



UNIVERSITÀ DEGLI STUDI DI NAPOLI FEDERICO II  
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# **INNOVAZIONE E DIRITTO**

## **The contract in the civil law**

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The Romanian Civil proceedings code of 1865, as other European civil proceedings codes, this task returned to judicial doctrines. this is also due to the fact that the authors of the civil proceedings code have adopted the definition from IUSTINIAN's Institutes: „obligation est juris vinculum quo necessitate adstringimur , alicuius solvendae rei , secundum nostrae civitatis jura” .

The doctrine defined the liability mainly as the judicial report based on which the creditor is entitled to claim that the debtor performs the correlative performance of giving, doing, or not doing something, under the obligation to the state.

The most important origin of liabilities, legal reports is the contract or agreement defined by art.942 of the Civil Proceedings Code as the willingful agreement between two or more persons to set up or annul the legal relations between them.

Thus, the contract is a judicial document, a manifestation of will with the intention to produce legal effects, a voluntary agreement between two or more parties, with the intention of establishing a legal relation between them.

Being one of the two civil law basic institutions, along with the property, the contract suffered the changes determined by the historic evolution of the company, from the conception of full autonomy, of the parties' absolute freedom of will specific for the liberal period until the period when a contract crisis started being discussed determined by the practice of standard agreements, of adhesion and by the state's increasingly strong intervention in the contracts field by means of imperative norms. The contract liberty, the possibility that the subjects conclude contracts between themselves, of establishing their contents, of amending or annul them finds its legal grounds in the Civil Proceedings Code orders but it was considered indirectly acknowledged and guaranteed by constitutional means.

The terminology of “agreement/contract” is a generic notion with a vast meaning including a large variety of special contracts. Nevertheless the number of contracts is not limited and they can be concluded by parties with no other restriction than that of not violating public order good behavior (art.5 of the Civil Code). Along with the contract expressly regulated

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by the law, the current civil law also acknowledges the category of contracts not nominated that do not have a legal regulation but are valid and produce mandatory effects complying with art. 969 of the Civil Code.

#### CONTRACTS CLASSIFICATION

The vast variety of contracts that may be at the origin of liability legal reports determines their useful classification in order to understand what is common and what is specific to each category of contracts and the determination of the applicable legal system.

Thus, depending on the formation modality, they can be consensual when concluded by the mere agreement of the parties, solemn if their conclusion and validity requires the compliance with a certain form provided by the law and real contracts the form of which requires besides the parties' agreement also the material transmission of the object of the performance of one of the parties.

By their content, the contracts are classified into unilateral contracts giving birth to obligations only for one party (art.944 civil code) and bilateral or synalagmatic contracts that complying with art.943 of the civil code is the contract in which the parties commit to one another.

Depending on the purpose aimed by the parties, the contracts can be onerous, that complying with art.945 civil code is the contract in which each party wishes to procure an advantage, and free contracts by means of which a patrimonial advantage is procured without aiming at obtaining another patrimonial advantage in return (art.946 civil code). Also, onerous contracts are subclassified into commutative contracts upon the conclusion of which the parties are aware of the existence and scope of the obligations and aleatory contracts upon the conclusion of which the parties are aware only of the existence of the obligations not of their scope, and there is the chance of gain or the risk of loss due to uncertain future circumstances. Free contracts are subclassified into disinterested contracts by which one of the parties obtains a patrimonial benefit to the other party without decreasing its patrimony and liberties by which one of the parties decreases its patrimony by means of the patrimonial benefit obtained for the other party (e.g. the donation contract).

Depending on the legal effects the fulfillment of which is watched by the parties by means of contracts conclusion, contracts can be rights grating or rights transferring, i.e. granting new rights or transmitting existing rights and producing only future effects and rights declarative contracts that do not create, nor do they transmit right, they only acknowledge the existing ones.

Some contracts such as sale, exchange, donation are executed at once, by a sole document, being called immediate execution contracts, others, such as the tenancy or maintenance are executed step by step in time being successive execution contracts. There are differences between the two categories of contracts in terms of the effects their annulment and resolution produces, effects that in the case of successive contracts only act for the future and have no retrospective action. Also, the incidence of the unpredicted theory can only be imagined for this type of contracts.

Although most contracts have an independent existence and are main contracts, there are also accessory contracts that can only exist along a main contract they accompany (e.g. the pledge contract or the mortgage agreement).

Except for the classical, negociable contracts, upon the conclusion of which the parties negotiate with one another, discuss and agree on all the contract clauses, in the evolution of contracts also appeared new contract categories that are not negotiable: the adhesion contracts and the mandatory contracts, the so called institution contracts. The adhesion contracts are entirely written by one of the parties, while the other party does not have the possibility to change it only of deciding whether it accepts the entire contract, of adhesion to it. The party making the offer under these circumstances takes advantage of a dominant economic position allowing it to impose its will, and for this reason, in order to provide a balance between the parties, the regulator's intervention is required. The mandatory contracts are the contracts the clauses of which are imposed by law, and the law determines the content of the resulting legal report, the rights and liabilities of the parties, who no longer have the liberty to establish or change them as they wish.

## THE CONSUMPTION LOAN AGREEMENT (THE ACTUAL LOAN)

### NOTION AND LEGAL FEATURES

The (actual) consumption loan is a contract by which a person, called lender, transmits in the property of another person, called borrower, a quantity of fungible and consumption goods, with the borrower's obligation to reimburse an equal quantity of goods of the same type and quality by a due date.

The consumption loan agreement, as well as the commodate agreement, has the following legal features:

- real contract;
- unilateral contract;
- free contract, but it can also be onerous, known as interest loan;
- property transfer contract.

### VALIDITY CONDITIONS

The consumption loan agreement is subject to the general rules in terms of validity conditions, but has its own features in what regards the capacity, approval and object.

Considering the property transferring nature of the contract, the lender must have the capacity required by law in order to conclude order documents and must own the good representing the object of the agreement, while the borrower must have the capacity to conclude order documents.

The parties' consent must be expressed freely not affected by any vices under the sanction of contract voidableness.

The object of the consumption loan agreement solely consists of mobile goods, of kind, fungible and consumable according to their nature.

#### AGREEMENT PROOF

The proof of the consumption loan agreement is made, complying with the general rules, only by authentic document or by document under private signature.

by exception, the witnesses probation is admissible in two situations:

- when the borrower agreed to it;
- if the borrower proves that at the moment when the contract was concluded a document could not be drawn up.

The private signature document must be fully written by the borrower or carry the mention "good and approved for", followed by the borrowed amount, written in letters and by the signature (art. 1180 civil code).

#### AGREEMENT EFFECTS

- the borrower's obligations. Complying with art. 1584 civil code, the borrower has the obligation to hand to the lender on the due date the same quantity of goods he received, of the same quality regardless of the increase or decrease of their value between the contract date and the payment date. The failure to comply with this obligation entitles the lender to initiate an action against the borrower or his rightful successors, action that prescribes in the 3 years general prescription term. the prescription term begins to be considered beginning with the date provided by the parties in the contract , as term for the reimbursement, and if such a term has not been provided, from the date the contract was concluded.
- The interest payment obligation. This obligation only exists in onerous consumption loan contracts, also known as interest loan. If by means of the contract, the parties stipulated that the borrower owes interest, not mentioning the total amount of the interest, the borrower owes the legal interest, set by Government Ordinance no. 9/2000 regarding the legal interest level for money liabilities, approved with amendments by means of Law no. 356/20025. In civil matters, the legal interest is set at the level of the reference interest of the National Bank of Romania, diminished by 20 %, complying with art. 3 paragraph 3 of the Government Ordinance no. 9/2000. The National Bank of Romania's reference interest level is the one of the last working day of each quarter, valid for the next quarter and must be published in the National Gazette. Complying with art. 5 of the Government Ordinance no. 9/2000, the conventional interest cannot exceed the legal interest by more than 50% per year.

## TERMINATION OF THE LOAN AGREEMENT

The consumption loan terminates by:

- The reimbursement of the good on the due date set in the contract;
- annulment, in the case of failure to comply by fault with the contract liabilities;
- compensation. i.e. the writing off modality specific to mutual liabilities, within which, the same persons are, at the same time creditor and debtor to one another, by which the liabilities are written off up to the amount of the smallest;
- the debt remittance, i.e. the creditor's free waiver of revaluating the debenture he holds against his debtor;
- confusion – the modality of writing off liabilities consisting of the in the same person having the quality of creditor and of debtor of the same liability;

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