

# THE ABILITY TO CONTRACT - AN ESSENTIAL CONDITION IN EVERYDAY LIFE

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## Abstract

*The contract is one of the most common forms of the legal act today. Practically, the contract represents a fundamental legal institution of the law that was and continues to be the main source of obligations, through which the circulation of goods, the provision of services and, in general, the satisfaction of the material and spiritual needs of people are achieved.*

*In the traditional conception of contractual liability, it is closely related to the idea underlying the principle of the binding force of the contract. Since the contract has the force of a law in the relations between the parties, it is considered that the pendant of this principle is that each party must be responsible for the possible non-compliance with its "law", therefore for the violation of the "private norm" that the contract generates.*

*The conclusion of the contract implies not only the realization of the agreement of will but also the valid formation of this agreement in terms of the capacity of the parties, the content of the will and the validity of the object.*

**Key words:** *contract, capacity, liability, incapacity*

## 1. Introduction

The 20th century was characterized by a wide development of two instruments of obligation law, the contract and contractual responsibility. It manifests itself through the quantitative and qualitative growth of the "contractual" concept, as a legal expression of the birth of a "contract culture". In this sense, it was emphasized that the contractual field has acquired an unprecedented extension due to its invasion of meanings that go beyond the given legal definition, until to the point where one could even speak and consider that the metaphor of the contract occupies, "public space"<sup>2</sup>.

The phenomenon of the contract, in its expansion, is the direct result of increasing the power of the idea of contracting society.

A contract seeks to achieve a goal, and this is always legal. The purpose is represented by the legal relations that the act can generate. Those who conclude a legal act do not aim so much to establish certain relationships, as to achieve their content. Reports are good because their content includes rights and civil obligations that the legal act can generate.

Until now, the contract has been of interest from a substantial point of view, emphasizing its voluntary nature, the fact that we are dealing with a consent, an understanding, produced with the intention of generating legal effects.

The sale-purchase contract, known as an instrument of economic exchanges, is one of the most common contracts in commercial relations, being the most common in operations of production, sale and resale of goods, provision of services, execution of works.

The contract has a strong educational role in the life of our society, being the "law" of the contracting parties and, therefore, obliging the parties to respect the commitments assumed. It introduces into the relations between people the sense of responsibility for their duties and promotes collaborative relationships, educates people in the sense of contractual discipline and creates skills and habits in this sense, thus contributing to the development of citizens' consciousness.<sup>3</sup>

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<sup>2</sup> Liviu Pop, Ionuț-Florin Popa, Stelian Ioan Vidu, Elementary treatise on civil law. Obligations, according to the new Civil Code, Universul Juridic publishing house, Bucharest, 2012, page 239

<sup>3</sup> Tudor Popescu - Civil law. Course notes, Hyperion Publishing House, Bucharest, 1991, p. 39

## 2. The capacity to contract

In legal terms, the ability to conclude a civil legal act means the ability of the subject of civil law to become the holder of civil rights and obligations by concluding civil legal acts, respectively the ability of natural or legal persons to conclude, personally or through representation, a civil contract.

According to art. 28 para. (1) Civil Code, "civil capacity is recognized for all persons", and the provisions of para. (2) establish that any person has the capacity to use and, except for the cases provided by law, the capacity to exercise. The limitation of the capacity of use and the deprivation, in whole or in part, of the capacity to exercise, can be done only in the cases and conditions expressly provided by law.

According to the Civil Code, in art. 1.180 Civil Code, in the field of contracts, the rule is the capacity to contract. According to this provision, "any person who is not declared incapable by law or prevented from concluding certain contracts" can contract. Also, according to art. 1.652 Civil Code "all those who are not prohibited by law can buy or sell".

Based on these conditions, the principle of capacity is enshrined, according to which, in general, all people enjoy the ability to sell.

There are also some exceptions, thus, two categories of people do not have the right to conclude contracts:

- minors without exercise capacity;
- persons placed under a judicial ban, under the terms of the law, respectively physical persons lacking legal capacity.

The company is not limited only to the category of natural persons as the contract, but in full right legal persons participate vehemently in the conclusion of civil, commercial contracts...

To the two categories of natural persons who do not have the right to conclude contracts, we could add the category of legal persons who do not have the exercise capacity necessary for their legal functioning, although anyone can, in principle, be a seller.

The sale-purchase being an act of disposition, gives the right to the minor and those placed under the ban to be able to sell if they are assisted or represented under the conditions of common law and the approval of the guardianship court has been obtained in the cases provided by law (possibly also the opinion of the family council). If, in relation to one's own patrimony, the sale-purchase is intended for the execution of acts of conservation or administration, the required capacity is that provided by law for acts of conservation and administration. The inability to sell represents a prohibition to sell established in consideration of the respective person.

According to common law, they do not have the capacity to contract even natural persons who, although capable, i.e. having full exercise capacity, this right is restricted by an express legal provision, under the conditions of art. 53 of the Romanian Constitution. Legal entities may be added to them which, although they have the capacity to exercise acquired under the law, are forbidden by law to conclude certain categories of contracts.

In the old regulation, the only prohibition provided by the Civil Code was that provided by art. 1,307 of the Civil Code, according to which the sale cannot be made between spouses<sup>1</sup>. The current Civil Code abandoned the previous concept and no longer provided for

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<sup>1</sup> The regulation had a threefold purpose:

- a) To prevent the spouses from entering into donation contracts under the guise of a sale-purchase, which would have been irrevocable, although according to art. 937 Civil Code, donations between spouses were always revocable during the life of the donor;
  - b) To defend the interests of reserved heirs who, in the case of donations, can ask for the report or request the reduction of liberality that violates the inheritance reserve. If the sale-purchase had been allowed, this possibility could have been circumvented by disguising the donation under the guise of a sale-purchase contract;
  - c) Protecting the interests of creditors who could have been defrauded by concluding fictitious sales-purchase contracts.
- The penalty for violating the provision of art. 1.307 C.civ. it was relative nullity, being the protection of a private interest, not a general interest.

this incapacity. On the contrary, art. 371 of the Civil Code provides that "Unless the law provides otherwise, each spouse can conclude any legal documents with the other spouse or with third parties"<sup>1</sup>.

The provisions of art. 1.652 of the Civil Code establishes that "all those who are not prohibited by law can buy or sell". The conclusion would be that an express prohibition is necessary through a law whereby a certain person does not have the right to buy or sell or to buy and sell at the same time.

### **3. Inability to contract**

The inability to contract is an exceptional situation and it must be expressly provided for by law. By establishing a certain disability, a specific goal is pursued, such as:

- defense of the minor's material interests;
- defense of public morality;
- defending the interests of third parties.

At the same time, one can appreciate the type of nullity that affects the act concluded by an incapable person, in relation to the goal pursued by the legislator by establishing such an inability to contract.

Incapacitations aimed at protecting a public interest, in case of non-compliance, are sanctioned with absolute nullity, as in the cases provided for by art. 1,654 letter c)<sup>2</sup>, of the act concluded with their ignoring, and those that defend a personal interest or even of a narrower group (so not public) are sanctioned with relative nullity, as in the cases provided by art. 1,654 lit. a)<sup>3</sup> and b)<sup>4</sup>. The nature of the nullity is expressly shown by the mentioned legal provision.

In accordance with the provisions of art. 53 of the Romanian Constitution, "the exercise of certain rights or freedoms can be restricted only by law and only if it is required, as the case may be, for: the defense of national security, order, health or public morals, the rights and freedoms of citizens ; carrying out the criminal investigation, preventing the consequences of a natural calamity or a particularly serious disaster" [par. (1)]. According to the provisions of para. (2) of the same article, "the restriction must be proportional to the situation that determined it and cannot affect the existence of the right or freedom".

In the case of the sales contract, these disabilities regulated by law according to the mentioned constitutional provisions, represent disabilities to exercise certain rights, and not disabilities to use<sup>5</sup>. If these disabilities in question would be qualified as being of use, they would affect the existence of the rights to sell and buy, rights that are granted by law to people other than those affected by the respective disabilities, so that, in the light of the provisions para. (2) of art. 53, the legal provisions establishing them would be unconstitutional.

The inability to contract that can affect natural or legal persons can be viewed from various perspectives.

### **4. Inabilities to buy**

Most of the inabilities are those of buying certain goods, by certain people. According to the provisions of art. 1,653 para. (1) Civil Code, under the penalty of absolute nullity, judges, prosecutors, clerks, executors, lawyers, notaries public, legal advisers and insolvency practitioners cannot purchase, directly or through interposed persons, litigious rights that are within the jurisdiction of the court in whose constituency he carries out his activity.

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The ban also does not apply to cohabitants, because they do not have the special quality required by the analyzed text, that of being spouses.

<sup>1</sup> Ghe. Comăniță, Ioana-Iulia Comăniță, "Civil law. Special civil contracts", Ed. Universul Juridic, Bucharest, 2013, page 26.

<sup>2</sup> c) civil servants, syndic judges, insolvency practitioners, executors, as well as other such persons, who could influence the conditions of the sale made through them or whose object is the goods they administer or whose administration they supervise.

<sup>3</sup> a) the trustees, for the goods they are tasked to sell.

<sup>4</sup> b) the parents, the guardian, the curator, the temporary administrator, for the goods of the persons they represent.

<sup>5</sup> I make an exception for foreigners, natural or legal persons, whose disabilities regulated by law are for use, and not for exercise

By litigious rights<sup>1</sup> we must understand that category of rights, regardless of their nature, regarding which there is a dispute regarding their substance, regardless of what phase that dispute is in, with the exception of the enforcement phase.

This inability to be a buyer of litigious rights is likely to prevent the abuses that could be committed by the categories of persons listed above, taking advantage of their quality and position in the processes in which they would pursue the valorization of the purchased litigious rights. The identification of the litigious rights would be done by reporting to the seat of the court that was referred to the respective litigation, starting with the judgment on the merits and continuing with the appeals, ordinary and extraordinary.

Several categories of operations for the purchase of litigious rights are established that can be concluded by the categories of persons listed above, considering the origin and purposes for which the purchase of those litigious rights is made. In this sense, the following are exempted from this prohibition:

- the purchase of succession rights or shares in the property right from co-heirs or co-owners, as the case may be;
- the purchase of a litigious right in order to satisfy a claim that arose before the right became litigious;
- the purchase that was made to defend the rights of the one who owns the asset in relation to which the disputed right exists<sup>2</sup>

Thus, in any of the excepted situations, there can be no danger that those who will buy the litigious rights related to those goods can use abusively or fraudulently the quality or the functions they have within the jurisdiction of the courts that judge those disputes.

As regards the sanction related to the prohibition to purchase litigious rights, this is also absolute nullity and it is also an express nullity, established in order to avoid the controversy prior to the current Civil Code, regarding the nature of nullity. Some authors considered that in this case we are in the presence of a relative nullity<sup>3</sup>, and others appreciated that the protected interest is a public one and the nullity is absolute<sup>4</sup>.

"We have also previously appreciated that the sanction must be absolute nullity because in the discussed case the protection of the seller's interests is pursued as well as a broader interest, which is related to the good prestige of some professions of public interest".

Violation of the prohibitions regarding the sale of land to foreigners and stateless persons is sanctioned with absolute nullity.

Art. 1654, para. (1), regulates another category of inability to buy. The legal provision according to which the following categories of people are unable to buy, directly or through intermediaries, even through a public auction:

- trustees, for the goods they are tasked to sell, with the exceptions provided by art. 1304 para. (1)<sup>5</sup>, referring to the act itself and the double representation;
- parents, guardian, curator, provisional administrator, for the property of the persons they represent;
- civil servants, syndic judges, insolvency practitioners, executors, as well as other such persons who could influence the terms of the sale made through them or whose object is the goods they administer or whose administration they supervise.

The mentioned inabilities also apply in the case of sale by public auction.

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<sup>1</sup> Paragraph (3) of art. 1.653 defines the litigious right as when there is a started and unfinished process regarding its existence or extent

<sup>2</sup> Art. 1.653, para. (2), Civil Code.

<sup>3</sup> Gh. Comăniță, I.-I. Comăniță, op.cit., 2013, page 29

<sup>4</sup> Ibid.

<sup>5</sup> "The contract concluded by the representative with himself, in his own name, is voidable only at the request of the representative, unless the representative has been expressly authorized in this sense or the content of the contract has been determined in such a way as to exclude the possibility of a conflict of interests."

## 5. Inabilities to sell

The Civil Code also establishes an inability to sell, also with reference to persons unable to buy, regulated by art. 1654<sup>1</sup>, but the incapacity will be limited to certain requirements. In this sense, para. (1) provides that "the persons provided for in art. 1.654, para. (1), they cannot also sell their own assets for a price that consists of a sum of money derived from the sale or exploitation of the asset or patrimony that they administer or whose administration they supervise, as the case may be". Para. (2) contains the specification that the prohibition established by para. (1) will also apply appropriately to contracts in which, in exchange for a performance promised by the persons listed in para. (1) of art. 1654, the other party undertakes to pay a certain amount of money.

The inability to sell refers to the same category of people, but in somewhat different situations. The first case [paragraph (1)] in which the sale of property owned by the categories of persons in question, which are sold against a price obtained by them as consideration for the sale, exploitation or supervision by them of a property or of another person's patrimony, in which case there could be a temptation to obtain the necessary amount to be paid as a price at the expense of the one whose interests must be defended and promoted by the persons listed in paragraph. (1) of art. 1654<sup>2</sup>.

. The second case considers the situation where the persons in question only promise a certain benefit to third parties and they oblige themselves to pay them a sum of money.

This time, the legislator does not indicate the type of sanction that should be applied in case of violation of the examined incapacity. A rational prohibition is established by art. 1,656: none of the persons incapable of selling or buying, according to the law, have active procedural legitimacy to introduce actions - in their own name or in the name of the protected person - to cancel the sale made in violation of the incapacities examined in the previous ones.

According to art. 1.655 of the Civil Code, the parents, the guardian, the curator, the provisional administrator regarding the assets of the persons they represent, civil servants, syndic judges, insolvency practitioners, executors, as well as other such persons, who could influence the conditions of the sale made by through them or whose object is the goods that they administer or whose administration they supervise, besides the fact that they cannot buy the respective goods, they cannot also sell their own goods when the price to be paid for these goods is made up of a sum of money that comes from the sale or exploitation of the good or patrimony that it administers or whose administration it supervises, as the case may be.

"The sanction of sales-purchase contracts concluded in violation of the aforementioned prohibitions to sell is relative nullity when the sellers are parents, guardians, curators or provisional administrators, and absolute nullity when the sellers, under the conditions shown, are civil servants, judges- syndics, insolvency practitioners, executors, as well as other such persons who could influence the conditions of the sale."

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<sup>1</sup> "(1) They are unable to buy, directly or through intermediaries, even through a public auction:

a) Trustees, for the goods they are tasked to sell;

b) Parents, guardian, curator, provisional administrator, for the assets of the persons they represent;

c) Civil servants, syndic judges, insolvency practitioners, executors, as well as other such persons, who could influence the conditions of the sale made through them or whose object is the goods they administer or whose administration they supervise.

(2) Violation of the prohibitions provided for in para. (1) lit. a) and b) are sanctioned with relative nullity, and those provided for in letter c) with absolute nullity."

<sup>2</sup> Regarding this incapacity, the doctrine stated that "the interest of the persons provided for in art. 1654 para. (1) to sell one's own assets as profitably as possible conflicts with the interests of the persons protected by the law. If the amount of money that represents the sale price does not come from the exploitation of the asset or the patrimony that he administers or whose administration he supervises, the inability to sell does not operate. If the origin of the amount of money paid as price was indifferent, the inability to sell would also be the inability to buy for the person protected by the prohibition" (M. Gavriș, in the collective work "New Civil Code. Comments, doctrine and jurisprudence", Vol. III, Art. 1650-2664, Ed. Hamangu, Bucharest, 2012, p. 12).

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