



The New Civil Code for Everyone

CONCLUSION OF THE CONTRACT Substantive conditions

- As elements of *novelty*, the New Civil Code regulates the *principle of freedom* to contract, as well as that of the *good faith* both on the negotiation and on the conclusion of the contract, as well as during the entire time of its enforcement, without the possibility to institute disclaimer or limitation clauses of such an attitude of loyalty and obligation of good faith.

Essential Conditions for the Validity of the Contract

- In art. 1.179 paragraph 1 the necessary essential conditions for the validity of a contract are listed:
 1. capacity to contract;
 2. consent of the parties;
 3. an established and licit object;
 4. a licit and moral cause.
- (2) To the extent provided by law of a certain form of contract, this must be observed, under the sanction established under the legal enforceable provisions.

Capacity to Enter into a Contract

- The New Civil Code maintains the principle of the capacity to enter into a contract both for natural and legal persons, which represents the rule, exceptions being strictly regulated and enforced.
- Under-age children who have not yet become 14 and the legally incapacitated can only contract through their legal representatives, as provided by law.
- *Sanction for the infringement of the incapacity to conclude legal documents*: as this is about the infringement of a substantive condition, essential and concerning the validity of the contract, the enforced sanction, in principle, is that of the nullity of the document concluded by infringement if the regulations referring to the civil capacity of the person.

Consent

- The conclusion of the contract is to be done **by negotiation** between the parties or **by qualified acceptance of an offer to contract** (the agreement consisting of two elements: offer and acceptance).
- The New Civil Code consecrates the **principle of good faith** that must be shown by the parties in initiating and carrying out of the negotiations for the conclusion of the contract.
- In order to be validly expressed and to become legally binding, the consent must be given informed and totally free, respectively not be impaired by vices altering it. In this sense, the provisions of art. 1204 New Civil Code provides, referring to the conditions of consent, that the latter has to be **serious, free end expressed learnedly**.

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- According to art. 1206 of the New Civil Code, consent is corrupted when it is issued by **error**, surprised by **deceit** or forced by **violence** (paragraph 1). Consent is also vitiated in case of **injury**.
- **Error**: As opposed to the previous regulation, where error was treated in only one text (art. 954 and, generally, in the provisions of art. 953, 961, together with other vices of consent), in the New Civil Code the relevant provisions are to be found in several articles (art. 1207-1213), which regulate various kinds of errors which can appear at the moment when the act is performed (the inexcusable error, the admitted error, the error in calculation, error in communication or transmission), with the corresponding sanctions which may occur.
- **The deceit**: The deceit is that specific vice of consent which consists in misguidance of a person by using artful or deceitful means or by omitting, in a fraudulent manner, to inform the co-contractor on certain circumstances which should have been unveiled (art. 1214 of the New Civil Code). Seen as a tort, committed purposefully by its author, the deceit supposes a material element as well as an intentional or subjective one. Under the aspect of the material element, the new regulation pays attention not just to the commissive act (action, consisting in making use of fraudulent maneuvers, able to generate the error), but also to the omissive one (a negative attitude, of not informing the other party on circumstances which should have been unveiled). As opposed to the old regulation, which mentioned expressly the condition that the deceit should have been decisive for the conclusion of the contract (since "without those doings, it is obvious that the other party would not have agreed to enter the contract"), so that the error generated should have concerned some decisive elements for the conclusion of the contract, *in the new regulation* this condition is not provided anymore, as it is now sufficient for the deceitful attitude of the party to have caused an error, albeit the latter may have not been of the essence (art. 1214 paragraph 2).
- **Violence**: In the conception of the New Civil Code, violence, as a vice of consent, is understood as the "justified fear, unrightfully induced by the other party or by a third party, so that the menaced party could have believed, according to the circumstances, that, in the absence of their consent, their life, person, honor or assets would have been exposed to a serious and imminent danger" (art. 1216). In establishing the decisive character of violence one must take into account, as provided by art. 1216 paragraph 4 of the New Civil Code, the "age, social status, health and character of the person on whom violence was exerted, as well as any other circumstance which could have influenced the state of that person at the moment when the contract was concluded". Considering that not any menace represents, by itself, a violence-vice of consent, it is necessary for it to represent an infringement of the law (i.e. be illicit), in order to attract the invalidity of the act. On the other hand, according to the New Civil Code violence means: „fear inoculated by menace with exerting a right with the purpose to obtain unjustified advantages" (art. 1217). The fact that menace has to be decisive, also results implicitly from the provisions of art. 1219 of the New Civil Code, which do not recognize the character of vice of consent for the simple reverential fears, issued out of respect, without being accompanied by violence. The menace with harm doing is not, according to the New Civil Code, considered as constitutive element of violence, when it results out of a state of necessity, unless to the extent to which the other party took advantage of that circumstance (art. 1218 New Civil Code).
- **Injury**: An injury exists when one of the parties, taking advantage of the state of necessity, of the lack of experience or the lack of knowledge of the other party, stipulates in their own favor or of another person a service of a considerably larger value, at the date of conclusion of the contract, that the value of their own performance. (art. 1221). The existence of the injury is also assessed depending on the nature and purpose of the contract. The injury may also exist when the minor undertakes an excessive obligation considering their wealth, against the advantages they obtain from the contract or the ensemble of circumstances. As opposed to the old regulation, the New Civil Code also admits injury in the case of the person of full age, on condition that the difference of performance should exceed half of the value of the performance promised or actually done by the injured party, at the time of the conclusion of the contract (art. 1222 paragraph 2). In the context of legal instruments, which can be contested for injury, *the new legal provisions* exclude from the

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incidence of this sanction the aleatory contracts, the settlement agreement, as well as other contracts specifically indicated by the law (art. 1224).

Object of the Contract

- **The object of the contract** is represented by the legal operation considered by the parties at the time of its conclusion (art. 1.225). It must be determined and licit (i.e. not prohibited by law or contrary to public order or decency), under the sanction of absolute nullity. The legal operation is distinct from the performance undertaken by the debtor and which represents the *object of the obligation* seen as a legal relationship. Thus, according to art. 1226 of the New Civil Code, the object of the obligation is the performance undertaken by the debtor and, under the sanction of absolute nullity, it must be determined or at least determinable and licit.
- **Conditions of validity of the object of the contract:** *to exist* - the condition is fulfilled when the asset is present as such at the time of the conclusion of the instrument, but also in the situation of future assets (in the absence of an express provision, contracts can also refer to future assets, according to art. 1228 New Civil Code); *to be in the civil circuit* (only assets within the civil circuit can be objects of a contract performance – art. 1229 of the New Civil Code); *be possible* (in case of an initial impossibility, at the time of the conclusion of the instrument, for one of the parts of the instrument, the contract remains validly concluded); *be determined or determinable*. Under this aspect, the New Civil Code contains provisions concerning the determination of the object by a third party or by referring to a reference factor, as well as provisions on the determination of the quality of the object (i.e., when it cannot be established according to the contract, the quality of the performance or of its object must be reasonable or, as the case may be, at least average).

Cause

- As opposed to the previous regulation, the New Civil Code defines the cause of the contract as being „the reason which determines each of the parties to conclude the contract” (Art. 1.235).
 - **Conditions of validity.** In order to be valid, the case of the legal instrument must fulfill cumulatively the following conditions (art. 1236, 1237 of the New Civil Code):
 - a) to exist. The cause does not exist when legal competence or immediate purpose are absent at the time of the conclusion of the contract.
 - b) be licit. The cause is licit when it is in agreement with the law and public order. The cause is considered illicit also when the contract is only the means to elude the enforcement of an imperative legal norm
 - c) be moral (not contrary to the good manner, respectively the rules of social cohabitation).
 - **Sanction:** The lack of the cause attracts the voidability of the contract, except for the case when the contract was wrongly classified and can generate other legal effects. The illicit or immoral cause attracts the absolute nullity of the contract if common or, in the contrary case, if the other party knew it or, as the case may be, should have known it.
- Proof of the cause:** the contract is valid even when the cause is not expressly mentioned. The existence of a valid cause is presumed until the proof of the contrary.

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