



# The New Civil Code for Everyone

## CONCLUSION OF THE CONTRACT Form of Contracts

- Art. 1178 of the New Civil Code states the *principle of the free form*, meaning that the conclusion of the contract takes place by the simple agreement of the parties, able to contract, if the law does not impose a certain formality.

### Consensualism

- As opposed to the old regulation, the New Civil Code consecrates expressly the *principle of consensualism* by the provisions of art. 1178 concerning the freedom of the form and of art. 1240 on the forms of expression of consent.
- According to art. 1240 New Civil Code, the will to contract can be expressed *verbally or in writing* (paragraph 1). The will can also be expressed *by a behaviour* which, according to the law, the convention between the parties, the practices or customs established between them, leaves no doubt on the intention to generate the corresponding legal effects (paragraph 2). Therefore, the manifestation of will of the parties generates legal effects without other special formalities.
- Examples of contracts which can be validly concluded by consensus: "*the lease*" is considered as concluded as soon as the parties have agreed on the asset and the price" – art. 1781; the "*mandate agreement*" can be concluded in written, in authentic form or as private deeds, or verbal form" – art. 2013 paragraph (1).

### Form required *ad validitatem* (*ad solemnitatem*).

- The form required for the validity of the legal document is that special and essential condition which supposes the fulfilling of certain formalities provided by law, **in the absence of which the deed could not arise validly.**
- The New Civil Code provides certain situations when the written form is a condition for the validity, in which case including the private deed is sufficient to satisfy the legal requirement, however for certain cases the form of the authentic deed is required.
- The New Civil Code provides under art. 1242 paragraph 2 that „if the parties have agreed for a contract to be concluded in a certain form, which the law does not require, the contract is considered valid even if the form has not been observed”. The inobservance of the form required *ad solemnitatem*, considering that it represents the constitutive element of the deed, is sanctioned by absolute nullity.
- **Examples of contracts for which the written form is required as a validity condition:** agricultural lease – art. 1838 paragraph (1); fidejussion – art. 2282
- **Examples of contracts for which the authentic form is required as a validity condition:** sale of an estate – art. 1747 paragraph (2); contract by which a company with legal personality is incorporated – art. 1884 paragraph (2); the caretaking contract – art. 2255; conventions which move or establish rights *in rem* intended to be recorded in the Land Register - art. 1244.

### Form *ad probationem*.

## Project „The Codes Are Coming!”

The contents of this material does not represent an official interpretation of the New Civil Code and does not cover all the aspects concerning this subject.

➤ The form *ad probationem* is the specific condition imposed by the law or by the parties, which consists in drafting a written document with the purpose to prove the validly concluded civil juridical deed. According to art. 1241 New Civil Code, the deed which ascertains the conclusion of the contract can be a private deed or an authentic deed, with the probative force as provided by law (respectively, of constitutive element of the contract or just as means of proof). This condition is instituted, for instance, in the case of the settlement agreement or of the voluntary deposit contract. The inobservance of the form required *ad probationem* does not attract the invalidity of the deed, as it does in the case of the form *ad validitatem*, but the impossibility to prove the deed by another means of proof.

➤ **Examples of contracts concluded in written form only as proof of the contract:** the commission contract art. 2.044 paragraph (2), the consignment contract – art. 2055; (security) deposit contract – art. 2104, the insurance contract – art. 2200 paragraph (1)

**The form required for the opposability to third parties.**

➤ By the form required for the opposability to third parties of the legal document is understood that necessary condition for the legal document to be also **opposable to persons who have not taken part to its conclusion**, for the purpose of protecting their rights and interests. This is a requirement provided for the protection of third parties from the damaging effects of certain legal documents.

➤ This is done by fulfilling formalities of publicity, especially by recordings or annotations in the Land Register for alienations of real estate rights, or for recordings in the Electronic Archive for Security Interests in Movable Property, for pledges and other security interests in movable property.

➤ By art. 1244 New Civil Code, referring to the required form for the recording in the Land Register, the need is stated to conclude the deed as an authentic document, under the sanction of absolute nullity, in the case of conventions which move or establish rights *in rem* intended to be recorded in the Land Register. The inobservance of the required form for the opposability against third parties of the legal document is sanctioned by the non-opposability of the legal document, which means the possibility, for the interested third party, to ignore the deed invoked by the parties against him/her.

**Conditions of form for the contract amendment**

Art. 1.243 provides that, "if the law does not provide otherwise, any amendment of the contract is subject to the form conditions required by law for its conclusion".

**Electronic Contracts**

The New Civil Code regulates the form of *electronic contracts* in art. 1245, respectively states that those contracts concluded by electronic means are subject to the conditions of form provided by the special law.

**Project „The Codes Are Coming!”**

**The contents of this material does not represent an official interpretation of the New Civil Code and does not cover all the aspects concerning this subject.**