

**NEWSLETTER**  
**September 2011**

**NOUL CODUL CIVIL (1)**

In Monitorul Oficial nr. 409 din 10.06.2011 a fost publicata Legea nr. 71/2011 pentru punerea in aplicare a Legii nr. 287/2009 privind Codul Civil (denumita in continuare Legea 287/2009 sau Noul Cod Civil); Legea 287/2009 a fost publicata in Monitorul Oficial nr. 511 din 24.07.2009, ulterior fiind modificata si rectificata, urmand a intra in vigoare incepand cu data de 1 Octombrie 2011.

Conform normelor de aplicare (in ceea ce priveste materia obligatiilor si pe care o vom analiza in cele urmeaza) dispozitiile Noului Cod Civil se aplica doar contractelor incheiate dupa data de 1 octombrie 2011.

In continuare, vom prezenta principalele modificari si completari aduse de Legea 287/2009 in materia obligatiilor, astfel: (i) clauzele neuzuale stipulate in contracte; (ii) leziunea – viciu de consimtamant; (iii) imprezviunea; (iv) riscul in contractul translativ si (v) pactul comisoriu.

**1) Clauzele neuzuale stipulate in contract**

In conformitate cu prevederile Noului Cod Civil, anumite clauze nu produc efecte decat daca sunt acceptate, in mod expres, in scris, de cealalta parte. Astfel de clauze sunt cele care prevad in folosul celui care le propune prin Conditii Generale, Contracte cadru etc:

- limitarea raspunderii;
- dreptul de a denunta unilateral contractul;
- dreptul de a suspenda executarea obligatiilor;

**NEW CIVIL CODE (1)**

Within the Official Gazette no. 409 dated 10.06.2011 there was published Law no. 71/2011 on applying Law no. 287/2009 regarding the Civil Code (hereinafter referred to as Law 287/2009 or the new Civil Code); Law 287/2009 was published within the Official Gazette no. 511 as of 25.07.2009, thenceforth amended and rectified, and shall eventually enter into force starting with the 1<sup>st</sup> of October 2011.

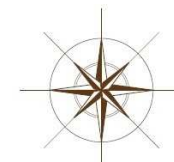
As per the norms of applications (and when it comes of rules related to the civil obligations matter and which we shall further analyze) the New Civil Code dispositions apply solely to contract concluded after 1<sup>st</sup> of October 2011.

Hereinafter we shall present the main amendments and completions brought by Law 287/2009 in matter of obligations, as follows: (i) non-usual clauses stipulated in agreements; (ii) lesion – vice of consent; (iii) hardship; (iv) risk in contracts transferring ownership; (v) commissoria lex.

**1) Un-usual clauses stipulated in the agreement**

According to the provisions of the new Civil Code, certain clauses shall not be effective unless expressly and in written accepted by the other party. Such clauses are those which provide for the benefit of the one who proposes them, by means of General Terms & Conditions, Frame Agreement:

- the limitation of liability;
- the right to unilaterally terminate the agreement;
- the right to suspend the execution of the obligations;



- decaderă din drepturi ori din beneficiul termenului;
- limitarea dreptului de a opune excepții;
- restrângerea libertății de a contracta cu alte persoane;
- reînnoirea tacită a contractului;
- legea aplicabilă;
- clauze compromisorii sau prin care se deroga de la normele privitoare la competența instanțelor judecătorești.

Astfel, în situația în care una dintre părți utilizează Condiții Generale sau Contracte Cadru în relația cu partenerii de afaceri, pentru ca aceste clauze să producă efecte, este necesar să fie acceptate expres, în scris de către cealaltă parte.

## 2) Leziunea – viciu de consimțământ

Conform noii reglementări, leziunea ca viciu de consimțământ există atunci când una dintre părți, profitând de starea de nevoie, de lipsa de experiență ori de lipsa de cunoștințe a celeilalte părți, stipulează în favoarea sa ori a unei alte persoane o prestație de o valoare considerabil mai mare, la data încheierii contractului, decât valoarea propriei prestații (vechea reglementare prevedea existența leziunii ca viciu de consimțământ doar în cazul minorilor). Mai mult, existența leziunii se apreciază și în funcție de natura și scopul contractului.

Conform prevederilor legale, partea al cărei consimțământ a fost viciat prin leziune poate cere, la alegerea sa, fie anularea contractului, fie reducerea obligațiilor sale cu valoarea daunelor-interese la care ar fi îndreptățită.

Conform dispozițiilor noului Cod Civil, nu pot fi atacate pentru leziune contractele aleatorii, tranzacția, precum și alte contracte anume prevăzute de lege.

- the other's party forfeiture of rights;
- the limitation of the right to oppose exceptions;
- the limitation of the right to contract with other persons;
- the tacit renewal of the agreement;
- the applicable law;
- the arbitration clauses or the clauses derogating from the provisions regarding courts' competence.

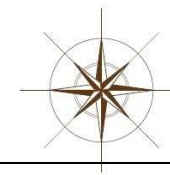
In line with the before mentioned, should a contracting party use standard General Conditions of Frame Agreements, which include unusual clauses as the ones above mentioned, these should be expressly and in written accepted by the other party, through individual contracts, in order not to be considered void and null.

## 2) Lesion – vice of consent

According to the new regulation, the lesion as vice of consent exists when one of the parties, taking advantage of the other party's state of need, lack of experience or lack of knowledge, stipulates, at the conclusion of the agreement, on his benefit or in other party's benefit, a service of a value significantly higher than its own service (the previous regulation provided the lesion as vice of consent only for minors). Moreover, the lesion's existence shall be also considered in accordance with the nature and scope of the agreement.

According to the legal provisions, the party whose consent was vitiated by lesion may ask, if it chooses, either the cancellation of the contract or the reduction of its obligations with the damages value to which it is entitled.

According to the provisions of the new Civil Code, random contracts, settlements, and also other contracts expressly provided by law cannot be attacked for lesion.



### 3) Impreviziunea

Conform noii reglementari, partile care au incheiat un contract in conditiile legii, sunt tinute sa isi execute obligatiile, chiar daca executarea lor a devenit mai oneroasa. Totusi, in situatia in care executarea contractului a devenit excesiv de oneroasa datorita unei schimbari exceptionale a imprejurarilor care ar face in mod evident injusta obligarea debitorului la executarea obligatiei, instanta poate dispune fie adaptarea contractului, fie incetarea acestuia.

### 4) Riscul in contractul translativ de proprietate

Spre deosebire de vechea reglementare, care prevedea ca in contractele ce au ca obiect transferul proprietatii, sau a unui alt drept real, riscul contractului este in sarcina dobanditorului, chiar daca lucrul nu a fost predat, conform noului Cod Civil, in lipsa de stipulatie contrara, cat timp bunul nu este predat, riscul contractului ramane in sarcina debitorului obligatiei de predare, chiar daca proprietatea a fost transferata dobanditorului. Mai mult, in cazul pieririi fortuite a bunului, debitorul obligatiei de predare pierde dreptul la contraprestatie, iar daca a primit-o, este obligat sa o restituie. Totusi, in situatia in care creditorul a fost pus in intarziere, acesta preia riscul pieririi fortuite a bunului.

### 5) Pactul comisoriu

In conformitate cu dispozitiile noului Cod Civil, pactul comisoriu produce efecte doar daca prevede, in mod expres, obligatiile a caror neexecutare atrage rezolutiunea sau reziliereade drept a contractului.

### 3) Hardship

According to the new regulation, the parties that have concluded a contract under the law shall perform their obligations, even if their execution has become more onerous. However, if the execution of the contract has become excessively burdening due to exceptional change of circumstances that would render obviously unjust the obligation of the debtor to execute his obligation, the court may order either the adjustment of the contract or its termination.

### 4) The risk in contracts transferring ownership

Unlike the old regulation which provided that in contracts that are intended for transfer of ownership or of other real right, the risk is borne by the acquirer, even if the property has not been handed over, under the new Civil Code, in absence of contrary stipulation, as long as the property is not handed over, the risk of the contract is borne by the debtor of the handing over obligation, even if the property was transferred to the acquirer. Moreover, in case of fortuitous destruction of property, the debtor of the handing over obligation loses the right to consideration, and if he received it, he is obliged to return it. However, in case the creditor has been delayed, he takes over the risk of fortuitous destruction of property.

### 5) Cosmissoria lex

According to the provisions of the new Civil Code, *commissoria lex* generates effects only if it provides, expressly, the obligations whose breach attracts the termination of the contract.

*Yours sincerely,*  
*Almaj & Albu, attorneys at law*