

## THE CONTRACT - ESSENTIAL LEGAL INSTRUMENT IN CARRYING OUT COMMERCIAL ACTIVITY

### -part II-

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#### **Abstract**

*The commercial contract named, according to the Civil Code - simple contract - is the main legal instrument with which the domestic and international trade is carried out. The contract is an agreement of will between the parties participating in a commercial relationship, an agreement by which a commercial legal relationship is created, modified or extinguished. At first sight, a commercial contract seems to be an ordinary contract, similar to other contracts regulated by the Civil Code. However, a closer analysis of the specifics of this contract shows that it presents itself as a legal institution different in its characteristics from other contracts, benefiting from its own rules and bears the impact of the rules of the Civil Code. The commercial contract is the most important source of commercial obligations, but not the only one.*

**Key words:** contract, commercial activity, manifestation of will, contracting parties, contractual freedom

#### **INTRODUCTION**

Carrying out a commercial activity involves the production and circulation of goods, the execution of works, the provision of services. Due to this aspect, the commercial activity implies the conclusion of some legal acts - contracts -, in order to commit legal deeds and economic operations.

The commercial contract is a legal instrument to carry out the trade, which, due to its specificity, gives the signatory parties a security in terms of acquiring rights and assuming obligations.

## **MATERIAL AND METHOD**

The materials used in writing this paper are composed of specialized books such as: specialized courses, treatises, legislation

. The methods used are legal, namely the formal method, the historical method, the comparative method, the logical and sociological method, the analytical method. The use of these methods has the role of performing a systematic analysis of the information from the studied sources in order to elaborate the points of view and the conclusions.

## **RESULTS AND DISCUSSION**

One of the fundamental requirements of trade is the speed with which commercial obligations are born, executed and extinguished, meant to allow participants the access to the circuit of values, so as to ensure their safe and fast profit.<sup>1</sup>

Contracts concerning commercial activity are legal acts concluded by professionals in order to operate an enterprise from the economic point of view. The economic aspect of the manifestation of will of the parties, in order to conclude a commercial contract is its final goal - obtaining the profit by producing / circulating the goods and executing works / providing services.

The particular rules or derogations that apply to commercial contracts are provided both in the Civil Code and in the special laws. Regarding the Civil Code, we find these rules in the articles 1650 - 2278.

According to art. 1169 Civil Code corroborated with art. 11 of the Civil Code "The parties are free to conclude any contracts and determine their content, within the limits imposed by law, public order and morals" respectively "It is not possible to derogate by conventions or unilateral legal acts from the laws that concern the public order or from the good morals".<sup>2</sup>

The principles governing the conclusion of commercial contracts are the principle of contractual capacity and freedom. The principle of contractual freedom is the one that prevails at the conclusion of a commercial contract.

Taking into account this aspect, the essential elements of such a contract must be met cumulatively, more precisely the will (manifestation of will). This principle of contractual freedom is a principle that we find in civil and commercial law. In commercial law, it has a general applicability because it concerns both the contractual legal relations in which the individual professionals (traders) or the commercial companies participate and the

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<sup>1</sup> Ioan Schiau, *Commercial Law*, Hamangiu Publishing House, Bucharest, 2009, pg. 370

<sup>2</sup> art. 1169, art. 11 of the Civil Code of 2009 (Law no. 287/2009) - Republished, published in the Official Gazette of Romania, Part I, no. 409 of June 10, 2011

relations in which the commercial companies with state capital and the autonomous utilities participate. Thus, according to art. 47 of Law 15/1990 on the reorganization of state economic units as autonomous companies and commercial companies, the commercial relations between the autonomous companies, between the commercial companies with state capital and the relations between them or between them and the state are developed on a contractual basis.

The contracts concluded between the economic agents mentioned above are governed by the principle of contractual freedom and by the regulations contained in the Civil Code and in the special laws, with the exceptions deriving from this law.<sup>3</sup>

Thus, at the conclusion of the contracts, the parties freely express their will in order to shape, modify, transmit and extinguish certain rights and obligations. The freedom of expression of the contracting parties is a contractual freedom and reflects the existing human rights and freedoms. The freedom of will expression of the contracting parties is a contractual freedom and mirrors the existing human rights and freedoms.<sup>4</sup>

Due to the fact that contractually it is the main source of commercial obligations, both the legislator and the doctrine paid special attention to this institution because it has an essential role in the realization and development of goods circulation between producer and consumer.<sup>5</sup>

In this respect, of course, an important role in the development of commercial activities, in addition to the general and special legislation governing commercial activity, we also have the legislation on consumer protection which briefly outlines the obligations of professionals (traders) regarding the production and implementation in circulation of products regardless of the category to which they belong.

In order to conclude a commercial contract, certain stages must be completed, with the aim of choosing, contacting the business partner as well as conducting discussions or negotiating, the terms and conditions according to which the transactions will take place. This stage is known as the pre-contractual phase and aims to establish the clauses that will materialize the final contract. The advantages of completing the steps mentioned above are: concluding rigorous commercial contracts, reducing the risk of litigation, contracts adapted to the requirements of the contracting parties.

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<sup>3</sup> art. 47 Law 15/1990 on the reorganization of state economic units as autonomous companies and commercial companies, published in the Official Gazette 98 of August 8, 1990, Version from: November 2, 2019

<sup>4</sup> Stanciu D. Carpenaru, Romanian Commercial Law Treaty, Universul juridic Publishing House, Bucharest, 2012, pg. 402

<sup>5</sup> Ioan Schiau, Commercial Law, Ed. Hamangiu, Bucharest, 2009, pg. 370

The legal consequences of the existence of the principle of contractual freedom are: the freedom to express the will at the conclusion of the contract, the freedom to administer evidence in case of disputes related to the proper conduct of business and implicitly the contracts under which this activity is carried out, the freedom of the parties to opt for the institution of arbitration, in case of a dispute.

## **CONCLUSIONS**

The activity of professionals - traders implies a multitude of contractual relations concluded both with domestic partners and with foreign partners, on the Romanian market or on third markets. These contractual relations are governed by the provisions of the Romanian Civil Code or of the special laws, as well as by the European ones, on the one hand, or by the provisions of the laws chosen by the parties, laws with which the contract has at least a connection point, or of international conventions. or the standard laws that the parties have agreed to apply.

The contract is the main legal instrument through which domestic and international trade is carried out.

When drawing up an contract, it is important to be as clear as possible, containing all the identification data of the contracting parties, of the patrimonial mass being traded, payment terms and other clauses depending on the type of contract.

Regardless of the type of contract concluded, we must know that it has legal force and in resolving possible disputes between the contractual partners, the courts always resort to the contract.

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