

## **THE CONSUMER'S RIGHT TO CANCEL THE DISTANCE CONTRACT IN LIGHT OF THE EUROPEAN CONSUMER RIGHTS DIRECTIVES**

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### **1. Introduction**

There has been massive prevalence of products and services being sold remotely. In such sale contracts, consumers are in the vulnerable side: they do not have enough chance to inspect and examine products/services subject of the contract, hence they finalize contracts based on the effect of advertising, and wherein specifications of products/services are exaggerated beyond what is real. Therefore, in many regulations, consumers are given the right to cancel such contracts. This paper defines the limits and justifications of such right to rescind. It also addresses legal nature and legal base of rescinding, investigates the positive impacts on consumers resulted from practicing the option of rescinding, In addition to this, the effects resulting from exercising the right to cancel the contract on both the consumer and the supplier. This paper also will review terms stipulated by European directive on consumer protection and laws that are made according to such directive. It searches into the extent to which legislatures have the right to make such laws in other countries. There is no doubt that the international nature of remotely concluded contracts requires that consumer protection be extended to countries all over the world in order to reduce legal obstacles that make it difficult to put into effect legal provisions that give consumers the right to rescind remotely concluded contracts.

### **2. The concept of canceling distance contracts**

#### **2.1 Definition of contract cancellation**

There is no doubt that the binding force of a contract necessarily renders that no party to such contract can solely cancel such a contract on its own. However, products and goods being increasingly sold remotely created the need to protect consumers by giving them the right to rescind contracts that they concluded remotely. This is due to the circumstances surrounding the process of concluding these contracts, in which consumers' will is different from the one in contracts where both parties

are in presence. In traditional contracts, consumers are able to inspect and examine the product/service as it is in reality; hence, consumers are not under the effect of advertising and publicity, which would undoubtedly affect the will of consumers.

Some generally define the rescinding of contracts to be an expression of a different will with which the beholder of action rescinds its sole expression of will, withdraws it, and renders it to be null and void, and therefore deprives it from any consequent effect resulting in the past or in the future<sup>1</sup>.

## **2.2 The emergence withdrawing from the remote contract**

Contracting remotely is certainly one of the modern means of concluding contracts. Due to the need of consumers in this type of contracting to a special legal protection, which must be greater than the one given to consumers in traditional contracting, due to the considerations referred to above, the ability to rescind is therefore stipulated by law. The European guideline No. 7/97 was issued May 20, 1997 with regards to protection of consumers, giving purchasers this guarantee in remotely concluded contracts. Then the European guideline on consumers' rights No. 83/2011 was issued October 25, 2011, also giving consumers such guarantee; although these directives differ in the period of time that is given for rescinding.

The French legislation was one of the first legislations to define clear specifications of giving consumers such guarantee; hence the Law No. 21/88 issued January 6, 1988<sup>2</sup>.

Putting the European guideline No. 7/97 into effect, the French consumer law provides for this guarantee in Article 741-2011 added to the decree No. 741-2001 issued August 23, 2001. It reads, “Consumers shall have a full 7 day-period to practice the right to rescind with no commitment to provide reasons or pay penalties save and except return expenses.”

## **2.3 Forms of consumers rescinding contracts**

Rescinding a remotely concluded contract by canceling the contract by the sole will of the consumer may take the form of returning the product/service to the seller. This is the most common form. However, it is perceived that rescinding may take the form of substituting a product in place of another. Rescinding may lastly take the form of the consumer asking to substitute a product, then asking to rescind the contract and return the product. In this latter form, consumer practices indirect rescinding: the consumer asks to substitute the product with another, and finds after substitution that the substituted product in itself cannot be put into use, then the consumer can return the product to the seller and get a refund. All of this is supposed to take place during the period provided for by the agreement or by the law. In all of the above

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<sup>1</sup> CORNU: «Rapport sur la protection de consommateur et l'exécution de contrat au droit français» Intravaux de Henri- Capitant, Tom24 -1973, Dalloz 1975, p726.

<sup>2</sup> Law No. 21/88 issued January 6, 1988 on remote sales in general, and TV sale in particular.

forms, the seller may not decline the purchaser's request unless the period allowed for rescinding expires or otherwise the product is damaged when in the possession of or because of the purchaser.

## **2.4 The legal nature of the idea of contract cancellation**

With respect to the legal nature of the guarantee provided to consumers for rescinding electronic contracts after being executed or implemented, the great majority of scholars see that rescinding is an advantage provided by law to consumers in remotely concluded contracts. With such advantage, consumers are allowed to rescind contracts. Such rescinding is rooted in law and gives the power to maintain the sole will for consumers as an exception that is based on the binding force of contracts, entailing that a party to a contract is independent with its sole will only in the cases provided by laws.

## **3. Legal base of consumers' right to cancellation**

Rescinding remotely concluded contracts by consumers is established by law provisions that allow such right to consumers and is justified by the circumstances surrounding this type of contracts; circumstances that set them apart from other contracts, including advertising and publicity that affect the will of consumers to rashly execute contracts. This is explained in cases where sellers pressure consumers and leave them no space to take careful informed decisions. Therefore, consumers are economically vulnerable and have less experience in legal matters than the other parties to contracts.

The source of such guarantee or advantage may be in the agreement or in law provisions. On these bases, there can be two types of rescinding rights; each is differentiated from the other, namely: rescinding by agreement and rescinding by law. In the rescinding by agreement, the right to rescind is either established for both parties, or established for one of them without approval of the other.

In rescinding by agreement, the agreement is the base on which rescinding is practiced. In rescinding by law, rescinding is practiced based on law provisions.

## **4. Committing to informing consumers of the right to cancellation**

For providing efficient protection, consumers must be informed of their right to rescind contracts. This requires that sellers be obliged to inform consumers of such right, with such obligation valid in pre-contract and post-contract execution.

### **4.1 Obligation to inform consumers pre-contract**

Few laws made it mandatory on sellers to inform consumers of their right to rescind contracts. Such obligation commences in the stage before contracting, thereby

consumers are guaranteed that rescinding policy is in place by the seller. Fulfillment of such obligation is proven by publicizing in the same advertisement of the product on the website on which the product/service is advertised.

This obligation appeared as a result of the European guideline No. 7/97 issued by the European Parliament May 20, 1997 and enforced by member states. In France, Article 28/121 of Order No. 741/2001 issued August 23, 2001 provides that sellers must inform consumers on their right to rescind contracts. In addition, Article 4 of the French contract form of e-commerce provides that consumers be informed on the guarantees and after-sale services, including the right to rescind contracts<sup>3</sup>.

#### **4.2 Obligation to inform consumers post-contract**

This obligation is established in the post-contract. In France, enforcing Article 5 of the European guideline No. 7/97 issued in 1997, Article 19/121 of the order No. 741/2001, makes it mandatory on sellers to give consumers, via specific means, confirmations on information provided for in Article 18/121, and makes it mandatory on sellers to give consumers information on terms and conditions and ways to practice the right to rescind.

#### **4.3 Breaching the obligation of sellers to inform consumers in the post-contract**

Legislations establishing the right to rescind to consumers and obliging sellers to inform consumers on such right provides that if sellers fail to abide by this obligation, the period, during which consumers may practice their right to rescind, be extended.

The European directive on consumer protection provides for such penalty; this includes the guideline No. 7/97 issued in 1997. Enforcing this penalty, the French legislature provides for extending the period, during which the consumer practices the right to rescind, from 7 (seven) days to 3 (three) months. Similarly, the Belgian legislature provides for similar term in Article 79 of consumer protection law<sup>4</sup>.

The author of this study thinks that such penalty is not sufficient. It is better to fine sellers who are in breach rather than to extend the period, during which the consumer practices the right to rescind.

### **5. Scope of consumers' right to cancellation**

Laws when originally adopted the right to rescind remotely concluded contracts established that such right must cover all remotely concluded contracts between sellers and consumers. However, there is a category of contracts where the right of consumer to rescind is restricted, wherein there has to be an agreement between the seller and the consumer that provides for such right. Meanwhile, such right is not valid under any circumstances in another category of contracts.

<sup>3</sup> JCP, Semaine Juridique Entreprise et Affaires, N0 41,8 Octobre 1998, p.1580.

<sup>4</sup> VERBISET(TH): Commerce électronique. Le nouveau cadre juridique. èd LARCIER, 2004,p.116.

### **5.1 Contracts wherein the right to cancellation is applicable only by an agreement between seller and consumer**

According to the European guideline No. 7/97 and subsequent laws enforcing it, including the French consumer law issued under decree No. 741/2001 on August 23, 2001, Article 2/29/828 thereof provides that “The right to rescind may be practiced ONLY if parties agree in a separate arrangement in:

1. Service contracts that starts to be executed in agreement with the consumer prior the period to practice the right to rescind;
2. Product/service supply contracts which prices are defined by the market (price fluctuations);
3. Supply contracts of products that are manufactured based on the consumer specifications (products that consumers requested to be manufactured);
4. Contracts of products that cannot be returned to the seller due to its nature or perishability;
5. Supply contracts of newspapers, journals, and magazines; and
6. Authorized gambling or lottery contracts.

Products subject of these contracts mostly have specifications that restrict practicing the right to rescind; some are perishable, others are manufactured based on consumers’ request conditional to specifications that cannot meet the request of another consumer, therefore putting the seller in a critical situation to find another consumer that request the same specifications.

With respect to supply contracts of newspapers, journals, and magazines, as well as gambling and lottery, such type of product has temporary nature, therefore, allowing consumers the right to rescind renders these products expired. Magazines can only benefit consumers very timely and loses its value when time passes.

### **5.2 Contracts excluded from using the right to cancellation**

Some laws provides for excluding few contracts from using the right to rescind, or for inapplicability of the period to rescind. In the French law, such exclusions are provided for in many laws. Article 4-20-121 of the French consumer law, added by order No. 741/2001 issued August 23, 2001, provides for exclusions<sup>5</sup> on the right to rescind contract which subject may be:

- Supply of common consumer goods distributed to residences and workplaces, which contracts are concluded between consumers and distributors to supply products regularly and periodically; and
- Supply of accommodation, transportation, catering, and entertainment services in which provision of service is restricted by limited periodical times.

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<sup>5</sup> It is noticeable that this exclusion is not relevant to remotely concluded contracts. However, due to that such contracts concluded in this way (at the doorstep) are similar to contracts concluded remotely in terms of that there is no sufficient opportunity for consumers to take the decision to contract. The reason behind such exclusion is that consumers are regularly and daily provided with products, therefore have the experience in such contracts, thus the consumers’ right to rescind contracts is unjustifiable.

According to the last paragraph of Article 9 of the French contract form, the period of supply of audio and video recordings, computer software, which the consumer unpackages, newspapers, journals, and magazines<sup>6</sup>, shall not apply.

## **6. Conditions of consumers' right to cancellation**

By examining law provisions in many regulations on consumers' right to rescind contracts, there are two conditions to practice such right by consumers:

### **6.1 Condition 1: The cancellation during the period allowed**

In order for the right to rescind to result in its legal effect, consumers have to practice such right during the period allowed by law. The right to rescind in e-contracts is of temporary nature, therefore must be practiced by consumers during the period specified thereto in order to maintain stability of transactions. It is not right to leave the seller waiting for a longer time suffering uncertainty from what will happen to the contract, and therefore its legal status is compromised for unlimited period.

Such period differs as per different laws. According to the European guideline in 2011 on protection of consumer rights, the period, during which consumers may practice their right to rescind, is 14 days, commencing as of the date of contract in service contracts, and commencing as of the date of product receipt by consumer in product contracts.

Laws differ in defining such period considering, as referred above, that it is perceived to increase such period in case of the seller breach to inform consumers to their right to rescind contracts<sup>7</sup>.

### **6.2 Condition 2: the contract is not excluded from the right to cancellation**

Practicing the right to rescind contracts by consumers is conditional to the contract included in the scope of consumer-rescindable contracts.

However, there is a question about how permissible to consumers to use the right to rescind if the product subject of contract is already used. The reason behind this question is that some sellers impose very strict conditions to practice the right to rescind, including that the product is unused or unpackage. In fact, the author of the study thinks that this is an unfair condition in contracts because it results in unfair result, which is consumers are not able to try the product.

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<sup>6</sup> JCP – La Semaine Juridique Entreprises et Affaires, No 41,8 Octobre.1998, p.1581. It is worth noting that contracts referred to in this law have already referred to that seller and consumer have to agree to the right to rescind, whereas in this provision, they are excluded from the right to rescind. To reconcile both provisions, we think that the right to rescind may be applicable in such contracts ONLY with a special agreement between seller and consumer.

<sup>7</sup> MOREND (D): le Droit français et la commerce électronique, JCP – Chaires de Droit de L'entrepris, No 4.2002, p.13

## **7. Effects of practicing the right to cancellation of contract**

Rescinding contracts due to rescinding consumers lead to reinstatement of parties, which entails obligations to be borne by the consumer and the seller. Many problems arise from these two effects.

### **7.1 Effects of rescinding contracts pertaining to professional sellers**

#### **7.1.1 Sellers' obligation to refund to consumers**

The French consumer law provides that the seller is to refund to the consumer the amounts paid against obtaining the product in no later than 30 days as of the date the consumer informs the seller of rescinding the contract. If the seller declines refunding such amounts, the seller shall be imprisoned for 6 months and shall be due to pay a fine of €75,000.

The European guideline No. 7/97 provides for the same penalty as it deems that the seller, who declines refunds for the amount paid by the consumer against the returned product, as the consumer acts on its right to rescind, a violation that is investigated by authorities concerned with competition, consumers, and defraud.

#### **7.1.2 Termination of contracts rescinded by consumers**

According to Article 4/6 of the European guideline No. 7/97, if the price of the product/service is fully or partially paid by credit by the supplier or by a third party on the basis of an agreement made between the latter and the supplier, practicing the right of rescinding is as well a termination of the credit contract by law, without paying damages or expenses, except those related to credit application.

### **7.2 Effects of rescinding contracts pertaining to consumers**

#### **7.2.1 Return of product to the (professional) seller**

If the consumer rescinds the contract, the product or good is to be returned to the seller, or the service is to be waived without any fines or expenses, except those related to returning the product. As referred above, laws that give consumers the right to rescind provide for excluding the right to rescind on specific types of sales and sales of audio and video recordings. Such exclusion is to avoid abusing the right to rescind by consumers, who can already benefit from or use such products.

#### **7.2.2 Consumers' obligation to pay for returning products**

For practicing the right to rescind, consumers bear expenses of returning products to sellers, a matter that is expected by consumers given the particularity of remote contracting. Therefore, in this regard, the European guideline No. 7/97 in Article L.6.2 provides that expenses that may be borne by a party, in the capacity of the consumer, due to rescinding the contract, are only the direct expenses related to returning the product to the professional seller.

## 8. Conclusion

This study addresses consumers' right to rescind remotely concluded contracts in light of the European directive related to consumers' rights and in light of laws of specific countries that are issued in relation thereof. It is clear that the right to rescind remotely concluded contracts is a necessary protection to consumers in the stage where the contract is in effect because it protects consumers from risks incurred as the consumer is not familiar with the product subject of contract, or the consumer has no sufficient knowledge of the product specifications. Therefore, this right is given to fulfill the element of mutual consent, which is essential in contracts.

This study reaches the following conclusions:

- The right to rescind electronic contracts is associated with a short specified period, during which the consumer may express rescinding the contract, otherwise, the consumer become bound by the contract.
- The right to rescind is a right given to the vulnerable party to a remotely concluded contract, which party faces the challenge to familiarize itself with all specifications of the product subject of contract, as well as has no sufficient time to take well-informed decision in this regard.
- The right to rescind primarily aims at protecting satisfaction of the party by giving time to think and remedy the rash in executing the contract.
- The right to rescind is an advantage given to buyers (consumers) by which consumers are encouraged to buy and contract remotely. It is a guarantee to earn the trust of consumers to avoid hesitation in conducting such contracts when consumers contemplate the sufficiency of the product/service and its ability to fulfill its needs.

Given these conclusions, this study hopes to reach an international accord that bind over most countries, thereby guaranteeing the right to rescind to be an obligation binding parties to contracts, especially when remotely concluded contracts are deemed to have an international nature.