

ASPECTS REGARDING THE COMPETITIVE OFFER CLAUSE IN INTERNATIONAL COMMERCIAL CONTRACTS

Marlena BOANCĂ IVAN*

ABSTRACT: *The competitive offer clause allows one contracting party (usually the buyer) to get from the other contracting party (usually the seller) conditions that are more favourable than those from the current contract, namely those offered by a third party.*

The promissory party has the possibility to accept the adaptation of the contract or to refuse it. If the seller accepts to align to the competition tariff, the contract continues under the new conditions. The acceptance of the promissory party can intervene also within new negotiations between parties, a situation when the contract adaptation will be made not necessarily under the terms of the competitive offer, but anyway under more advantageous conditions for the beneficiary.

Otherwise, the parties most frequently stipulate for the suspension of the contract at a given time, allowing the establishment of a contractual relationship between the clause beneficiary and the more competitive party. If the promissory party refuses expressly or by silence the adaptation of the contract, the parties stipulate for the termination of the contract as a solution, each contracting party regaining his freedom to conclude new contracts (including with the third party that makes the most favourable offer), without being encumbered by the obligations in the original contract.

KEY WORDS: *adaptation of the contract clause, precautionary clause against risks that are not generated by foreign exchange fluctuations, more favourable offer, contractual balance.*

CODUL JEL: K12, K22, K33

1. DEFINITION. ECONOMIC ROLE

The competitive offer clause is specific to international commercial contracts and allows one contracting party (usually the buyer) to get from the other contracting party (usually the seller) conditions that are more favourable than those from the current contract, namely those offered by a third party.¹ The contracting party has the option to align to the more favourable offer or to allow the other party in the contract to conclude

*Phd. Candidate, Judge – Court of Appeal, Tg. Mureş.

¹ J.-M. Jacquet, P. Delebeque, S. Corneloup, *Droit du commerce international*, Dalloz, Paris, 2010, p. 259.

the agreement with the third party, a period when the contract between the initial parties is suspended or, less frequently, terminated.²

An example for such a clause may be the following: If during the execution of a contract the buyer notifies the seller about receiving a competitive offer from a known and reliable supplier, made at a price below the contracted price with identical contract conditions (quality, quantity, shipping terms), the seller shall present the same conditions as the competitive offer within 10 days of the notification by the buyer.

In the absence of the agreement as mentioned, the buyer will be relieved of the obligation to buy from the seller and the current contract shall have no effects after the 10-day notification of the seller.³

Also called the English clause, it follows a purpose similar to that of the clause of the most-favoured customer: to be performed so as the price stipulated in the contract is aligned to that agreed by the third party. Unlike the most-favoured customer clause, it is not about the price established between a supplier and another customer, but about the price proposed to the customer by a third supplier. In other words, through this clause the supplier undertakes to align to competition. The advantage is that the supplier is informed about the pricing policy of its competitors, still without being forced to align to competition prices if they have become too competitive.⁴

A third party can make such an offer as a result of changes intervened in the local or even in the global economy.⁵ If competitive offers are possible, the beneficiary is the buyer and he is entirely interested in stipulating such a clause in the contract in order to benefit from subsequent changes of the economic circumstances.⁶

The competitive offer clause represents for the supplier a security of his good faith and concern to remain competitive at all times. For the buyer, as an exclusive concessionaire for instance, such a clause represents a means of pressure and stimulation of the supplier, as well as the freedom to source elsewhere if the supplier's performance is degrading. The clause in question is a counterpart for the exclusivity obligation assumed by the concessionaire to his supplier. For the contractual obligation remain stable in the long run under the conditions of a very competitive market with numerous potential suppliers, this clause allows the flexibility necessary in a contract: a re-consideration of the a contractual aspect, without harming the overall commercial relations between the parties.

The aim of the parties, when they introduce this clause in the contract, consists in adapting the contract to its competitive environment. Indeed, if changes to the seller offer are made aligned to the competition offer, the later loses any opportunity to disrupt the stability of the contractual relationship.⁷

The clause of the competitive offer, frequently used in contracts of sale can be used to the buyer's advantage but also to the seller's advantage. In the latter case the seller has the

² S. Hotte, *La rupture du contrat international. Contribution à l'étude du droit transnational des contrats*, LGDJ, Paris, 2007, p. 170.

³ M. Fontaine, F. De Ly, *Drafting international contracts. An analysis of contract clauses*, Edit. Koninklijke Brill NV, Leiden, 2009, p. 494.

⁴ W. Dross, *Dictionnaire des clauses ordinaires et extraordinaires des contrats de droit privé interne*, Litec, Paris, 2011, p. 34.

⁵ D. Mazilu, *Dreptul comerțului internațional, Partea specială*, Edit. Lumina Lex, București, 2007, p. 93.

⁶ An example in this respect is represented by lowering prices for raw materials or finished products.

⁷ S. Hotte, op. cit., p. 171.

right to require the buyer to pay the price the seller would actually get for the same goods from other customers, for example, if after the implementation of the contract, the difference between the contract price (selling price) and the net export price will be more than 5% (or some other percentage).⁸

2. THE CONCEPT OF THE MORE FAVOURABLE OFFER

To see if an offer is more favourable, comparison must be made. If the element that makes the difference is the price, and the other elements are the same, the comparison is made easier. But often, the situation is complex, either when the price is the same, but the other elements are different (payment methods, quality, quantity, regularity, term), or when all the elements, including the price, are different. In the latter case, one should consider all the clauses of the contract, because only by comparing them he can see if the offer is more favourable than the current contract.

These difficulties are complicated by the possibility of having an offer from a non-reliable firm, the offer may be complacency or refer to a shorter duration and the price may be spot, as it is the usual practice for small quantities and for short duration.⁹

It is also important to eliminate the risk represented by the competing offer coming from a participant in the international trade who is in a friendly relationship with the offer addressee and who conspires with the latter¹⁰ for a non-genuine review of the contract in question.

These different requirements are difficult to put into written clauses. Some examples of these terms could be the following:

- "a competitive offer originating from a known and reliable supplier at a price lower than the contract price, all other terms (quantity, quality and delivery terms) being the same;"

- "an offer from a manufacturer or a company selling ... at the same quality at least, under similar terms and conditions and at a price lower than that set out in the current contract with the buyer and in an amount not less than the maximum that the seller has undertaken to sell in the next contract year; "

- "... a price (lower) ... provided (buyer) for all his needs by a manufacturer located in the area of the European Economic Community, also known and reliable, all other conditions relating to quality, payment, delivery terms being the same... ;"

- "... if the buyer receives from a known ... producer in the countries ... a bona fide written offer to provide the buyer with the products he needs for the next year at a price less than the ... respectively the price stated in the contract being enforced and guarantees the delivery of annual quantities as set out in the clause relating to the quantity and quality equivalent to that specified in the contract ...;"

- "an offer of good-faith from another source, independent of the buyer for the supply of goods of equal quality under comparable conditions ... ";

- "in case of repeated offers made to the buyer's competitors or customers on the European market for products of comparable quality, substantial quantities, regularly delivered ...".¹¹

⁸D. Florescu, L. N. Pîrvu, *Contractele de comerț internațional*, Edit. Universul Juridic, București, 2009, p. 129.

⁹T. R. Popescu, *Dreptul comerțului internațional*, Edit. Didactică și Pedagogică, București, 1983, p. 186.

¹⁰M. Fontaine, F. De Ly, op. cit., p. 495.

¹¹Ibidem, p. 496.

3. THE MORE FAVOURABLE OFFER EVIDENCE

The evidence issue of the competitive offer is a delicate one. The buyer must clearly convince the seller about the reality of the existence of the competitive offer and give the possibility to the seller to perform a comparative analysis of both offers.

The presented mechanism naturally involves the disclosure of the more favourable proposal by the beneficiary of the clause, by the very fact of notifying the other contracting party in the ongoing operation. Such a notification contravenes to the confidential nature of the relationship between traders and may harm the interests of the competing offerer.¹²

As a remedy it is expected that a trustworthy person designated by the parties or a neutral expert body to proceed with full discretion to the comparison of the more favourable proposal and the ongoing contract.¹³ The latter could be a technical expert, an arbitrator.

In practice, some of the clauses discussed in the literature were silent on the competitive offer evidence. The clause is valid even if the contracting parties do not agree on the competitive offer evidence. However, insertion of an express provision on the issue of competitive offer evidence is preferable.

In practice, sometimes, contractual provisions regarding the aspect of the competitive offer evidence are not very explicit. They generally require the buyer to provide sufficient evidence, usually in written form with regard to the offer coming from the third party.¹⁴

4. EFFECTS OF COMPETITIVE OFFER CLAUSE ON THE CONTRACT

The effects of the competitive offer clause on long-term contract will depend on the parties' will.

The promissory party has the opportunity to accept or refuse the contract adjustment.¹⁵

If the seller agrees to align to the competition tariff, the contract will continue under the new conditions.¹⁶ Acceptance by the promissory party acts as a suspension condition for the adaptation of the contract according to the will of the third party.

The promissory party acceptance can occur in the new negotiations between the parties, in which case the contract adjustment will not necessarily be within the terms of the competitive offer, but anyway under the more advantageous conditions for the beneficiary.¹⁷

If not, the parties provide most often the suspension of their contract performance for a certain period of time, allowing the establishment of a contractual relationship between the clause beneficiary and the better competitor. In practical terms the competitive offer

¹²O. Căpățină, B. Ștefănescu, *Tratat de drept al comerțului internațional*, vol. II, Edit. Academiei, București, 1987, p. 38.

¹³I. Rucăreanu, V. Tănăsescu, V. Babiuc, "Contractele comerciale internaționale de lungă durată. Clauze de adaptare a contractelor și extindere a relațiilor dintre părți", in *Studii și Cercetări Juridice*, 1980, no. 3, p. 248.

¹⁴M. Fontaine, F. De Ly, op. cit., p. 497.

¹⁵T. R. Popescu, op. cit., p. 190.

¹⁶J.-M. Jacquet, P. Delebeque, S. Corneloup, op. cit., p. 259.

¹⁷D.-A. Sitaru, *Dreptul comerțului internațional, Partea specială*, Edit. Universul Juridic, București, 2008, p. 483.

has never stipulated for a suspension for a period exceeding one year. By hypothesis, the minimum period should be that of a delivery term, for instance when the goods supply is carried out quarterly, the contract may be suspended during this period. For example, "the buyer will be able to suspend the contract during a maximum period of 90 days, and at the end of this suspension period the contract fully resumes its effects" or "this contract will be suspended for the established period of 12 months."¹⁸

If the promissory party refuses expressly or by silence the adaptation of the contract, the parties stipulate the contract termination solution, each contracting party regaining his freedom to conclude new contracts (including with the third party with the most favourable offer) without being encumbered by obligations under the original contract.

5. PROCEDURAL ASPECTS

From perspective of the competitive offer clause efficiency, a series of procedural issues must be fulfilled. Thus, the parties must be notified with the compliance of the requirements related to the form and time limits.¹⁹ The buyer must notify the seller in connection with the competitive offer and the seller must notify if he decides to adapt the contract in the competitive offer spirit or not. In case the seller decides not to adapt the contract, the buyer may notify the seller to the intention to suspend or terminate the contract.²⁰

It is generally recommended that notification be made in compliance with the written form and have a registration number. However, the trend is the practice of notifying by phone, fax or e-mail.

Regarding the time limits, the following considerations must be imposed: the buyer should notify the seller when he was offered the competitive offer and his intention is to invoke the clause. Some contracts provide that notification may be made only to a certain time of year. Restrictive conditions regarding time limits shall be provided for the seller response and for his notification as regards the final decision of the buyer, since the future contractual relations of the parties depend on them. It is desirable that these time limits are relatively short, in particular, if the contract has as subject the goods that are exposed to frequent price fluctuations.²¹

The following two examples illustrate how the notification procedure can be implemented:

- "... the buyer must satisfactorily demonstrate the evidence of the submitted offer before 1st February each year.

- within 40 days of receiving notification, the seller must notify the buyer whether to reduce or not the product price for the contract of the following year in accordance with the terms of the competitive offer. Assuming the seller refuses to make such a price reduction within the 40 days, the buyer is entitled to give notice of withdrawal within 20

¹⁸S. Hottte, op. cit., p. 171.

¹⁹O. Căpăţină, B. Ştefănescu, op. cit., p. 38. S. Deleanu, *Contractul de comerţ internaţional*, Edit. Lumina Lex, Bucureşti, 1996, p. 102.

²⁰M. Fontaine, F. De Ly, op. cit., p. 500.

²¹In the English law, the rule of time is essential (time is of the essence) and imposes the establishment of strict time limits. See:

J. Beatson, *Law of contract*, Oxford University Press, 1998, p. 476.

days of the expiry of the 40 days mentioned above in order to buy under contract the respective products from the manufacturer or trader who made the competitive offer in good faith.

- the buyer must provide written notice to the seller, proving the competitive offer, and the seller must notify the buyer, no matter it will reduce the price or not, within 30 days of his notification by the buyer.

If the seller reduces the price, this becomes effective within 30 days after the notification, and this contract or any extension and subsequent renewal thereof shall be valid and further its effects. If the seller does not lower the price, the buyer can suspend the deliveries for the contract for that year, 30 days after notification, respectively. ²²

6. COMPARISON WITH THE RELATED JURIDICAL INSTITUTIONS

Both the competitive offer clause and that of benchmarking are clauses of adapting international commercial contracts. The particularity of the benchmarking clause is that it involves the adjustment of the contract not *in concreto*, related to an offer made by the supplier to a third party client himself or by a competitor to the buyer, but *in abstracto*, according to global market price agreed for the performance provided. Originally, benchmarking was a management method that allowed by comparative analysis the adoption of the most efficient production process. Imported into the contractual technique, it is providing the contracting party the guaranty of having an efficient contract in turn, namely one whose execution will continue to operate in competitive environment.

Price adjustment operates by reference to all offers on the market. Clause effectiveness depends on the possibility of obtaining an accurate and reliable basis for the comparison of similar contracts, which requires a precise technique - adopting relevant comparison criteria, the intervention of a third party, bench-marker, whose appointment is operated by the parties. The difficulty and the costs of such a procedure confer the clause rather a deterrent than effective role, encouraging the parties to renegotiate the agreement in order to avoid the enforcement of the benchmarking clause.²³

The competitive offer clause is close to the most favoured customer clause by which a contractor gets from his partner more favourable conditions, the latter being offered to third parties that are in business relations with him. The most favoured customer clause is similar to the competitive clause in that it aligns the price and general conditions for the same goods or services. However, while the most favoured customer clause obliges a participant in the international commercial activity to equally treat his contract partners, the competitive offer clause grants a contractor the possibility of overriding his contractor's conditions for the more advantageous ones offered by a third party, for the same goods or services in their contract.²⁴

²²M. Fontaine, F. De Ly, op. cit., p. 500.

²³W. Dross, op. cit., p. 34.

²⁴J. Mestre, J.-C. Roda, *Les principales clauses des contrats d'affaires*, LGDJ, Paris, 2011, p. 100.

CONCLUSIONS

In international commercial contracts, from the perspective of ensuring continuity of commercial relations in the medium and long term, the parties resort to negotiation and stipulation of clauses allowing the adaptation and renegotiation of the contract starting from the premise of a potential change of the contractual equilibrium and of the circumstances considered by the parties when the contract was concluded. Among the contract adaptation clauses, the competitive offer clause has a special role, additionally representing a cover against risks that are not generated by foreign exchange fluctuations. Its importance lies in that it allows the adaptation of the contract to its competitive environment, the disruption of the contract equilibrium being prevented by aligning the contractor's offer to the competition.

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