

# THE CONCLUSION OF THE CONTRACT FROM THE PERSPECTIVE OF THE NEW CIVIL CODE

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## Abstract

*The New Civil Code regulates in large the general rules regarding the conclusion of the contract. These rules regard the formation of the contract, between parties that are either present or at a distance. The rules in question have as foundation the classical principles regarding the formation of the contract and also reflect the realities of the modern society.*

**Keywords:** *offer to contract, offer's acceptance, offer's withdrawal, acceptance withdrawal, offer's ineffectiveness, closing of the contract*

1. Having as basis the dogma of will autonomy, The Romanian Civil Code of 1864 did not regulate formation of contract. Such loophole was partially covered, by The Commercial Code of 1887, which, in art. 35-39, regulated the conclusion of contract "between remote persons".

Taking into consideration this reality, the new Civil Code comprehensively regulated the general rules of form and contract (art. 1182-1203). These rules regard the conclusion of contract both between present persons and between absent ones.

The rules established by The Civil Code rely on the classic principles of contract conclusion, yet considering also the realities of modern society.

2. The contract is the will agreement between two or more persons intending to constitute, modify or terminate a legal relation (art. 1166 of The Civil Code).

Any natural or legal person may freely manifest their will, according to their interests, it being possible for them to conclude any contract, with any partner and having the contents the parties have agreed on, within the limits imposed by the law, public order and good customs.

Concluding the contract means, in essence, reaching the parties' will agreement on the contractual clauses.

The contract is concluded by the parties' simple will agreement, if the law does not impose a certain formality for its valid conclusion, such as in the case of real and solemn contracts.

Will agreement, which signifies the conclusion of the contract, is achieved by the concordant match of an offer to contract with the acceptance of such offer<sup>1</sup>. To this end, pursuant to art. 1182 of The Civil Code, the contract shall be concluded by its negotiation by the parties<sup>2</sup> or by acceptance without reference of an offer to contract.

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<sup>1</sup> See C. Stătescu, C. Bîrsan, Civil Law, General Theory of Obligations, 9<sup>th</sup> Edition, revised and enlarged, Bucharest, Hamangiu Printing House, 2008, p. 37

<sup>2</sup> On contract negotiation, see Gh. Piperea, Introduction in Professional Contract Law, C.H. Beck Printing House, Bucharest, 2011, p.86 and the next; Mariana Buric, Legal Aspects of Contract Negotiation, in Revista de drept comercial no. 11/2004, p.114 and the next; Ivanița Goicovici, Progressive Formation of Contract – Notion and Scope, Walters Printing House, Bucharest, 2009; S. Deleanu, Letters of Interest, in Revista de drept comercial no. 1/C 995, p. 110 and the next.

As the contract is concluded by the parties' agreement, one party's will may not be replaced by court decision<sup>3</sup>.

For the conclusion of the contract it is sufficient that the parties achieve the will agreement on the essential elements of the contract, even if some secondary elements are left aside in order to be agreed subsequently, and entrust their determination to third parties. If the parties do not reach an agreement on the secondary elements in question and the person entrusted with their determination makes no decision, it is the court of law the one that will complete the contract, at the request of any of the parties, taking into account, depending on the circumstances, the nature of the contract and the parties' intention.

Upon negotiating and concluding the contract, and also during the performance of the contract, the parties have to act in good faith, which is presumed until proved otherwise.

According to the law, the parties have the liberty to initiate, have and break off negotiations, without being responsible for their failure, if they responded to the exigencies of good faith. It goes without saying that the conduct of the party initiating or continuing negotiations without intending to conclude the contract is contrary to the exigencies of good faith.

Initiating, continuing or breaking off negotiations against good faith entail the liability of the breaching party for the damage caused to the other party. Liability cannot be but a civil liability *ex delicto*, in the conditions of art. 1357 of The Civil Code. Upon establishing the compensations, the expenses incurred for the negotiations, the other party's waiver of other offers and any other similar circumstances will be taken into account.

In the negotiation for the conclusion of the contract, the parties can have in view certain information with confidential character. In such a case, the law imposes on the parties a confidentiality obligation. The party that has been communicated, during negotiations, confidential information is forbidden to disclose it or use it in its own interest, no matter if the contract is concluded or not. The breach of the confidentiality obligation engages the civil liability *ex delicto*, under the conditions of art. 1357 of The Civil Code.

In certain cases, during the negotiations, a party can insist on reaching an agreement on a certain element or on a certain form. In such a case, the contract will not be concluded until an agreement is reached in connection to the above, no matter if the element in question is an essential or a secondary one or the form is not imposed by the law for the validity of the contract (art. 1185 of The Civil Code).

Conclusion of any contract involves the meeting of the essential conditions required by the law for the validity of the contract: the capacity to contract; the parties' consent; a determined and licit object; a licit and moral cause (art. 1179 of The Civil Code).

In those cases in which the law provides a certain form of the contract, this has to be observed, under the sanction provided by the applicable legal provisions. Consequently, the manifestations of will forming the will agreement, and namely the offer to contract and the acceptance of the offer, have to take the form required by the law for the valid conclusion of the contract (art. 1187 of The Civil Code).

3. The offer to contract is a proposal of a person, addressed to other person, to conclude a certain contract. This comprises a manifestation of will expressing the offeror's intention to obliges itself, in case of its acceptance by the recipient.

Pursuant to the law, in order to constitute an offer to contract, the proposal must contain sufficient elements for the contract formation (art. 1188 of The Civil Code).

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<sup>3</sup> The High Court of Cassation and Justice, Commercial Section dec. no. 876/2002, in Revista română de drept al afacerilor no.3/2004, p.199

According to doctrine, the offer to contract must be manifestation of real, unvitiated will, concretized in a precise, complete and firm proposal<sup>4</sup>.

The offer is precise and complete when it comprises all those elements that are necessary for concluding the contract, indispensable to the recipient of the offer for making a decision, in the sense of acceptance or rejection of the offer. These elements are not the same for any contract, being specific to the various categories of contracts.

The offer will be firm, if it expresses a legal engagement of the offeror, which, by its acceptance by the recipient, would lead to the conclusion of the contract. This condition is not met if the proposal comprises certain reserves.

The offer to contract can be exteriorized expressly, in writing, verbally, exhibit of the merchandise by displaying the price, or tacitly, resulting without any doubts from the behavior of a person; for example, the conclusion of the lease contract, in case of tacit relocation (art. 1810 of The Civil Code).

According to the law, the offer to contract may have as issuer the person who has the initiative to conclude the contract, which determines its contents or, depending on circumstances, the person that proposes the last essential element of the contract.

The recipient of the offer may be a determined person, generically determined persons or undetermined persons (the public).

In what regards the offer addressed to undetermined persons, the new legal regulation makes certain distinctions.

Pursuant to the law, the proposal addressed to undetermined persons, even if precise, is not equal to the offer to contract, but, depending on circumstances, request for offer or intention to negotiate (art. 1189 of The Civil Code).

Exceptionally, the proposal is equal to an offer if this results from the law, from usual practices or, undoubtedly, from circumstances, for example, standing of a taxi in the taxi stand, with the meter indicating "vacant". In these cases, the revocation of the offer addressed to the undetermined persons produces effects only if made in the same form with the offer or in a way allowing it to be known to the same extent with this; for example, the standing of the taxi in the taxi stand, with the meter indicating "occupied".

The request of undetermined persons or more determined persons to formulate offers does not stand, in itself, for the offer to contract. In such cases, the requesting party becomes the recipient of the offer.

The offer to contract represents a unilateral manifestation of will of its author. As provided by the law, the offer to contract produces effects only from the moment when it arrives at the recipient, even if this does not take note of the offer for reasons that are not imputable to it (art. 1200 of The Civil Code).

Consequently, until it arrives at the recipient, the offer produces no effects, and can be withdrawn without consequences for the offeror, but only if the withdrawal arrives at the recipient prior to or simultaneously with the offer.

It goes without saying that, if the offer makes provision for an acceptance term, the offeror must comply with the term granted. The acceptance term elapses from the moment when the offer arrives at the recipient.

For the purpose of this solution, art. 1191 of The Civil Code provides that the offer is irrevocable as soon as its author undertakes to maintain it for a certain term.

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<sup>4</sup> See C. Stătescu, C. Birsan, *op.cit.*, p.41; L. Pop, p.41; L. Pop, *Civil Law Treaty. Obligations, Volume II, The Contract*, Universul Juridic Printing House, Bucharest, 2009, p.156-160; Albu, *Civil Law. The Contract and the Contractual Liability*, Dacia Printing House, Cluj-Napoca, 1994, p.72-73

Yet, pursuant to the law, the offer is also irrevocable when it may be considered as such, under the parties' agreement, under the practices settled between them, negotiations, contents of the offer or usual practices.

One should note that, whereas the term offer is irrevocable, any statement for revocation of such an offer produces no effect (art. 1191, paragraph 2 of The Civil Code).

The matter that has been discussed in the past and that is also currently debated regards the offer without acceptance term. The new Civil Code establishes the fundamental doctrine solutions, distinguishing between the offer being addressed to a present person or to an absent one.

If the offer without acceptance term is addressed to a present person, this remains without legal effects if not accepted immediately (art. 1194 of The Civil Code).

The solution is the same also in the case of the offer transmitted by phone or by other means of remote communication.

If the offer without acceptance term is addressed to a person that is not present, this has to be maintained in a reasonable term, depending on circumstances, in order for the recipient to receive it, analyze it and dispatch the acceptance (art. 1193 of The Civil Code).

Such an offer can be revoked and prevents the conclusion of the contract, but only if revocation arrives at the recipient before the offeror receives the acceptance or, as the case may be, before carrying out the act or fact determining the conclusion of the contract, under the terms and conditions of art. 1186, paragraph 2 of the Civil Code.

Revocation of the offer before the expiry of the reasonable term, provided by art. 1193 of the Civil Code, engages the offeror's liability for the damage caused to the recipient of the offer (art. 1193, paragraph 3 of The Civil Code).

In the past, against the background of inexistence of any regulation in The Civil Code, there were discussions on the mandatory force of the offer and the grounds for liability for revocation of the offer<sup>5</sup>.

Both doctrine and judicial practice admitted that the withdrawal of the offer, before the expiry of the acceptance term provided by the offer entails the offeror's liability for the damages caused as a consequence of the unexpected revocation of the offer. The issue that was subject to the controversy was the legal ground of the offeror's liability.

In general, it has been sustained that unexpected revocation of the offer, which causes damages, entails the civil liability *ex delicto* of the offeror (art. 998 of the old Civil Code)<sup>6</sup>.

Some authors considered that the legal ground for liability is not the illicit and guilty deed of revocation, but the legal fact of the abusive exercising of the right to revoke the offer<sup>7</sup>.

Other authors found the justification of the obligation to maintain the offer in the term provided by the offer, in the idea of validity of the unilateral will engagement representing the offer to contract<sup>8</sup>.

The new Civil Code comprises provisions regarding the offeror's liability for the damage caused by the revocation of the offer (art. 1193, paragraph 3 of The Civil Code).

Still, one should note that this liability of the offeror regards the case of the offer without term addressed to an absent person, which was revoked before the expiry of the reasonable term considered by the law for the recipient to receive it, analyze it and dispatch the acceptance.

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<sup>5</sup> See T. R. Popescu, P. Anca, General Theory of Obligations, Ed. Științifică, Bucharest, 1968, p.75 and the next; C. Stătescu, C. Bîrsan, op.cit., p.41-44; L. Pop, op.cit., p.167 and the next.

<sup>6</sup> See T. R. Popescu, P. Anca, op.cit., p.78

<sup>7</sup> See C. Stătescu, C. Bîrsan, op.cit., p.44

<sup>8</sup> See I. Albu, op.cit., p.75; D. Chirica, Civil and Commercial Special Contracts, Volume I, Rosetti Printing House, Bucharest, 2005, p.145; L. Pop, op.cit., p.172.

As regards the offer in which the offeror undertook to maintain it for a certain term, this is, pursuant to art. 1191 of The Civil Code, immediately irrevocable. Moreover, any statement of revocation of the irrevocable offer produces no effect (art. 1191, paragraph 2 of The Civil Procedure Code).

As the offer with acceptance term cannot be revoked by the offeror, and any revocation produces no effects, it means that the offer “revoked” before the expiry of the term can be accepted and, consequently, leads to the conclusion of the contract.

As regards the liability of the offeror for the damage caused by the offer revocation, in the conditions of art. 1193 of The Civil Code, its ground is the illicit and guilty deed of the offeror (art. 1357 of The Civil Code).

In certain cases, the offer to contract may become null and, therefore, may no longer produce legal effects. The cases of nullity of the offer are the ones provided by art. 1195 of The Civil Code.

Thus, the offer will become null if the acceptance of the offer does not get to the offeror in the term laid down in the offer or in the reasonable term provided by art. 1193, paragraph 1 of The Civil Code.

Then, the offer becomes null when refused by the recipient.

Finally, the irrevocable offer becomes null in case of the offeror’s decease or incapacity, but only when the nature of the business or circumstances impose so.

To conclude here, it has to be specified that the offer to contract should not be mistaken for the promise to contract (sale promise). Unlike the offer, which is a unilateral manifestation of will, the promise to contract (sale promise) is a pre-agreement (art. 1669 of The Civil Code).

In the case of bilateral sale promise, the promissory party undertakes to sell, and the beneficiary undertakes to buy a certain asset, at a certain price, based on a sale-contract to be concluded in the future.

In the case of the unilateral sale promise, the promissory party undertakes to sell, or, as the case may be, to buy a certain asset, and the beneficiary reserves the faculty to subsequently manifest the will to purchase, respectively to sell the promised asset.

In both cases, the sale promise is a pre-agreement giving rise to an affirmative covenant, and namely that of concluding a sale contract in the future.

4. Acceptance of the offer is the manifestation of will of the recipient of the offer to conclude the contract in the conditions provided by the offer.

Pursuant to art. 1196 of The Civil Code, acceptance of the offer means any act or fact of the recipient, if it undoubtedly indicates its consent to the offer, as formulated, and arrives in due term at the offer author.

The conditions required by the law for the validity of acceptance of the offer result from this definition.

Thus, the acceptance of the offer may consist in a legal act, and namely a manifestation of the recipient’s will, in the sense of conclusion of the contract, or in a legal fact, such as the dispatch of the merchandise to which the offer refers.

Then, from the recipient’s act or fact it must undoubtedly result the recipient’s consent with regard to the offer, as formulated by the offeror.

Consequently, in order for it to stand for an acceptance, the recipient’s manifestation of will cannot be confined to the confirmation of the receipt of the offer, but it has to undoubtedly express the recipient’s will to legally engage, and namely to conclude the contract in the conditions proposed in the offer<sup>9</sup>. This means that acceptance must be total and have no reserves or conditions.

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<sup>9</sup> See The High Court of Cassation and Justice, Commercial Section dec. no.35/2009, in Buletinul Casăției no.3/2009, p.33

According to the law, the recipient's answer does not represent acceptance when it comprises amendments or supplementations that do not correspond to the offer received (art. 1197, paragraph 1, letter a) of The Civil Code).

An answer of the recipient comprising changes or supplementations to the contents of the offer may be considered, depending on circumstances, a counter offer (art. 1197, paragraph 2 of The Civil Code).

Doctrine has sustained the necessity to distinguish between the essential and non-essential amendments and supplementations comprised by the acceptance of the offer and that only in the case of essential amendments and supplementations, acceptance should have the value of a counter offer. As regards the non-essential amendments and supplementations, if the offeror does not immediately manifest its disagreement with them, the contract should be considered concluded in the terms of the recipient's acceptance<sup>10</sup>.

In supporting this solution, one could invoke the provisions of art. 1182, paragraph 2 of The Civil Code, pursuant to which in order to conclude the contract it is sufficient for the parties to reach an understanding on the essential elements of the contract, even if they leave aside certain secondary elements to be subsequently agreed on.

Still, we consider that it is only the recipient's agreement with regard to the offer, as formulated by the offeror, that leads to the conclusion of the contract. Any amendment or supplementation, even if a non-essential one, involves an insecurity element in what regards the conditions of the conclusion of the contract. Therefore, an acceptance with any amendment or supplementation represents a counter offer addressed by the recipient to the offeror, which can be accepted or rejected.

Finally, in order for it to have legal value, the acceptance of the offer must reach the author of the offer in due term.

Acceptance of the offer will be legally inappropriate, if it reaches the offeror after the offer has become null (art. 1197, paragraph 1, letter c) of The Civil Code).

According to the law, the offer will become null if the acceptance does not reach the offeror in the term set out in the offer or, in absence, in the reasonable term, necessary for the recipient to receive it, analyze it and dispatch the acceptance (art. 1195 of The Civil Code).

The offer will also become null if this is refused by the recipient or in case of the offeror's decease or incapacity.

One should show that, according to the law, also tardy acceptance, and namely that has reached the offeror after the term set out in the offer or after the reasonable term contemplated by the law, may lead to the conclusion of the contract.

Tardy acceptance produces effects, i.e. leads to the conclusion of the contract, only if the author of the offer immediately informs the accepting party of the conclusion of the contract (art. 1198 of The Civil Code).

For the case in which the acceptance was performed in due term, but it reached the offeror after the expiry of the term, for reasons that cannot be imputed to the accepting party, the law provides that such an acceptance will produce legal effects, and namely will lead to the conclusion of the contract, if the offeror does not immediately inform the accepting party accordingly.

For the conclusion of the contract, acceptance of the offer, like the offer itself, has to take the form required by the law for the valid conclusion of the contract.

If by the offer a certain form of the acceptance of the offer has been established, acceptance will be inappropriate if it does not comply with the required form and, therefore, produces no legal effects (art. 1197, paragraph 1, letter b) of The Civil Code).

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<sup>10</sup> See L. Pop, *op.cit.*, p.176

Like the offer, acceptance of the offer may be express or tacit.

Express acceptance of the offer may manifest itself by a written record or verbally or by certain gestures signifying the recipient's agreement to the received offer.

Tacit acceptance consists in an act performed by the recipient involving the idea of conclusion of the contract in the conditions formulated in the offer; for example, dispatch of the merchandise to which the purchase offer refers or payment of the price of the merchandise received from the seller.

The problem that has been discussed in the past was that of knowing whether the acceptance of the offer can result from the recipient's silence. Doctrine distinguished between silence accompanied by positive attitudes and simple silence of the recipient<sup>11</sup>.

In the case of silence accompanied by positive attitudes of the recipient, silence means, in fact, tacit acceptance; for example, dispatch of the merchandise object of the offer.

In case of pure and simple silence, silence cannot have the significance of acceptance of the offer, whereas the principle "who is silent, consents" does not apply in law.

Exceptionally, doctrine admitted that silence can have the value of acceptance of the offer in the cases provide by the law or agreed by the parties or when the offer is made exclusively in the recipient's interest<sup>12</sup>.

The solutions of the doctrine have been taken over and recognized in the new civil code. Pursuant to art. 1196, paragraph 2 of The Civil Code, the recipient's silence or inaction stands for acceptance only when it results from the law, from the parties' agreement, from the practices settled between them, from usual practices or from other circumstances.

A known case provided by the law in which silence is equal to acceptance of the offer is tacit relocation.

Art. 1810 of The Civil Code provides that if, after the elapsing of the term, the lessee continues to hold the asset and to fulfill the obligations without resistance on the lessor's part, it shall be considered that a new lease has been concluded, in the conditions of the old one, including in what regards the guarantees.

In commercial activity there may be legal relations between certain partners with continuity, and for facilitating the conclusion of contracts, they agree to conclude them in the simplified form, by order followed by execution, without there being necessary a formal acceptance of the order. Such an understanding between partners may lead to the establishing of practices between them, which makes superfluous the acceptance of the offers.

In certain areas of activity, usual practices can impose that the recipient's silence be equal to the acceptance of an offer to contract.

Acceptance of the offer must be communicated to the offeror. Communication must be made by means at least as fast as the ones used by the offeror for transmitting the offer, if by the law, from the parties' agreement, from the practices settled between them or from other such circumstances does not result otherwise (art. 1200, paragraph 2 of The Civil Code).

It being a unilateral manifestation of will, acceptance of the offer produces effects only from the moment at which it gets to the offeror, even if this does not become aware of the same for reasons that are not imputable to it. Consequently, the recipient may withdraw the acceptance of the offer, provided that the withdrawal reaches the offeror previously or simultaneously to the acceptance (art. 1199 of The Civil Code).

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<sup>11</sup> See T. R. Popescu, P. Anca, op.cit., p.74; I. Albu, op.cit., p.76

<sup>12</sup> See C. Stătescu, C. Bîrsan, op.cit., p.47-48; L. Pop, op.cit., p.179-181

5. Conclusion of contract implies the achievement of the parties' will agreement on the contract clauses.

As showed, the parties' will regarding the conclusion of the contract manifests itself in the offer to contract and the acceptance of the offer.

If these two manifestations of will are concordant, the will agreement is achieved, i.e. the contract is concluded.

The matter brought forward by the conclusion of the contract is that of the moment of achievement of the agreement of will, as this represents the moment of conclusion of the contract.

In absence of a legal regulation in the old civil code, establishing of the moment of conclusion of the contract between absent parties was the subject of a controversy.

Civil and commercial law doctrine has proposed several theories (systems) regarding the determination of the moment of conclusion of the contract between absent parties<sup>13</sup>.

According to the **theory of issuing**, named also the **will declaration theory**, the contract shall be considered concluded at the moment when the recipient has manifested its will to accept the offer received, even if such offer was not communicated to the offeror.

This theory was criticized for not allowing to establish exactly the acceptance moment and, therefore, the moment of the contract conclusion. Moreover, this does not offer any certainty, because, not being known to the offeror, acceptance may be revoked.

According to the **theory of dispatching**, also named the **transmission theory**, the contract should be concluded at the moment when the recipient dispatches the answer regarding the acceptance to the offeror.

The theory has been contested for not ensuring total certainty of contract conclusion, whereas, although the acceptance of the offer was dispatched to the offeror, its author can revoke it until the arrival of the acceptance at the offeror, using a faster means of communication. At the same time, by applying this theory, the offeror takes note of the conclusion of the contract after the moment when the same took place, and namely upon the receipt of acceptance of the offer.

In the **theory of receiving**, also named the **theory of acceptance receipt**, the contract is considered concluded at the moment when the offeror receives the answer regarding the acceptance of the offer, even if the offeror did not take note of such answer.

It has been showed that, although it offers a higher guarantee regarding the certainty of the moment of contract conclusion, still, the inconvenience of this theory lies in the fact that it considers the contract concluded, even in the case in which the offeror is not aware that the offer has been accepted<sup>14</sup>.

Finally, according to the **theory of informing**, named also the **theory of knowledge of the acceptance**, the contract should be considered concluded at the moment when the offeror actually becomes aware of the acceptance of the offer.

This theory found legal support in art. 35 of The Commercial Code, according to which synallagmatic contract shall not be considered concluded "if acceptance was not brought to the notice of the proposing party". In other terms, the contract is considered concluded at the moment when the offeror becomes aware of the acceptance of the offer.

In relation to the theory of informing in has been objected, for good reason, that this does not ensure the possibility to exactly establish the moment when the offeror became aware of the acceptance of the offer. Moreover, by relating the moment of conclusion of the contract to the moment of actual knowledge of the acceptance of the offer one creates the possibility for the offeror

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<sup>13</sup> See C. Stătescu, C. Bîrsan, op.cit., p.49-50; L. Pop, op.cit., p.186 and the next. See also St. D. Cărpenu, Romanian Commercial Law Treaty, p.451-453

<sup>14</sup> The theory of receiving was adopted by the United Nations Convention on Contracts for the International Sale of Goods (art.18 item 2), Vienna, 1980



to prevent the conclusion of the contract, by not opening the correspondence containing the acceptance of the offer.

Considering its advantages, but also the objections to it, the theory of informing has been applied in practice, using the simple presumption that the offeror has taken note of the acceptance of the offer at the moment of receipt of the answer regarding the acceptance of the offer. As presumption is relative, it could be overthrown by contrary evidence, in the sense that, without being in a breach situation, the offeror has not become aware of the acceptance of the offer upon the receipt of the correspondence, but at another date.

By applying in this manner the theory of informing, practically one applies the theory of receiving, considered the most correct both theoretically and practically and, for such reason, recommended for being adopted in future civil legislation<sup>15</sup>.

Taking into account the past situation, the new civil code adequately regulates the moment of conclusion of the contract.

In the case of the contract that is concluded between present persons, in which case each party's will is received by the other party directly and instantaneously, the contract shall be considered concluded at the moment of acceptance of the offer. To this end, art. 1194 of the Civil Code provides that the offer without term addressed to a present person remains effectless if not immediately accepted.

The solution is the same also in the case of the offer transmitted by phone or by other such means of remote communication.

In the case of the contract concluded between the persons that are absent, in which case the offer and the acceptance of the offer will be communicated by correspondence (letter, phone, fax) and, consequently, there is a time interval between the offer and acceptance, the contract will be considered concluded at the moment when the acceptance of the offer arrives at the offeror. To this end, pursuant to art. 1186 of The Civil Code, the contract will be concluded at the moment and in the place in which acceptance arrives at the offeror, even if this does not take note of it for reasons that are not imputable thereto.

As one can notice, in relation to the moment of conclusion of the contract between absent parties, the new Civil Code provides for the theory of receiving.

In order to ensure full certainty and exactness of the moment of contract conclusion, the new regulation is more categorical; in all cases, the contract is considered concluded at the moment when the answer regarding the acceptance arrives at the offeror, even if the offeror does not become aware of the answer for reasons that are not imputable thereto.

The new Civil Code regulates the moment of conclusion of the contract in simplified form (art. 1186, paragraph 2 of The Civil Code).

In the case in which, according to the offer, practices settled between the parties, usual practices or nature of the business, the offer may be accepted by a conclusive act or fact of the recipient without informing the offeror any longer of the acceptance of the offer, the contract will be considered concluded at the moment when the recipient performs the conclusive act or fact (for example, dispatch of the merchandise that is the object of the offer).

Establishing the moment of the contract is of interest not only theoretically, in relation to the conclusion of the contract, but also practically.

Thus, the effects of the contract produce from the moment of its conclusion, except for the cases in which the parties have agreed otherwise.

Then, at the moment of conclusion of the contract, one assesses the meeting of the validity conditions of the contract (capacity, consent flaws etc.).

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<sup>15</sup> C. Stătescu, C. Bîrsan, op.cit., p.50

Also, in relation to the moment of conclusion of the contract, one determines the law applicable to the contract with extraneity elements.

Finally, the moment of conclusion of the contract serves to determining the venue of conclusion of the contract.

The new Civil Code regulates not only the moment of contract conclusion, but also the venue of contract conclusion between absent parties.

According to art. 1186 of The Civil Code, the contract shall be concluded at the moment and in the venue in which acceptance arrives at the offeror. So the venue of contract conclusion is the locality where the offeror is and where acceptance of the offer arrives at the offeror.

We consider that this solution of the law is applicable also in the case of conclusion of the contract by phone or by other such means of remote communication.

In the case of conclusion of the contract in simplified form, when the contract is considered concluded at the moment when the recipient performs a conclusive act or fact (for example, dispatch of the merchandise that is the object of the offer), the venue of conclusion of the contract is the locality where the recipient of the offer is (art. 1186, paragraph 2 of The Civil Code).

Determining the venue of contract conclusion is of practical interest.

Thus, depending on the venue of contract conclusion one determines the competence of the court of law (territorial competence) for the resolution of the disputes regarding the contract.

Then, the venue of contract conclusion is of interest for determining the applicable law, in the case of a conflict of laws in space regarding the contract with extraneity elements.

6. By concluding the contract, the parties agree on the contract clauses, which synthesize each party's obligations.

Of course, the parties are bound by the obligations assumed by the contract clauses, which express their will.

The new Civil Code regulates also the legal regime of special clauses regarding the conclusion of the contract. The external clauses, the standard clauses and the unusual clauses are being contemplated.

The contract concluded by compliance with the law obliges not only to what is expressly stipulated, but also to all the consequences that the practices settled between the parties, usual practices, law or equity confer on the contract, depending on their nature.

Pursuant to the law, the parties shall be also bound by the extrinsic clauses to which the contract refers, if the law does not provide otherwise (art. 1201 of The Civil Code).

The law has in view also the conclusion of contracts using standard clauses (art. 1202 of The Civil Code). These standard clauses are stipulations previously established by one of the parties in order to be generally and repeatedly used and that are included in the contract without having been negotiated with the other party; for example, the general conditions regarding the leasing contract.

In principle, the conclusion of the contract in which standard clauses are used is governed by the general rules for the conclusion of the contract, provided by art. 1178-1203 of The Civil Code, which apply accordingly.

But, according to the law, the clauses negotiated prevail over the standard clauses.

In the case in which both parties use standard clauses and do not come to an agreement regarding such clauses, the contract will be still concluded based on the agreed clauses and on any standard clauses that are common in their substance. The contract shall not be concluded if either of the parties notifies the other party, either before the moment of conclusion of the contract, or afterwards and immediately, that it does not intend to be bound by such a contract (art. 1202, paragraph 4 of The Civil Code).

In order to ensure the parties' protection, upon the conclusion of the contract, the law especially regulates the legal regime of unusual standard clauses. There are contemplated the clauses providing for the benefit of the one proposing them the limitation of liability, the right to unilaterally terminate the contract, to suspend the fulfillment of the obligations or providing to the detriment of the other party the losing of rights or from the benefit of the term, limitation of the right to oppose exceptions, restriction of the liberty to contract with other persons, tacit renewal of the contract, applicable law, arbitration clauses or clauses by which one derogates from the norms regarding the competence of the courts of law.

Such unusual standard clauses produce effects only if expressly accepted in writing by the other party (art. 1203 of The Civil Code).

7. All that have been showed above lead to the **conclusion** that the regulation of the new Civil Code regarding the conclusion of the contract stands for actual progress in comparison with the previous legal regulation.

Even if, in many cases, the solutions adopted are not a novelty towards the solutions accepted by the civil law and commercial law doctrine, as well as by the judiciary practice, they have the merit of offering legal support and, therefore, a guarantee for the security of contractual relations.

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