant and adherent, conclude a pre-written contract (What in the Common Law is known as the suggestive and wide-spread name of contract „*take-it or leave-it*". See also Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, in „Akron Law Review", 2008, p. 123 and the following, document available online at the address: https://www.uakron.edu/dotAsset/728194.pdf (consulted on 2/12/2015)); it is imposed by one of the parties, by the stipulant, while the other party, the adherent, has only the possibility to accept it as it is (not being able to negotiate it) or to refuse to conclude it (See, Carmen Tamara Ungureanu, *The Romanian Adherent, Party to the Transnational Adhesion Contract,* in „Studies of Business Law - Recent Developments and Perspectives", Contributions to the International Conference *Perspectives of Business Law in the Third Millennium*, November 2, 2012, Bucharest, Editions Peter Lang, Berlin, 2013, p. 262).

RESULTS AND CONSIDERATIONS

A considerable part of the electronic contracts are contracts of adhesion.

An electronic contract is a distance contract, concluded between absent parties, which, as in any other contract, involves the exchange of consents between contracting parties, with the intention to establish, modify or extinguish a specific legal relationship; specific for this kind of contract is the manifestation of consent in an electronic document (See, Carmen Tamara Ungureanu, *Electronic contract*, *op. cit*., p. 162).

Under the Romanian legislation (Law no. 365/2002 on electronic commerce (republished in the Official Gazette of Romania, Part I, no. 959 dated 29th November 2006) and Law no. 455/2001 on electronic signature (republished in the Official Gazette of Romania, Part I, no. 316 dated 30 April 2014); both laws transposed into Romanian

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legislation two European Union (hereinafter, EU) Directives: Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), published in the Official Journal of the European Union L 178, special Edition 13/vol. 29, p. 257; Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures, published in the Official Journal of the European Union L 013/12, Special Edition 13/vol. 28, p. 120), parties to an electronic contract are *the information society service provider* (hereinafter, *service provider*) and the *recipient of the service* (hereinafter, *service recipient*). Both parties may have both the quality of the individual/natural person, and legal person. When the contract of adhesion is electronic, the service provider has the quality of a stipulant and the service recipient has the quality of an adherent.

Using electronic means in order to conclude contracts make them to be, by nature, distance contracts, which, often, go beyond the borders of one State; in this case, there are transnational contracts.

Electronic contract of adhesion, which, usually, is named "Terms and Conditions", contains several clauses imposed by the service provider. In this paper it will be analyzed only the effectiveness of two of these clauses: the competent authority for dispute resolution clause and the applicable law clause.

Locating the electronic contract in Cyberspace, which has no borders and, theoretically, could not be subject to a certain state jurisdiction, does not have as an effect, the infringement of Private International Law provisions relating to competent authority for dispute resolution and applicable law. In order to establish them, connection points can be used, similar to those applicable to traditional contracts; nevertheless, in electronic contracts, the rule is that the service provider includes in the contract a clause on the competent authority and a clause on the applicable law (See also, Carmen Tamara Ungureanu, *Cloud computing contract: competent authority for disputes resolution,* in „Uniformization of the Law – Legal Effects and Social, Political, Administrative Implications", Hamangiu Publishing House, Bucharest, 2015, pp. 297-305).

Are these clauses valid and can they produce any effects? The answer varies depending on the quality of the parties and the place where the service provider is established.

One of the most common cases will be further analyzed, namely the electronic click-wrap contract. The click-wrap contract or click-through contract is that contract of adhesion for the conclusion of which the service recipient of an offer made online (via Internet) has just to tick a box (make a simple click on an icon), the "Yes" or "I accept" or "I agree" or other similar button (See, Carmen Tamara Ungureanu, *Electronic contract, op. cit.,* p. 165). Rules applicable to the click-wrap contract can be used in any electronic contract.

There are two scenarios taken into consideration: the first one, in which the electronic contract is concluded between a consumer and a professional and the second one, in which the electronic contract is concluded between professionals, in both cases having the Romanian adherent as a reference system.

1. The case in which the contract is concluded between a Romanian consumer (as a recipient of information society services) and a professional (information society service provider), established outside Romania.

The effectiveness of the competent authority for disputes resolution clause depends on compliance with consumer protection laws in the country of residence of the consumer (recipient of the service).

Two situations can be considered: the service provider has chosen an arbitration court for disputes resolution and the service provider has chosen a state court for disputes resolution.

In the first situation, if the service recipient is a Romanian consumer or another consumer with residence in European Union (hereinafter EU) and an arbitration court for disputes resolution was chosen, then, that clause is considered unfair. Under the Law no. 193/2000 on unfair clauses in contracts concluded between professionals and consumers (Republished in the Official Gazette of Romania, Part I, no. 543 dated 3rd August 2012, as amended), transposing into Romanian legislation the provisions of the European Directive no. 93/13/EEC on unfair terms in consumer contracts (Published in the Official Journal of European Union L 095 , 21/04/1993 P. 0029 – 0034), in the Annex, at the letter l), it is stipulated that are considered unfair the clauses which have the object or the effect of "excluding the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration".

If the Romanian consumer is in dispute with a professional established outside Romania and an arbitration clause is included in the adhesion contract, the Romanian consumer can seise the court of his residence. A Romanian court will be

declared competent by, firstly, investigating the validity of the arbitration clause inserted in the contract. According to art. 1113 par. (2) of the Romanian Code of Civil Procedure (Law no. 134/2010 regarding the Code of Civil Procedure, republished in the Official Gazette of Romania, Part I, no. 247 dated 10th April 2015), the Romanian court seised to rule on the validity of the arbitration clause, applies, on its choice, the following laws, all competent: the law chosen by the contractual parties, the law applicable to the dispute (*lex causae*), the law applicable to the contract containing the arbitration clause (*lex contractus*) or the Romanian law. Typically, the first three laws coincide. The New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, as the Geneva Convention of 1961 on International Commercial Arbitration (Romania joined the New York Convention of 1958 by Decree no. 186/1961 published in the Official Gazette no. 19 dated 24th July 1961; Romania has ratified the Geneva Convention of 1961 by Decree no. 281/1963 published in the Official Gazette no. 12 dated 25th June 1963), stipulate that the law according to which the validity of an arbitration clause is considered, is the law designated by the parties and, failing that, the law indicated by the Private International law rules.

If the Romanian court chooses to apply the Romanian law, the arbitration clause will be considered unfair, according to Law no. 193/2000 and, therefore, the Romanian court will declare itself competent, moving next to resolve the dispute on the merits.

For example, a service provider based in the USA, Dropbox, had in the contract of adhesion, version applicable until 1 May 2015, an arbitration clause for disputes resolution, regardless of the quality of its customers (consumers or professionals). In the version dated 1st May 2015, the arbitration was imposed only to US residents; for all others, the competent court was the state court of San Francisco, California. In the latest version of 4th November 2015, competent for dispute resolution are the federal or state courts of San Francisco, California, subject to the mandatory arbitration provisions (See https:// www.dropbox. com/privacy#terms, last consulted on 28th december 2015).

As regards *the applicable law*, if the adhesion contract contains a clause on applicable law and the service provider who included it in the contract is established in the EU, that law will be applied to solve the dispute, only if it is the law of the place where the service provider is established. If the chosen law is not the law of the place where the provider is established, it will be removed and the court will rule applying the law of service provider establishment. The solution is given by the provisions of Law no. 365/2002, which contains a Private International Law rule (Law no. 365/2002 contains a Private International Law rule, although in the article 1.4 of the European Directive on electronic commerce, which has been transposed by the Romanian Law, is stipulated that the Directive „does not establish additional rules on private international law or on the jurisdiction of Courts"), generally applicable (to consumers and professionals, as well). According to art. 3 of Law 365/2002, information society services are subject to: "a) exclusively, provisions of Romanian laws which are part of coordinated legislation (The coordinated legislation means „requirements laid down in Member States' legal systems applicable to information society service providers or information society services in respect of: a) the taking up of the activity of an information society service, such as requirements concerning qualifications, authorization or notification; b) the pursuit of the activity of an information society service, such as requirements concerning the behavior of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider" (article 1 point 9 of Law no. 365/2002)), when these services are offered by providers established in Romania; b) exclusively, provisions of national laws in question, which are part of coordinated legislation, when these services are offered by providers established in a EU Member State.".

This rule must be interpreted as meaning that Romanian law will be applied as an overriding mandatory provision to all electronic contracts in which the service provider, party to the contract, is established in Romania (not being necessary to search the conflict rule in order to indicate the applicable law (See, also, article 2.566 of Romanian Civil Code)). When the service provider is established in an EU Member State, other than Romania, the foreign law of the place where the service provider is established, will be applied directly, as an overriding mandatory provision.

According to art. 1, paragraph 4 of Law 365/2002, an information society service provider established in a EU Member State is a provider who has its permanent seat on the territory of a state and pursues effectively an economic activity using a fixed establishment for an indefinite period; the presence and use of the technical means and technologies required to provide the service do not, themselves, constitute an establishment of the

provider" (A similar provision exists in EU Law. For details see, Michael Bogdan, *Concise Introduction to EU Private International Law*, European Law Publishing, Groningen, 2012, pp. 160-161). If the service provider is not established in the EU, but directs its activities by any means in Romania, and the contract is concluded in the framework of such activities (The mere fact that a website is accessible in a particular State is not enough to believe that the provider's activity was directed to that State; it is necessary, in addition, the website to offer the possibility of the conclusion of distance contracts and that a contract has actually been concluded at distance, by whatever means; the language or currency which a website uses does not constitute a relevant factor in this regard. See explanatory memorandum to Rome I, paragraph 24), the validity of the applicable law clause will be assessed by the seised Romanian court, according to Rome I Regulation (Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), published in the Official Journal of the European Union L 177/7 of 4 July 2008) provisions. According to art. 6 para. (2) of the Regulation, the choice of law "may not, however, have the result of depriving the consumer of the protection accorded to him by provisions that cannot be derogated from by agreement, based on the law which, in the absence of choice, would have been applicable", i.e. the law of habitual residence of the consumer, respectively, the Romanian law.

The choice of law is therefore effective and takes effect only if the substantive provisions of the chosen foreign law are more favorable to the consumer. The seised court has the task of identifying the laws to be compared (i.e. the chosen law and the Romanian law) and then proceeding to their actual comparison. The comparison must be made on all the advantages and disadvantages, depending on the general interest of consumers (not the consumer involved in the dispute) (See, Jean-Christophe Pommier, *Principe d'autonomie et loi du contrat en droit international privé conventionnel,* Editions Economica, Paris, 1992, pp. 157 – 165). If the Romanian law is more favorable, the foreign law will be removed and the Romanian law will be applied instead.

In the *second situation*, when the chosen court is a *state court*, usually, the service provider choses the court situated on the territory of the State where it has its registered parent unit. For example, although Facebook has secondary offices in Europe, in several states, the chosen court for disputes resolution is exclusively the U.S. District Court for the Northern District of California or a state court located in San Mateo County (See, https://www.facebook.com/legal/terms, last consulted on 28th of December 2015). In 2012, a French court being seised by a Facebook user, with residence in France, with an action against the social network, considered itself competent. The French court has determined that, under the French law, a clause which derogates from the territorial jurisdiction is deemed unwritten, if it is not specified in a express manner in the contract (The judgment is available online at: http://www.juritel.com/Ldj_html-1599.html, last consulted on 10th December 2015).

In art. 1068 par. (2) Romanian Code of Civil Procedure is stipulated, similarly, that the choice of jurisdiction is without effect if it leads to depriving, abusively, one party of the protection assured by the Romanian courts. Depending on the situation, it could be the case of the Romanian consumer, who is deprived of the protection of the Romanian law, because the service provider imposed the competence of a foreign court for resolving disputes between the parties.

The choice is ineffective, as well, when the chosen court is foreign, and the dispute is within the exclusive jurisdiction of Romanian courts and vice versa. Romanian court has exclusive jurisdiction under art. 1.080 Romanian Code of Civil Procedure. As regards the contract of adhesion, Romanian courts have exclusive jurisdiction over consumer contracts, when consumers are domiciled or have habitual residence in Romania and the contracts are related to personal or family use of consumer and unrelated to professional or commercial purpose, if the supplier has received the order in Romania and an offer or an advertisement were made before the conclusion of the contract in Romania and the consumer has fulfilled the necessary documents for the conclusion of the contract (art. 1080 point 3 Romanian Code of Civil Procedure). If these conditions are met, the jurisdiction clause in favor of a foreign court, inserted into a contract of adhesion, in which the adherent is the consumer, is without any effect, i.e. is void, and the competent court is the Romanian court. In a click-wrap contract all these conditions are met; therefore, the jurisdiction clause is void.

Certain service providers take into account in the adhesion contract proposed to the service recipients the legislation on consumer protection in force in the states in which they direct their activities. For example, Google + in the adhesion contract, called "Terms and Conditions", says that „nothing in these terms or any additional terms

limits any consumers' legal rights which may not be waived by contract" (See, https://www.google.com/intl/en_uk/policies/terms/ regional.html, last consulted on 27th december 2015).

2. The case in which the electronic contract is concluded between professionals and the service provider is established outside Romania.

When the service recipient is a professional, he/she cannot benefit from the consumer protective provisions. Being professional is deemed to have legal and economic power and therefore he/she does not need protection.

When the professional is an adherent in the adhesion contract, imposed by the professional service provider, it is likely to be in an unbalanced position before the service provider; the service recipient has not the power to negotiate contractual terms. Inequality between the parties is manifested in terms of their economic, legal or informational power.

The court designated by the service provider may be a state court or an arbitration court. Whatever the nature of the court is (arbitration or state court), the professional service recipient may challenge its competence, when the jurisdiction clause is unfair. The unfairness of the clause will be examined by the seised court, usually, by applying the law of the contract.

If the professional with seat in Romania seises the Romanian court and he/she claims the unfairness of the clause designating the competent court, the court will rule using the provisions of art. 1203 Romanian Civil Code. According to its provisions, the clauses conferring jurisdiction are qualified by the law as unusual clauses, with a special regime: "arbitration clauses or clauses derogating from the jurisdiction of the courts have no effect, unless they are expressly accepted, in writing, by the other party ". To be validly concluded, the clauses relating to the choice of competent authority for dispute resolution must be expressly accepted by the adherent, i.e. the service recipient; acceptance through a click-wrap procedure is not sufficient. Accordingly, if the clause is not expressly accepted, the court will declare it unwritten or void, depending on its own interpretation and will remove it from the adhesion contract. Then, the court declares itself competent and will settle the dispute on the merits.

CONCLUSIONS

The effectiveness of the clauses on competent jurisdiction and applicable law in transnational electronic contract of adhesion depends on the quality of the contracting parties and on the place where the service provider is established. When one of the contracting parties (the adherent) is a consumer such clauses are likely to be considered unfair and, therefore, not to be able to produce any effect; they will be replaced by the provisions designated by Private International Law rules of the forum. This possibility is based on consumer protection legislation.

If the contracting parties are professionals, regardless the case in which one of them acts as adherent and is therefore in a position of inferiority to the stipulant, the contract clauses are, usually, effective. The possibility to rely on and obtain a qualification of a jurisdiction clause or applicable law clause as unfair is relatively low and would have its basis (in the Romanian law) on the art. 1203 Civil Code.

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