THE CONSUMPTION LOAN AGREEMENT PARTICULAR ASPECTS REGARDING CONTRACTING CAPACITY OF PARTIES

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Abstract
The study contains a short presentation of loan contract, with a special view of condition for the validity of the contract that refers to the capacity of the parties to conclude such contract. The study proposed to analyze the doctrine, jurisprudence and legal texts of the old and the new Civil Code regarding the capacity of parties to conclude a consumption loan agreement, the rule and the exceptions.

Key words: *loan contract, consumption loan, condition for the validity of contract, loan of consumption, anticipated legal capacity.*

Introduction

The paper covers aspects regarding Civil Law, Commercial Law, Consumer Law, and Civil Procedure Law

The importance of study is given by:

- The newness in civil law doctrine;
- The new regulations of consumption loan;
- The importance of knowledge of condition for the validity of contract to assure the stability of commerce;

For answering to these problems I will try to analyze the legal framework of consumption loan and, in particular, capacity of parties to conclude such contract, to analyze the Romanian and foreign doctrine, the jurisprudence, and to propose an interpretation of the new regulations regarding the capacity of physical and juridical person to conclude the consumption loan.

Content

1. The Loan Contract in Civil Code

Traditionally, a loan is defined to be the contract by which a person, called the lender, transmits the use or ownership of property to another person, called the borrower, under an obligation on the part of the borrower to return the property in kind or other goods of the same quantity and quality[1].

Unlike the former Civil Code[2] which regulated in Book III, Titles X and XI, the commodatum and the loan as two distinct contracts, the Civil Code currently includes the Book V. Of obligations, Title IX. Various special contracts, Chapter XIII. Loan contract. The chapter has three sections: general provisions, loan for use and loan for consumption, thus responding more

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[1] See in this respect L. Stănciulescu, *Curs de Drept Civil. Contracte* (*Course of Civil Law. Contracts)*, Hamangiu Publishing House, Bucharest, 2012, p. 395, C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român (Romanian Civil Law Treatise)*, 2nd vol., Restitutio, All Publishing House, Bucharest, 1997, p. 622.

[2] Please note that throughout the paper we refer to the old Civil Code as to the Civil Code of 1864, published on 26.11.1864 and entered into force on 1.12.1865, and the phrase "Civil Code" shall mean the current Civil Code covered by the Law no. 287/2009, published in the Official Gazette of Romania no. 511 of 24.07.2009 and republished in the Official Gazette of Romania no. 505 of 15.07.2011.

accurately to the requirements of theoretical classification, since the essence of the two contracts is the same.

The Civil Code, in the general provisions of chapter XIII, by Art. 2.144, provides that there are two types of loans: the loan for use, also called *commodatum* (or free loan) and the loan for consumption (or *mutuum*).

Thus, at present, the hearth of the subject matter is constituted by Art. 2.158 – 2.170 of the Civil Code, The Book V. Of Obligations, Title IX. Various Special Contracts, Chapter XIII. Loan Contract, Section III. Loan for Consumption.

Art. 2.158 defines the loan for consumption as the contract by which the lender remits to the borrower an amount of money or other similar fungible and consumable goods, and the borrower binds himself to return, after a certain period of time, the same amount of money or quantity of goods of the same kind and quality.

Although the legislator has enlarged the legal definition, including elements outlined in the doctrine over the years by various authors, however, criticism has been aimed at the fact that no reference is made to the transfer, at least temporarily, of the ownership, considered essential in this context[3].

It is characteristic of loan for consumption that the good loaned shall be consumed by the borrower, who will not be able to return the identical property but instead of which he will return other property of the same kind, quality and quantity[4].

It may be noted that, unlike the provisions of the Civil Code of Québec, the definition of the Romanian Civil Code expressly refers to fungible goods (according to classification given by Art. 543), qualification of goods that is not found in the Canadian Civil Code.

The Romanian legislator has not assumed the provisions of Art. 1894 of the French Civil Code which expressly excludes from the category of goods that may be subject of a loan for consumption those immovable goods, individually determined movable goods or goods that, although are of the same species, varies by individual characteristics, the animals being given as an example[5].

II. The loan contract validity condition – The Capacity of Parties to conclude a loan agreement

As Section 3, Chapter XIII of Book V of the Civil Code, dedicated to the loan for consumption, does not contain special rules on the contract validity conditions, then the contract must fulfill the essential and general conditions for the validity of any contract, as provided by Art. 1.179 par. 1 of the Civil Code, though with some particularities regarding capacity of parties, their consent and the object of the agreement, which particularities are generated by the characteristic of the loan for consumption.

Sometimes, in the doctrine[6], the conditions of validity specific for the loan of consumption have been outlined, being estimated that the following elements must be met: lender should be the owner of the amount of money or of the other fungible goods that constitute the material object of the respective loan for consumption, the transfer of the ownership to the borrower which implies the effective delivery of the good, express assumption of obligation to restitute the exact amount received by the borrower, valid consent of the parties having legal capacity, legal object and cause.

[3] G. Boroi, L. Stănciulescu, *Institutii de Drept Civil în reglementarea noului Cod Civil (Civil law institutions to regulate the new Civil Code)*, Hamangiu Publishing House, 2012, p. 505.

[4] Frédéric Leclerc, *Droit des contrats spéciaux*, LGDJ, 2007, p. 287.

[5] Pascal Puig, *Contrats spéciaux*, 3e édition, Dalloz, 2009, p. 432.

[6] E.g. T. Prescure, A. Ciurea, *Contracte civile* (*Civil contracts),* Hamangiu Publishing House, 2007, p. 263.

The first condition for the validity of a contract provided by Art. 1.179 par. 1, point 1 of the Civil Code refers to the capacity of the parties to conclude contracts. In this regard, the rule is the capacity to conclude civil legal acts, the incapacity constituting an exception. The rule is contained implicitly, generally, in Art. 29, par. 1 of the Civil Code, according to which "nobody can be restricted in the capacity of use or deprived, in whole or in part, of the capacity of exercise, except in the cases and under the conditions expressly provided by law."[7]

Art. 1.180 establishes in principle that any person who is not declared incapable by law nor banned to conclude certain contracts may conclude contracts. Rules on the capacity to conclude contracts are regulated mainly in Book I of the Civil Code (Art. 1.181 of the Civil Code).

The loan for consumption, which is an act of transfer of property, was qualified as an act of disposition[8], an act that results in removing a good from the patrimony.

Therefore, considering the effects and the importance of such a contract on the patrimony of the lender, he must have the capacity, respectively to fulfill the conditions required by law regarding the acts of disposition, in principle full legal capacity and be the owner of the good that constitutes the object of the contract[9].

The loan for consumption is a as a gift contract, though it is not a munificence, but it is a simple disinterested act as long as the borrower has the obligation to restitute goods of the same kind, quantity and quality. Hence in this matter are not applicable the special incapacities provided for munificence's [10].

In the legal literature[11] it was also mentioned that the loan for consumption by onerous title is, for the lender, an act of transfer of property and an act of disposition by its content, but an act of administration of the patrimony by its effects. Although initially the lender transfers the ownership of the goods loaned from his patrimony, when the contract terminates the borrower shall restitute to him goods of the same kind, quantity and quality, so that no decrease of the patrimony of the lender is produced, per contra, in the case of the loan with interest, his patrimony shall increase according to the parties agreement.

The borrower must, in turn, have the legal capacity to conclude acts of disposition as long as he assumes an obligation to restitute the goods, which means that on due date he must restitute an equivalent value, being that the borrowed goods were consumed. Moreover, he becomes an owner and thus bears the risk of accidental destruction of the things borrowed[12].

Another argument justifying this requirement for the borrower is the legal equality of the parties in a civil legal act[13], neither party being able to impose its will on the other.

Free will of each party is however a matter of consent and how it is expressed, and the principle of legal equality of the parties when concluding a contract does not automatically imply that the requirements and qualities are identical (for example, in relation to donation, there are some

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[7] G. Boroi, C. A. Anghelescu, *Curs de Drept Civil. Partea Generală (Course of Civil Law. The Generic Part)* 2nd ed. revised and enlarged, Hamangiu Publishing House, 2012, p. 128-129.

[8] Ghe. Beleiu, *Drept Civil Român, Introducere în Dreptul Civil, Subiectele Dreptului Civil (Romanian Civil Law, Introduction to Civil Law, Civil rights issues)*, "Sansa" Publishing and Press House, Bucharest, 1992, p. 117- 118: "It is an act of transfer that civil legal act which results in transferring a civil subjective right from a patrimony to another patrimony"; "It is an act of disposition that civil legal act which results in removing an asset or a right from the patrimony or in asset encumbrance"; see in this respect G. Boroi, C. A. Anghelescu, *Curs de Drept Civil, Partea Generală*, *(Course of Civil Law. The Generic Part)*, Hamangiu Publishing House, 2011, p. 111, 113.

[9] F. Deak, *Tratat de drept civil. Contracte speciale (Civil Law Treatise. Special Contracts)* Universul Juridic Publishing House, Bucharest, 2001, p. 354, L. Stănciulescu, *op. cit.*, p. 405.

[10] F. Deak, *op. cit.*, p. 354.

[11] Ovidiu-Sorin Nour, *Contractul de împrumut: analiză teoretică si practică (Loan agreement: theoretical and practical analysis),* Universul Juridic Publishing House, 2009, p. 226.

[12] F. Deak, *op. cit.*, p. 355, L. Stănciulescu, *op. cit.*, p. 405.

[13] Ovidiu-Sorin Nour, *op. cit.*, p. 226.

inabilities of disposing or receiving, different for donor and donee, without thereby considering it as violating the principle of equality of parties).

It is necessary that the borrower have the capacity to conclude legal acts of disposition as long as he actually concludes such a contract, which shall produce its specific effects in his patrimony.

Regarding natural persons, the acts of disposition may be concluded by persons with full legal capacity[14]. Full legal capacity begins on the date when the person becomes a major, respectively at the age of 18 (Art. 38 of the Civil Code).

As an exception, the minor who marries acquires from that date full legal capacity (Art. 39 par. 1 of the Civil Code).

We note that, in principle, according to Art. 272, par. 1 of the Civil Code, a marriage may be concluded if the future spouses have reached the age of 18. For solid reasons, however, the minor who has attained the age of 16 may get married on the basis of a medical advisory, with the consent of his parents or tutor and with the guardianship court authorization.

The 16 year old minor has full legal capacity. The basis for this exception is, on the one hand, the purpose of marriage, which is starting a family, so it would be unnatural for the members of a family that could become legal protectors of their own children, to be under parental care. On the other hand, the principle of equality between spouses must be respected, for it may happen that one of them be a major[15].

As a rule, cancellation or nullity of marriage will not produce retroactive result on the legal capacity of the spouses, so that to ensure the security and stability of the legal turnover.

Regarding the future effects, the law makes a distinction between the minor spouse's good or bad faith when concluded the marriage. Article 39 par. 2 of the Civil Code expressly provides, ending a vast polemic arisen in the doctrine under the former Family Code[16], that the minor who acted in good faith when concluded the marriage shall retain full legal capacity.

Per a contrario, the minor who acted in bad faith when concluded the marriage shall lose the full legal capacity in the event that the marriage is annulled, but only if he did not become a major until the date of the annulment, thus obtaining legal capacity under civil law.

Art. 39 par. 2 refers to the marriage "annulled", understanding that the legislator considered the dissolution of marriage for reasons of relative nullity. But since the effects of the two kinds of

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[14] G. Boroi, C. A. Anghelescu, *op. cit.*, p. 113.

[15] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *Noul Cod civil, Comentariu pe articole art. 1-2664 (The New Civil Code, Comments on Articles art. 1-2664),* C.H.Beck Publishing House, Bucharest, 2012, p. 44.

[16] Putative marriage was defined as the marriage which, although invalid or canceled, nevertheless produces some effects towards the spouse who entered into in good faith (I. P. Filipescu, A. I. Filipescu, *Tratat de dreptul familiei (Family Law Treatise)*, 8th ed. revised and supplemented, Universul Juridic Publishing House, Bucharest, 2006, p. 223). According to the authors, if the declaration of the invalidity of a marriage occurs before the spouse who acted in good faith has reached the age of 18, he or she retains full legal capacity since this capacity is lost only in the cases and under the conditions stipulated by the law, and the law does not provide anywhere that the minor who acquired legal capacity by marriage and enjoyed it for a while may lose it afterwards. For the spouse who acted in good faith, nullity of marriage does not suppress the effects that marriage has produced in the past; the full legal capacity acquired as a result of a marriage is retained, independent of marriage, and returning to parental care of the respective spouse is out of the question (p. 223-224).

For the contrary opinion it is invoked Art. 23 para. 1 of the Family Code: "The spouse who acted in good faith when entered a marriage declared invalid or canceled shall be deemed to be in a valid marriage until the date when Court decision becomes final. "Conversely, this situation shall not be maintained after the decision of the Court to invalidate the marriage becomes final. The author agrees with *de lege ferenda* opposite thesis, considering that it is necessary to amend the legal provision, in terms of expressly providing that the full legal capacity acquired by marriage shall not be lost" (Gh. Beleiu, *op. cit.*, p. 286-287).

nullity are the same, such a distinction is not justified, the provision being applicable in the event of a marital dissolution, no matter whether this is due to relative or absolute nullity[17].

For the same reasons, the minor who acquired full legal capacity as a result of concluding a marriage shall not lose this capacity in case that the marriage is ended by divorce or upon termination of marriage by the death of the other spouse, if these situations occur before the respective minor has reached the age of 18[18].

A novelty of the present Civil Code is the anticipated legal capacity. Art. 40 establish a second exception to the principle of acquiring the full legal capacity when the minor becomes a major. For solid reasons, after hearing the parents or the tutor and with the accord of the family council (if constituted), the tutorship court may admit the full legal capacity to the minor who has reached the age of 16.

Such a possibility was regulated by the former Civil Code, but the provisions relating to emancipation were repealed by Decree no. 185/1949, the so called "express" emancipation not being recognized afterwards, until the entry into force of the new Civil Code.

Emancipation was a solemn act that had the effect of abolition of the parental authority or of the tutorship, conferring upon the minor the right to run his personal acts and to administer his patrimony within a limited capacity. He acquired the right to do certain acts alone, while for others had to be assisted by his curator, according to the categories of acts, considered more "serious", for which the law required the approval of the tutorship (for example, Art. 429 of the Civil Code of 1864 provided that the emancipated minor could not borrow without the authorization of the family council approved by the tribunal)[19].

The current law provides no limitation, and the text of the Art. 40 refer to acquirement of the full legal capacity. It is true that nowadays young people aged 16 have a high level of knowledge and benefit from facilities that contribute to their precocity, but their experience is still limited and the "temptations" are big, so that a minimum control over their acts was required.

Another deficiency of the regulation is the absence of a procedure for publicity, allowing third parties to take note of the change in the exercise capacity of minors; it is an issue that will create difficulties to third party contractors who will have to request to the minor the evidence of his emancipation and this will not always make them feel safe in this respect[20].

There are categories of people who may conclude acts of disposition only in certain circumstances, the law providing various limitations or restrictions. It is the case of the minor and the judicial ban or of the spouses who conclude acts with third parties. In addition, special rules regulate the acts concluded by legal persons.

a)The situation of the minor and the judicial interdiction

The Civil Code establishes special measures for the protection of minors and those who, though responsible, because of old age, illness or other reasons provided by law are not able to manage their properties and to defend their interests in appropriate conditions, the legislator considering that these persons lack discernment.

Protection of minor is accomplished by parents (common and ordinary way of protection), by establishing a tutorship, by placement commissioning or by other legal measures of social protection,

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[17] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 45, in the same sense C. T. Ungureanu and others, *Noul Cod civil, Comentarii, doctrină si jurisprudentă (New Civil Code, Comments, doctrine and jurisprudence)*, 1st vol. Art. 1-952, Hamangiu Publishing House, 2012, p. 76 I. P. Filipescu, A. I. Filipescu, *op. cit.*, p. 224, C. T. Ungureanu and others, *op. cit.*, p. 76.

[18] I. P. Filipescu, A. I. Filipescu, *op. cit.*, p. 224, C. T. Ungureanu and others, *op. cit.*, p. 76.

[19] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *op, cit*., p. 435, 443.

[20] C. M. Crăciunescu, D. Lupascu, *Emanciparea minorului în reglementarea noului Cod civil (The Emancipation of a Minor in the regulation of the new Civil Code)* in P.R. nr. 9/2011, p. 29, qtd by C. T. Ungureanu and others, *op. cit.*, p. 77.

such as those provided by Law no. 272/2004[21], special tutorship and judicial interdiction, and the protection of major is done by placing under judicial interdiction or establishing a tutorship (Art. 105-106 of the Civil Code).

Art. 502 of the Civil Code provides that the rights and duties of parents regarding the child's assets have the same legal regime as those of the legal tutor, the provisions regulating the tutorship being applicable accordingly.

The goods of the minor shall be administer in good faith, the tutor acting as

a manager charged with simple administration, with application of the new provisions of the Civil Code relating to the administration of the goods of another person contained in Title V of the Book III, unless otherwise provided by rules concerning the exercise of tutorship over the minor's property.

According to Art. 41 par. 1 of the Civil Code, except other cases provided by the law, have no legal capacity the minor under the age of 14 and the judicial interdiction[22]. For them, the legal acts of disposition shall be concluded on their behalf by their legal representatives, as provided by law[23], respectively with the accord of the family council (for the minor and when this council is established according to Art. 124 of the Civil Code) and with authorization of the tutorship court.

As an exception, the person lacking legal capacity may conclude personally acts provided by the law, acts of conservation and low-value routine acts of disposition that are carried out at the time of their completion. On the other hand, acts that a minor may conclude personally may also be made

[21] Law no. 272/2004 on the protection and promotion of children's rights, published in the Official Gazette of Romania no. 557 of 23rd of June 2004.

[22] Art. 164 Civil Code: „(1) The person without discernment necessary to mind his/her own interests, because of alienation or mental debility, shall be placed under judicial interdiction. (2) Minors with limited exercise capacity can also be placed under judicial interdiction." Art. 171 Civil Code: "The rules on tutorship of a minor who has not reached the age of 14 shall be also applied to the tutorship of a minor placed under judicial interdiction, insofar as the law may otherwise provide."

[23] In this regard, art. 144 of the Civil Code provides: „(1) The tutor may not, on behalf of the minor, make donations or guarantee someone else's obligation. Exception applies to common gifts that are given according to the minor's existing wealth condition. (2) The tutor may not, without family council accord and the tutorship court authorization, alienate, divide, hypothecate or encumbrance the minor's properties, may not renounce the minor's patrimonial rights or validly conclude any other acts beyond his right to administer. (3) Acts done in violation of the provisions of para. (1) and (2) are avoidable. In these cases, action for annulment may be exercised by a tutor, a family council or any member thereof, inclusive of a prosecutor, ex officio or at the request of the tutorship court. (4) However, the tutor can alienate, without the accord of the family council and without the authorization of the tutorship court, those properties subject to destruction, deterioration, alteration or impairment, as well as those that became useless for the minor."

Family Council is regulated by Art. 124-132 of the Civil Code and represents a novelty introduced by the new Civil Code, based on the Civil Code of Québec.

It is a voluntary body with an advisory function, while the tutorship court may constitute it whenever necessary for monitoring the activity of the tutor in exercising his rights and fulfilling his duties.

The tutorship court replaces the tutorship authority and is regulated by Art. 107 of Civil Code: "(1) Procedures provided by the present Code concerning the natural person protection come under the jurisdiction of the tutorship and family court established by law, hereby referred to as the tutorship court. (2) In all cases, the tutorship court shall resolve these requests immediately."

Law no. 134/2010 on the Civil Procedure Code, republished, stipulates in Art. 94 point 1, let. a that courts shall consider in first instance the request of the Civil Code under the jurisdiction of the tutorship and family court, except if expressly provided otherwise by the law.

Territorially, the competence belongs to the court in whose territorial jurisdiction the protected person's domicile or residence is located. In the case of applications for authorization from the tutorship and family court to conclude legal acts, when the legal act for which the authorization is requested refers to a building, it is also competent the court in whose jurisdiction the building is located, in which case a copy of the decision pronounced shall be communicated to the tutorship and family court in whose territorial jurisdiction the protected person's domicile or residence is located (Art. 114).

by his legal representative, unless the law would otherwise provide or the nature of the act would not allow him to do so (Art. 43 par. 3 and 4).

According to Art. 144, par. 4 of the Civil Code, the tutor may alienate, without the accord of the family council and without the authorization of the tutorship court, those properties subject to destruction, deterioration, alteration or impairment, as well as those that have become useless for the minor. The solution, taken from Art. 129 final par. of the Family Code is justified by the fact that although such acts are acts of disposition regarding the respective goods, taking into account the whole patrimony of the incapable one, they represent acts of administration[24].

The text refers specifically to "alienation", which leads to the idea of "selling", but we consider that, depending on the specific circumstances of the situation, a loan agreement for consumption may be concluded, provided that it meet the interests and needs of the one being guarded.

Minor who has reached the age of 14 has limited legal capacity (Art. 41 of the Civil Code). He may conclude legal acts of disposition with the prior approval of the parents or, where applicable, of the tutor and with the authorization of the tutorship court. The consent (which must be in writing according to Art. 146 par. 1 of the Civil Code, and not verbal or implied) or authorization may be given upon conclusion of the act at the latest.

Solutions still available in the application of the new Civil Code have been given under the influence of the Family Code to the issue of the use of monies belonging to the minor or concluding a borrowing agreement on behalf of the minor. It was considered that such acts go beyond the limits of the acts of administration, so that their performance is subject to the approval of the guardianship authority (currently the guardianship court) [25].

The same as the minor lacking legal capacity, the minor with limited exercise capacity may conclude personally acts of conservation, acts of administration which do not prejudice him, and low-value routine acts that are carried out at the time of their completion (Art. 41, par. 3 of the Civil Code).

Although Art. 41, par. 2 refers only to the authorization of the guardianship court, we consider that the text must be correlated with Art. 146 par. 2 of the Civil Code: "In the event that the act which is about to be concluded by the minor who has reached the age of 14 is one of those that the tutor is not allowed to conclude without the authorization of the guardianship court and the accord of the family council, both the respective authorization and the accord of the family council will be necessary" and with Art. 144, par. 2, whose per a contrario interpretation leads to the conclusion that a tutor may not, without the accord of the family council and authorization of the guardianship court, legitimately conclude acts of disposition.

We therefore consider that the minor who has reached the age of 14 may conclude a loan for consumption contract, but only with prior written approval of his legal protector and with the accord of the family council (if it has been established under Art. 124 of the Civil Code[26]) and with authorization of the guardianship court.

Regarding the accord of the family council, it is advisory and is validly taken by the vote of the majority members of the council (Art. 130 of the Civil Code).

With respect to the authorization of the guardianship court, Art. 145 require that it be granted only if the act responds to a need or presents an undoubted advantage for the minor. Authorization

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[24] See in this respect Gh. Beleiu, *op. cit.*, p. 297.

[25] Al. Bacaci, V.-C. Dumitrache, C.C. Hageanu, *Dreptul familiei (Family Law)*, 6th ed., C.H. Beck Publishing House, Bucharest, 2009, p. 316, qtd by C. T. Ungureanu and others, *op. cit.*, p. 47.

[26] Art. 124 Civil Code: "(1) Family council may be constituted in order to monitor the activity of the tutor in exercising his rights and fulfilling his duties towards the person and the properties of the minor. (2) If the minor is under parental care, in placement commissioning or, as appropriate, protected by other social protection measures provided by the law, the family council shall not be constituted."

will be given for each act individually, establishing, where appropriate, the conditions of concluding the act.

Failure to comply with the legal provisions regarding the legal capacity of the natural persons is punishable by relative nullity of the act, even without proof of damage. It is the sanction expressly provided for in Art. 44 par. 1 (for minors without legal capacity or with limited exercise capacity), Art 144 par. 3 and Art. 146 par. 4 of the Civil Code relating to the guardianship.

The same penalty provided for in Art. 130 par. 4 of the Civil Code is also applied for the lack of advisory notice of the family council, while concluding the act without taking into consideration the advisory opinion attracts the liability of the guardian only.

Thus such acts as the loan for consumption contracts concluded by the person lacking legal capacity, irrespective of whether or not the act prejudices the incapable, shall be annullable; also, the act concluded by his legal representative without the advisory notice of the family council or the authorization of the guardianship court; the contract personally concluded by the minor who has reached the age of 14, without prior approval of the legal protector, without the advisory of the family council and without authorization of the guardianship court; the act concluded by the minor with limited legal capacity with the approval of his legal protector but without the advisory of the family council and/or prior authorization of the guardianship court.

The mere statement made by that one lacking legal capacity, by that one with limited legal capacity and by the judicial interdicted (the new Code extending the solution in the case thereof, unlike the old Civil Code, Art. 1.162), that he/she is capable, does not remove the fact that the act may be annullable (Art. 45 of the Civil Code).

Fraud, however, raises tort liability of the incapable one, an exception to the principle of *quod nullum est nullum producit efectum*. The incapable person that willfully committed fraudulent misrepresentation in order to determine another person to contract with him, misleading that person about his/her legal capacity status, is taken out of the protection of the rules regarding the presumption of his lack of discernment and may not invoke minority as a cause of the annulment of the juridical act concluded in this way[27].

Should fraudulent misrepresentation has been used, at the request of the party mislead the court may keep the contract when they say that this constitutes an appropriate civil penalty.

Nullity may be invoked by action or exception, Art. 44 par. 2 of the Civil Code providing that the person lacking the legal capacity or having limited exercise capacity may invoke personally, in his/her defense, the fact that the act is annullable for his/her incapacity resulting from minority or from placing under judicial interdiction.

Unlike the action for annulment, which is prescriptible, the defense by way of exception is indefeasible, the incapable person who is required to execute the contract being able to oppose at any time the relative nullity of the contract, even after the limitation period of the right to the action for annulment (Art. 1.249, par. 2 of the Civil Code).

Aiming at protecting the interest of the incapable person, notwithstanding the provisions of Art. 1.248 of the Civil Code, the action for annulment may be exercised by the legal representative, by the minor who has reached the age of 14, and by the legal protector, by the prosecutor, ex officio or at the request of the guardianship court, when the act was concluded without the authorization of the guardianship court required by law, or by the family council or by any of its members (Art. 46, par. 2 and 3, Art. 144, par. 3 of the Civil Code).

The person with whom the contract was concluded shall not be entitled to invoke the nullity of the contract on the grounds that the other party is a person lacking legal capacity or having limited capacity, this being banned by the provisions of Art. 46, par. 1 of the Civil Code.

[27] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 51.

To the extent that the court will invalidate a contract concluded in violation of the legal requirements regarding the capacity, the incapable person may be compelled to refund only within the limit of the benefit realized, considered at the date of the request for refund.

The burden of proving the enrichment thereof rests with the person who requests the refund, respectively to the lender in the case of a loan for consumption (as in the case that the incapable person acts as a lender, he/she will get full refund from the borrower capable, the rule being a special one and applying only to incapable persons, for their protection).

The incapable person will be held to the full refund when, intentionally or because of gross misconduct, has made the refund impossible (Art. 47 and 1.647, also applying accordingly the provisions of Art. 1.635-1.649 of the Civil Code regarding the refund of the benefits).

As the sanction applied for non-compliance with the legal provisions regarding the legal exercise capacity is the relative nullity, according to the general rule contained in Art. 1.248 par. 4 of the Civil Code, the annullable contract is likely to be confirmed (the conditions and effects being provided in Art. 1.262-1.265 of the Civil Code).

Confirmation may be express or implied, resulting from the voluntary execution of the obligation at the date on which it could be validly confirmed by the interested party, but must be certain and given knowingly. Moreover, confirmation may intervene only after concluding the legal act affected by a relative nullity cause, cannot take the form of a clause inserted in this and it is not possible to waive the right to invoke the relative nullity by even the annullable legal act[28].

Art. 48 of the Civil Code provide that the minor who has become a major may confirm the act concluded during minority, without the representation or assistance required by the law. After discharging the tutor, he may also confirm the act concluded by the tutor without complying with all formalities required for its valid conclusion.

Thesis III of the text refers to the possibility of confirmation of the annullable act during minority as well, but only under the conditions of Art. 1.263-1.264 of the Civil Code. According to Art. 1.263, par. 3, the person called upon by law to approve the minor's acts may, on behalf and for the interest of the minor, request annulment of the contract concluded without his/her consent or confirm the contract when this consent was sufficient to validly conclude it. There are provisions that apply accordingly to any acts concluded without the authorization of the guardianship court.

However, if the minor who became a major may confirm the annullable acts during his minority express or implied, the person called upon by law to approve the minor's acts is not able of doing anything else than express confirmations, as Art. 48, thesis III refers imperatively to the cumulative conditions of Art. 1.263 and 1.264, the latter text regulating the content of the confirming act[29].

In the professional literature[30] it was concluded, from interpretation of all the above mentioned legal provisions that may not be confirmed those acts concluded by the person placed under judicial interdiction.

It is true that both Art. 48 and Art. 1.263 par. 3 of the Civil Code specifically refers to the acts of the minor, but we consider that if the general and common conditions of validation of the legal act by confirmation are met, according to Art. 1263-1265 of the Civil Code, this possibility should be also recognized for acts of the judicial interdicted.

The rule is that an annullable contract is likely to be confirmed (Art. 1248 par. 4 of the Civil Code) without any distinction based on causes of annulment, or failure of confirmation would be an exception that should be expressly provided by law, as long as it cannot be deducted by way of interpretation.

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[28] G. Boroi, C. A. Anghelescu, *op. cit.*, p. 263.
[29] See in this respect Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 54.
[30] Ibidem.

On the other hand, the guardianship of the person placed under judicial interdiction is governed by the same rules as the guardianship of minors under the age of 14, as far as it is not otherwise provided by law (Art. 171 of the Civil Code), so we see no justification for the exclusion of the confirmation of the acts of the person placed under interdiction, the goods of the two categories of persons being subject to the same legal administration regime.

Moreover, the same as the minor who becomes a major and acquires full legal capacity, the judicial interdicted as well may reacquire full legal capacity by termination of the judicial interdiction, provided that the causes of the interdiction have been stopped (Art. 177). In such a situation, the error which affected the annullable juridical act, respectively the incapacity, could not exist after the termination of incapacity and the former incapable person could confirm the act, provided that the measure responds to his/her needs or interests and at this time all others conditions of validity are met, according to Art. 1.263 par. 1 of the Civil Code.

An additional argument is the fact that the interdicted is judicially without discernment, but in fact he/she can have moments when acting with discernment. This is the reason why Art. 172 of the Civil Code expressly provide that the juridical acts concluded by the interdicted are annullable, even if at the date of their conclusion he/she would have had discernment. The solution is justified; the interdicted being under a particular legal regime where the juridical acts should be subject to unitary rules, being difficult to determine in each case whether or not he/she acted with discernment.

However, if he/she concluded a contract when in fact acted with discernment and draws advantages of such a contract, all the more reason not to eliminate the possibility to renounce, under the law, to the right to invoke the nullity and thus confirming the annullable act.

b) Common-property goods

Property in shares (co-ownership) and condominium are forms of common property according to Art. 632 of the Civil Code.

Co-ownership was defined in the professional literature[31] as that form of joint ownership characterized by the fact that the property, undivided into fractions in its whole entity, belongs simultaneously to several owners, ownership of the property being divided into abstract ideal shares.

Art. 634 par. 1 of the Civil Code provides that each co-owner is the exclusive holder of a share of ownership and may freely dispose of it in the absence of a contrary stipulation. But the co-owner cannot freely dispose of the property in its whole entity.

Any legal acts of disposition regarding the common property (and other acts assimilated by the law due to their effects on the acts of disposition) may not be concluded without the consent of all co-owners (Art. 641 par. 4 of the Civil Code). Law takes into consideration the ”consent” of the co-owners, which can be expressed or implied (aspect resulting from the per à contrario interpretation of Art. 642 par. 1 of the Civil Code), and not the effective participation of all co-owners to the conclusion of such a juridical act[32].

Consequently, as the loan for consumption is considered an act of transfer, being that it transfers a property, concluding of the contract will require the consent of co-owners. No act of material disposition (modification of the property shape, consumption or destruction of the property substance, gathering of products) shall be made without the consent of all co-owners[33].

Regarding the sanction for failure to comply with this requirement, the solutions were different and controversial under the old Civil Code.

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[31] C. Bârsan, M. Gaită, M. M. Pivniceru, *Drept Civil, Drepturile Reale (Civil Law, Real Rights)* European Institute, 1997, p. 94, I. P. Filipescu, *Drept Civil, Dreptul de proprietate si Alte Drepturi Reale (Ownership and other real rights)*, Proarcadia Publishing House, Bucharest, 1993, p. 146.

[32] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 701.

[33] V. Stoica, *Drept civil. Drepturile reale principale (Civil Law. Principal Real Rights)*, 2nd vol., Humanitas Publishing House, Bucharest, 2006, p. 74, qtd by C. T. Ungureanu and others, *op. cit.*, p. 931.

Most authors[34] and jurisprudence have conditioned the outcome of the contract on the result of the partition. If after the partition the property was assigned to the disposer co-owner, as the partition was declarative and thus produced effects retroactively according to Art. 786 of the former Civil Code, this one was considered retroactive exclusive owner and the contract remained valid. But if the property was assigned to another copartner, the contract was considered terminated retroactively due to the lack of ownership of the person who concluded the contract.

In the event that the parties or at least the co-contractor was in error, considering that the disposer was the owner, it was admitted that the relative nullity for error occurred (vice of consent). If both parties knowingly enter into contracts, being a speculative operation with an illicit cause, the applicable sanction was the absolute nullity under Art. 968 of the Civil Code 1864[35]

From the date of concluding the contract and the partition of the properties, the act was considered valid between the contracting parties, but undemurable to the co-owner who did not consent. It was decided[36] that during this period, co-owners who did not consent have no right of action for annulment or nullity of the contract or of claiming/vindication, their rights could be defended only by an action in partition.

The new Civil Code could not take the solution created by doctrine and jurisprudence under the old Civil Code because, according to the new regulation, the partition is constitutive and therefore produces effects only for future (Art. 680 par. 1 of the Civil Code).

As such, it was imagined the sanction of unopposability: "Legal acts concluded violating the rules provided for in Art. 641 are unopposable to the co-owner who has not consented, expressly or tacitly, to the conclusion of the act."

Unopposability is a sanction different from nullity, which does not question the validity of the title. The effects of the legal act occur towards the parties, but the rights and obligations arising from the respective act cannot be opposed to third parties[37].

The unopposability of the juridical act concluded by a co-owner violating the right of the other co-owners to express their consent means both that it will not create rights and obligations in favor of or for the co-owner who has not consented to the conclusion of the act, according to the general principle of relativity of the juridical act, and that it will be ignored by the co-owner, as a legal fact in restricted sense[38].

Likewise, distinct from the solutions adopted under the old Civil Code, at present Art. 642 par. 2 of the Civil Code admits the injured co-owner the right to exercise, before the partition, possessors actions against the third party contractor who acquired the common good after concluding the act. Possessor action may be introduced within the limitation period of one year from the date of

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[34] See in this respect F. Deak, *op. cit.*, p. 60, I. P. Filipescu, *op. cit.*, p. 148-149, P. M. Cosmovici, *Drept Civil, Drepturi reale, Obligatii, Legislatie (Civil Law, Real Rights, Obligations, Legislation),* All Publishing House, Bucharest, 1996, p. 47, High Court of Cassation and Justice of Romania – Civil and Intellectual Property Department, Dec. no. 965/2005, in Dreptul no. 4/2006, p. 280.

[35] Some authors (in this respect C. Bârsan, M. Gaită, M. M. Pivniceru, *op. cit.*, p. 101) who have started to resolve the problem from the distinction as the co-contractor had knowledge or not, when concluding the contract, that the disposer was not the exclusive owner of the property.

If the status of a copartner was known, the contract was considered subject to a resolutive condition, so that the property could not fall at partition into the lot of another co-owner. If the property had fallen into the lot of the disposer when making the partition, the contract would have been consolidated retroactively, and if the property was assigned to another co-owner, the contract would have been terminated retroactively, being decided. If the status of a co-owner was not known when concluding the act, the act was revoked. The theory of the act affected by the resolutive condition of including the properties in the lot of the co-owner who has not consented is also sustained by other authors, such as D. Chirică, *Studii de drept privat (Studies of Private Law)*, Universul Juridic Publishing House, Bucharest, 2010, p. 197.

[36] Supreme Court - Civil Department, Dec. no. 2603/1993, in *Jurisprudenta CSJ* , *(Supreme Court Jurisprudence)*, 1993, p. 39-41, qtd by F. Deak, *op. cit.*, p. 61, V. Stoica, *op. cit.*, p. 79.

[37] G. Boroi, C. A. Anghelescu, *op. cit.*, p. 242, Gh. Beleiu, *op. cit.*, p. 177.

[38] V. Stoica, *op. cit.*, p. 78, qtd by C. T. Ungureanu and others, *op. cit.*, p. 933.

dispossession (Art. 951 par. 1 of the Civil Code), after its expiration the action claim being disposable for the co-owner.

Restitution of possession of the property will be made for the benefit of all co-owners, those who participated at the conclusion of the act could be compelled to pay damages if thereby caused injuries to other co-owners.

From the rule of unanimity provided for in art. 641 par. 4 of the Civil Code, exception may be made by a co-ownership administration contract concluded with the consent of all co-owners. In the absence of other definitions specified in Art. 644 par. 1 of the Civil Code, we consider that such an administration contract is subject to the provisions relating to the administration of the properties of another person contained in Title V of Book III of the Civil Code.

The second form of the common property is represented by the condominium. According to the Art. 667 of the Civil Code, there is a condominium property when, by law or on the basis of a juridical act, the ownership belong simultaneously to several persons without any of them to be the holder of a share determined from the property ownership or common goods.

In the doctrine it was specified that in this case the share of each individual owner is not known, the good belonging to the common owners, without shares. Nor the ownership or the good on which bearing are not divided, the shares not being determined [39].

Relating to the juridical regime of the condominium, Art. 668 of the Civil Code provides that, if this arises by operation of law, is subject to the provisions of that law which shall be completed accordingly with the laws on the legal community regime.

Therefore, the legal community regime regulated by the new Civil Code in Art. 339-359 constitutes the common law in the matter of the condominium.

The current regulation establishes a mixed mechanism for the management of common goods: parallel management in case of the most juridical acts that concern the common properties of spouses, tempered by establishing a joint management for the conclusion of juridical acts considered serious for the community and that, in principle, require the consent of both spouses. For personal juridical acts (such as tying, deposits with credit institutions made only one spouse's name, etc..), Becomes operational mechanism exclusive management[40].

Parallel or competing management mechanism is established by Art. 345 par. 1 of the Civil Code and is based on the right of each spouse to manage personally, in principle, the common goods. Each spouse performs acts in relation to the common goods by virtue of his/her own power conferred by law and not as a representative of the other spouse[41], in this manner the new Civil Code abandoning the presumption of the reciprocal tacit mandate established by the former Family Code.

Art. 35 of the Family Code provided that spouses jointly manage and use the common goods and they dispose of them in the same way, any spouse exercising alone such rights being considered to have the consent of the other spouse. Exceptions were those act of disposition (but only of alienation or encumbrance, and not those of acquisition) regarding the real estate for which it was necessary the express consent of both spouses.

As a result, either of the spouses could conclude personally, under the reciprocal tacit mandate, a loan for consumption contract, which could only cover movable, fungible and consumptive goods. In the legal doctrine and judiciary practice[42] it was established that, in relation to community of goods, there are acts of administration and may be concluded by one of the spouses,

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[39] I. P. Filipescu, *op. cit.*, p. 157, C. Bârsan, M. Gaită, M. M. Pivniceru, *op. cit.*, p. 113, P. M. Cosmovici, *op. cit.*, p. 51.

[40] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 368-369.

[41] M. Avram, C. Nicolescu, *Regimuri matrimoniale (Matrimonial regimes)* Hamangiu Publishing House, Bucharest, 2010, p. 229, qtd by A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 369.

[42] D. Lupulescu, *Dreptul de proprietate comună al sotilor (Common Ownership of Spouses)*, Scientific and Encyclopedic Publishing House, Bucharest, 1987, p. 142, The Supreme Court, Civil Department, Dec. no. 1895 of 30 October 1975, in R.R.D. no. 5/1976, p. 63, qtd by I. P. Filipescu, A. I. Filipescu, *op. cit.*, p. 147.

who is presumed to have the consent of the other spouse, the contract by which a spouse grants alone a loan to another person, from the very amount of money that is common property, and the action by which it is required the restitution of the good loaned.

If one of the spouses concluded a loan for consumption contract, as a borrower, the contractual obligation was common if it was assumed to fulfill ordinary needs of the marriage[43].

The presumption of the reciprocal tacit mandate was relative and could be rebutted by evidence to the contrary, respectively the fact that non-contracting spouse did not give a mandate to the other spouse, opposing to the conclusion of the contract. It was estimated in the doctrine and jurisprudence[44] that the opposition could be express or tacit but it did not constitute sufficient grounds for annulment of the act, being necessary to prove that the third party contractor did know or should have known the opposition of the other spouse to the conclusion of the act, thus protecting the bona fide third party.

There were some authors[45] who estimated, we find that not well substantiated (not considering that the distinction between relative nullity and the absolute one emerges from the nature of the interest protected by the violated statutory provision - generally or individually), that if there have been an express opposition of the non-borrower spouse, the loan for consumption contract was absolutely void because, on the one hand, the presumption of the reciprocal tacit mandate of the spouses was only relative and, on the other hand, when it was rebutted, it became an incident the principle established in Art. 35 par. 1 of the Family Code, according to which spouses may use, administer and dispose in common of their properties.

Currently, while Art. 345 establishes the right of each spouse to use the common property without the express consent of the other spouse, to conclude personally acts of conservation, acts of administration and acts of acquisition of common goods, Art. 346 reiterates the joint management mechanism in relation to the acts of alienation and encumbrance of common goods (other than ordinary gifts), these cannot be concluded without the consent of both spouses.

Exceptions are the acts of disposition, by onerous title, concerning movable common goods whose alienation is not subject, according to law, to certain publicity formalities.

As a result, a loan for consumption contract, by onerous title, regarding common goods, will be concluded only with the express consent (as resulting from the corroboration of Art. 346 par. 1 with Art. 347 par. 1 of the Civil Code) of both spouses, as borrowers, while a loan with interest will be possible to be agreed by either spouse, personally.

The sanction for non-compliance with the condition of both spouses' consent, when it is required by law, is the relative nullity of the act (Art. 347 par. 1 of the Civil Code), thus being established expressly the solution promoted by most of doctrine and jurisprudence developed under the former Family Code.

It was also assumed the thesis of protection of the bona fide diligent third party acquirer, in which case the spouse injured by non-expressing the consent can only claim damages from the other spouse.

However, in the doctrine[46] it expressed the opinion (to which we adhere) according to which the text of Art. 347 par. 2 of the Civil Code would concern only the protection of bona fide third parties for legal documents by onerous title. If one of the spouses had disposed of a common good through a gratuitous act, without the consent of the other spouse, the consequences of nullity would have to be borne also by the third party acquirer, even if he/she acted in good faith and gave all necessary diligence, as in this case it should prevail the community interests of the other spouse and

[43] C. Macovei, *Contracte civile (Civil Contracts)*, Hamangiu Publishing House, Bucharest, 2006, p. 272.
[44] I. P. Filipescu, A. I. Filipescu, *op. cit.*, p. 149 and next.
[45] See Ovidiu-Sorin Nour, *op. cit.*, p. 227.
[46] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 371.

not the interests of the third party (non-participating spouse to the act seeks to avoid damage – *certat de damno vitando* - while the third party tries to keep hold of the benefit – *certat de lucro captando*).

In the event that one of the spouses concludes a loan for consumption, as a borrower, the contracted obligation shall be shared if it falls within one of the categories expressly and restrictedly provided in Art. 351 of the Civil Code.

III. The loan for consumption contract concluded by legal persons

Having legal personality, according to Art. 193 of the Civil Code, legal entities participate on their own behalf in the civil circulation/registry and are liable for the obligations assumed with their own property, unless the law would otherwise provide.

Legal entities have therefore distinct legal capacity which, like in the case of natural persons, includes the capacity of use and the capacity of exercise.

The content of the capacity of exercise is provided by Art. 206 of the Civil Code, which makes distinction between for-profit legal entities (with patrimonial purpose) and non-profit legal entities (without a patrimonial purpose)

According to par. 1, the legal entity (it results from the correlated interpretation of the first two paragraphs that it refers to the for-profit legal entity) may have any civil rights and obligations, except those which, by their nature or according to the law, belong only to the natural persons.

Non-profit legal entities may only have those civil rights and obligations that are required to fulfill their purpose established by the law, act of establishment or statute (par. 2).

Limited capacity of use of the legal entities established in civil law the specialty principle of the capacity of use, mentioned for the first time in Art. 9 of the Law 21/1924 and generalized in the Art. 34 par. 1 of the Decree no. 31/1954, which stipulated: "the legal entity can only have those rights which correspond to its purpose, established by law, act of establishment or statute"[47].

The current regulation preserves this limitation only for non-profit legal entities, but, as outlined in recent doctrine with regard to companies, though, by vocation, the capacity of use of the company is characterized by generality, it is nevertheless circumscribed to the company's object of activity. The company concludes those legal acts aimed at performing the object of activity established in the act of establishment, limitation reduced by setting a broad object of activity, providing the necessary flexibility to adapt to conjectural changes[48].

In achieving the purpose for which they were established, legal entities are sometimes constrained to conclude legal documents that exceed their object of activity. It was constantly estimated that such occasional transactions, related or adjacent to the object of activity, are valid precisely because what is sought is to achieve the purpose of the legal entity[49].

Regarding the particular situation of a loan for consumption contract, it should be considered that this contract is free by its nature. Exception is the loan of a sum of money presumed to be with onerous title. (Art. 2.159 of the Civil Code).

Virtually, legal entities may conclude such contracts by onerous title, both as a lender or as a borrower, in compliance with the specialty principle of the capacity of use, and according to their object of activity.

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[47] Gabriel Boroi, *Drept Civil, Partea Generală. Persoanele (Civil Law, The Generic Part. Persons)*, 4th ed. revised and suplemmented, Hamangiu Publishing House, 2010, p. 444.

[48] Stanciu D. Cărpenaru, *Tratat de drept comercial român, conform noului Cod civil (Romanian Commercial Law Treatise, according to the new Civil Code)*, 3rd ed. revised, Universul Juridic Publishing House, Bucharest, 2012, p. 183.

[49] See in this respect Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 195, C. T. Ungureanu and others, *op. cit.*, p. 241.

It is also accepted that gratuitous or occasional contracts may be concluded by legal entities that do not have as their object of activity credit operations, provided that such acts serve to achieve their statutory purpose.

Thus, in a case decision[50], it was recorded: "regarding the nullity of the loan contract between A.C.R. LLC and the debtor being that this would be an interest-free loan, taking into account that the lender is the borrower's shareholder, it cannot be considered that the loan is free of benefits, being a decision of business and opportunity, the company seeking to obtain benefits other than interest.

It is also invoked that the objects of activity of the creditor lacks the lending activity. First court correctly held that there was a sole loan transaction, which does not define a lending activity, and obtaining benefits such as dividends only comes out in support of the above, meaning that the company acted in its interest to achieve the purpose for which it was created".

A particular situation is that of legal entities under public law, respectively the state and territorial-administrative units. Art. 136 par. 4 of the revised Constitution of Romania establishes the inalienability of public property, provision reproduced in Art. 11 par.1 of the Law no. 213/1998.

Art. 861 par. 1 of the Civil Code provides that "public property is inalienable, indefeasible and intangible" while par. 2 stipulates that "ownership of these assets does not cease by non-use and cannot be acquired by third parties by acquisitive prescription, or by the effect of possession in good faith of movable goods".

Inalienability of property that is object of public property thus requires not only the solution of interdiction of their alienation, but also impossibility of their acquisition by third parties by any other mode of acquisition regulated by law[51]. Therefore, businesses that own public assets can not contract a consumer loan, which is a translate contract of ownership.

Interdiction is maintained for so long as the goods are in the public domain. If they are disabled and pass into the private domain of the state or territorial-administrative units, as the regime of the private domain is that of the common law (Art. 553 of the Civil Code) they will be eligible for consumption loans.

Since the loan for consumption is a contract of transfer of property, the lender should have the capacity, respectively to fulfill the conditions required by law regarding the acts of disposition and be the owner of the good that constitutes the object of the contract[52]. Although the last condition is not expressly stated in the legal regulation of the contract, it implicitly results from the real and transfer nature of the loan for consumption.

Actually the new Civil Code admits the possibility of trading the goods of other person, Art. 1.230 providing that "if the law does not provide otherwise, the properties of a third party may be subject of benefits, the debtor being required to purchase and transmit them to the creditor or, where appropriate, to obtain the consent of the third party. In case of default, the debtor is liable for damages."

The loan for consumption, however, being a real contract[53], is validly concluded only at the time of the relegation of the material good, which means that the parties, acting in good faith, cannot borrow another person's properties, such an agreement having a maximum value of a pre-contract, whose culpable non-performance gives rise to damages[54].

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[50] Bucharest Court of Appeal – Commercial Department no. 5, commercial decision no. 1126/22.06.2011, unpublished.

[51] Corneliu Bârsan, *Drept civil, Drepturile reale principale (Civil Law, Principal Real Rights)*, 3rd ed. revised and supplemented, Hamangiu Publishing House, 2008, p. 98.

[52] Liviu Stănciulescu, *op. cit.*, 2012, p. 405.

[53] Paul-Henri Antonmattei, Jaques Raynard, *Droit civil. Contrats spéciaux*, 6e édition, Litec Lexis Nexis SA, 2008, p. 273.

[54] Dalloz Civil Code, 108 e édition, 2009, p. 2124.

If the lender, although not the owner, loans the movable goods which he holds, the bona fide borrower will be able to defend against the true owner invoking possession in good faith in accordance with Art. 919 par. 3 and Art. 937 of the Civil Code[55].

These provisions correspond to Art. 1909 - 1910 of the former Civil Code, under which the doctrine constantly held that the bona fide borrower is protected against the true owner.

Lending an asset which does not belong to the lender will transfer however the ownership to the borrower, if he/she is acts in good faith and it is about movable assets[56]. Likewise, if the lender was not the owner, but the borrower acts in good faith, he/she can defend against the owner by the way of exception provided by Art. 1909 - 1910 of the former Civil Code[57].

As the previous Civil Code, the new regulation makes a distinction as the true owner relinquished jurisdiction over the good voluntarily or involuntarily.

If the owner has entrusted his movable good to a person and this one, in breach of its obligations, borrows it to a bona fide third party, who was not aware of the lack of ownership of the co-contractor, the action claim shall be rebutted according to Art. 937 par. 1 of the Civil Code.

Art. 938 of the Civil Code provides that "it is deemed as acting in good faith the possessor who was not aware or did not have to, as appropriate, be aware of the lack of ownership of alienator. (2) Good faith must exist at the date of entering into effective possession of the good", in our case at the date of the conclusion of the contract, being irrelevant the fact that the third party finds out afterwards that he/she did not contracted with the real owner.

Another essential condition imposed by Art. 937 par. 1 of the Civil Code is that the act of transfer of ownership completed on the property of another be by onerous title.

If the legal act is gratuitous, there is no more reason to prefer the bona fide third party and to sanction the owner for lack of diligence in choosing the person to whom he entrusted the property. In this case, that should be protected who strives to avoid damage (*certat de damno vitando*) and not the one that seeks to preserve a benefit (*certat de lucro captando*[58]).

On the supposition that the property has been lost or stolen, so the owner involuntarily relinquished jurisdiction, the action claim may be brought successfully even against a bona fide third party, within 3 years from the date on which the owner has lost possession of the object.

The plaintiff owner must prove his right of ownership over the good and over the loss or theft, without the need, in the latter case, of a criminal judgment by which to return to the offense of theft[59]. Moreover, it is not irrelevant whether the property loss was the result of negligence of the owner or of a fortuitous fact.

The term of 3 years is a limitation period, unsusceptible of suspension or interruption, at whose fulfillment the ownership ceases.

Loan contract whose object is the property of another person is hit by a relative nullity, sanction that may be invoked only by the borrower[60].

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[55] Also see in this respect Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 2141-2142, Dumitru C. Florescu, *op. cit.*, p. 269.

[56] C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *op, cit*., p. 625.

[57] Francisc Deak, *op. cit.*, 2001, p. 354-355.

[58] Gabriel Boroi, Liviu Stănciulescu, *Institutii de drept civil în reglementarea noului Cod civil (Civil law institutions to regulate the new Civil Code)*, Hamangiu Publishing House, Bucharest, 2012, p. 68.

[59] Also see in this respect A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 977-978. For the contrary opinion see Ovidiu-Sorin Nour, *op. cit.*, p. 224. The condition of a final criminal judgment would be excessive, what concerns in this case is that owner had lost possession of the property irrespective of his will, through a third party illicit deed or by misleading by a third party.

[60] A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinating), *op. cit.*, p. 2141, Dumitru C. Florescu, *Drept civil. Contracte speciale, Curs pentru învătământul la distantă (Civil Law. Special Contracts, Distance learning course)*, 2nd vol., Titu Maiorescu University Publishing House, p. 281. For the contrary opinion, according to which the sanction that occurs when lending the asset of another person is the absolute nullity, see Codrin Macovei, *op. cit.*, p. 272.

If after exercising the action claim by the true owner, the borrower was required to return the borrowed goods, he may claim from the lender damages for any damage suffered as the responsibility involved is a tort liability.

But the question arises on what are means of defense that the borrower may use if, although he returned the goods to the real owner, the lender claims him restitution of the goods or payment of interest according to the contract concluded.

There are authors who consider that the borrower may make use of the exception of non-performance[61]. We appreciate this as being inexact as long as exception of non-performance is a mean of defense available to the parties of a mutually binding contract and is founded on the reciprocity and interdependence of obligations, each of the obligations being the legal cause of the other. But the loan for consumption is a unilateral contract[62], the lender having, in principle, no contractual obligation, and as such the exception of non-performance cannot be invoked.

Although the exercise of any civil action is free[63], it requires certain conditions of exercise, respectively the assertion of a right, justification of an interest, legal capacity and quality.

To enjoy legal protection of the action, the asserted right must be recognized and protected by law, so it must not enter into a content of an illicit juridical report, must not contravene public order or morality, and the interest should be legitimate, not coming into conflict with the law.

There are conditions that are not fulfilled by such an action, by which the lender, who loaned a found or stolen good, requests its restitution from the borrower or payment of interest.

If both parties act in bad faith, unlike previous regulation, the new Civil Code establishes the indefeasibility of the movable goods claim action against the possessor in bad faith by the provisions of Art. 563 par. 2. The borrower in bad faith will be required to return the goods to the true owner, and if he/she consumed them, the same quantity of goods of the same kind and quality, the loan for consumption always having as object fungible goods. Only if it is not possible to return such goods, he/she shall be required to pay their value.

Regarding the sanction applicable to the loan contract, we consider that in this case the absolute nullity for illicit cause may occur (Art. 1.236 par. 2 and 1.238 par. 2 of the Civil Code).

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[61] Ovidiu-Sorin Nour, *op. cit.*, p. 225.

[62] French doctrine tendency is to consider that the money loan granted by a professional becomes mutually binding contract, the lender also being under an obligation of good faith (see in this respect Philippe le Tourneau, Jérôme Fischer, Emmanuel Tricoire, *Principaux contrats civil et commerciaux*, Ellipses Edition Marketing SA, Paris, 2005, p. 190). However, in this context it is unlikely that a professional would lend money that does not belong to him.

[63] Viorel Mihai Ciobanu, *Tratat Teoretic si Practic de Procedură Civilă (Theoretical and practical treatise of Civil Procedure)*, 1st vol., General Theory, National Publishing House, Bucharest, 1996, p. 265 and next.

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