Abstract
In the oldest age of the Roman law, the contract was a convention whose binding nature resulted from the formalities and solemnities performed on the occasion of its conclusion. At the beginning, the contract was a convention taking a certain form. The first contractual forms were characterized by a rigorous and excessive formalism.

After the appearance of consensual contracts, the notion of convention became synonym with the notion of contract and the new contracts which lacked the forms, were called informal. The first informal contracts were the real contracts, which were concluded by the mere remittance of the thing and afterwards the consensual contracts which were concluded by the simple consent.

The word “contractus” was generalized in the system of Roman private law and afterwards taken over worldwide in all the legislations which followed.

Keywords: literal contracts, informal contracts, innominate contracts

1. Introductory aspects
The first Roman contract appeared in the context of perpetration of an offence and represented the understanding between the guarantor and the injured party, expressed through a religious oath. The guarantor had to use the word spondeo followed by an oath. This oath was not uttered before an authority, but was related to the belief in gods. Thus, it was believed that its breach entailed the gods’ wrath.

Nexum, the old loan contract was made by the method of weighting in front of witnesses, called per aes et libram (by copper and scales) also used for the alienation of property. The verbal contract sponsio ended by uttering some solemn words while the litteris contract ended by certain records made in a register, codax, made by creditors with the consent of the debtor.

After the appearance of consensual contracts, the notion of convention became synonym with the notion of contract and the new contracts which lacked the forms, were called informal. The first informal contracts were the real contracts, which were concluded by the mere remittance of the thing and afterwards the consensual contracts which were concluded by the simple consent.

In the imperial age, we witness a progressive elaboration of the general theory of contracts. The jurisconsult Pedius is the first jurisconsult who attempted to unify around the meeting of wills, as essential element of a contract, all the categories of conventions recognized by the legal order and which caused legal effects. In this respect, numerous pacts, simple meetings of will, were raised to the status of contracts.

The word “contractus” was generalized in the system of Roman private law and afterwards taken over in all the worldwide legislations which followed.

*e-mail: avmihaiolariu@yahoo.com
The concept of obligation also appeared in the very old age of the Roman law. Jurisprudence at that time considered the offence as being the only source of obligations. Obligations were born through contracts. The meeting of wills should have been expressed in a certain solemn form.

Solemn contracts represent the oldest form of expressing the legal meeting of will. Usually, being rigid and not allowing interpretations, the parties’ presence was necessary. The most important contracts in religious form are religious sponsio and justiurandum liberti.

We mentioned above the agreement between the injured party and the guarantor, an agreement accompanied by the religious oath; subsequently, this contracting modality extended to other cases. Cicero mentions that the oath was also acknowledged during the Law of the 12 Tables.

Another religious contract was justiurandum liberti, the oath of the freedman, which took place between the owner and the freedman. This consisted in a double oath. The first oath was uttered by the slave before manumission, whereby he undertook to perform a certain provision, services, days of work to the owner’s benefit. The oath was renewed after manumission, this being practically the moment when it actually produced legal effects because, as we well know, slaves lacked legal capacity. The first oath only had a religious nature. In case of breach of such obligations, the owner could resort to an action called iudicum operarum.

Upon the establishment of the republic, the contract lost its religious nature, and sponsio religioso became a civil legal act, sponsio laica. Thus, Roman citizens had access to sponsio, while the peregrini resorted to stipulatio.

The stipulation gave rise to obligations only for the debtor. It could be known only under a single aspect, of the debtor’s obligation, without knowing the cause of the obligations. For this reason, the stipulatio was an instrument for exploitation of the debtor, being a verbal contract concluded by question and answer, in the presence of witnesses. Because of its abstract nature, patricians used it against the vulgus, and foreigners could also undertake obligations in verbal form.

This contract was used by bankers for practicing usury. This also resulted from congruentia (matching), because, being asked by the creditor if he owes a certain amount of money, the debtor had to answer like the creditor. Because of its oral nature, for the conclusion of this contract, both parties had to be present (who shouldn’t have had any verbal or hearing impairment), requiring the identity of time and place.

In time, the stipulation suffered transformations. The identity of time and place was mitigated, as well as the use of the solemn terms, which were replaced with similar terms. Later on, the stipulation turned into a written act. Thus, although the presence of the parties was a validity requirement of the stipulation, even in the case of the written act, the removal of the obligation was admitted if the debtor proved that the requirements of identify of time and place was not met. This generated a large number of disputes.

Emperor Justinian introduced some exceptions. For instance, the commodatarius and depository could be compelled to return the respective thing to a third party and not to the commodans or depositor. Also, a creditor who sold a good which was entrusted to it

---

2 Ibidem.
as pledge because it did not receive the debt, could reach an agreement with the purchaser to return it to the debtor if the debtor wanted to buy it back. Also, the ascertaining act of the stipulation could be challenged if the debtor proved that one of the parties was absent from the locality the whole day: “and if the document states that the act was made between the parties present we have to believe it, provided that both parties were in that city on that day when such an act was written”\(^3\). Also, in the context of abuses of the rich, the debtor was given the possibility to defend himself by the exception of fraud and thus to prove that he actually received less money. For this, the parties concluded a convention undertaking not to commit a fraud and, based on this convention, the judge could apply sanctions. However, generally, the burden of proof belonged to the debtor, who had to prove the negative fact of not having received the amount of money or having received less money. In reality, the proof was very difficult to make.

Because of abuses, emperor Caracalla issued an edict reversing the burden or proof, and the creditor had to make proof of the effective payment, if the debtor invoked by means of action (*querella non numeratae pecuniae*), or exception (*non numeratae pecuniae*), that he did not receive the promised money.

In the case of dowry promise (*dotis dictio*), with a view to marriage, certain persons on the female’s side, usually the father or paternal grandfather, undertook to the future husband to give him something as dowry, or to perform a service by uttering some solemn words. Subsequently, the establishment of a dowry by a simple pact was also admitted\(^4\). The dowry could also be returned to a third party in case of termination of the marriage.

The old Roman law also provided sanctions, and many times they took the form of actions available to the creditor for the recovery of the receivable. According to the Law of the 12 Tables, the debtor was sanctioned by *iudicis postulatio*.

Later on, according to the laws *SILLIA and CALPURNIA*, if the debtor undertook to pay a certain amount of money, it could have been pursued by *Condictio certae pecuniae*, if he promised a good determined by *Condictio certae*, and if he promised a common fact, the creditor could have resorted to *Actio ex stipulatu*.

The *Nexum* was considered as the only authentic contract concluded in the presence of the magistrate. It was made in the presence of five witnesses. According to authorized opinions, it was a loan contract which was made by the formalities of mancipation “*per aes et libram*” (copper and scales), which subsequently became a general manner of contracting\(^5\). Thus, the debtor undertook to work for the creditor in exchange for an amount of money.

### 2. Litteris Contract (written form)

The economic development of Rome had as its result the increase of trade and bank operations, which imposed a written form to prove the legal acts, in particular to evidence them, which many times was difficult to prove. This form is related to the

---


\(^2\) Ş. Cocoș, *op. cit.*, p. 269.

\(^3\) Ş. Cocoș, *op. cit.*, p. 269.

custom of the Roman citizens to keep a register of collections and payments called *codex accepti et expensi*. This register had two columns. The income was registered in one column (*accepta*) and the income was registered on the other (*expensa*).

The literal contract was used in fact to give legal efficiency to other conventions which were not recognized from a legal standpoint. An example in this respect is the sale-purchase contract, which was not recognized as valid because it was not formal. For this reasons, the *literis* contract was used in order to change the cause of an obligation. For instance, if a person (the purchaser) had to pay an amount of money as price further to a sale, this was mentioned in the register as if the respective amount resulted from a loan. Thus, the payment obligation resulted not from the sale but from the record (*transcriptio*), where the same amount of money was registered firstly as incoming and secondly as outgoing. Another case in which the literal contract was used was to change the debtor. Thus, the new debtor was recorded in the register instead of the old debtor. The literal contract had a particularly rigorous interpretation, it did not took into account the internal will of the parties, being a contract proper for the Roman citizens.

The peregrini used their own *literis* contractual form, known under the name of “writs”; some of them were drafted in a single counterpart and had the name of *chirographa*, and others were drafted in a number of counterparts equal to the number of the contracting parties, having the name *syngrapha*.

In the age of Justinian, there is already a “*literis* obligation” which had its own manner of formation, *i.e.* a debtor who admitted through a writ the receipt of an amount of money no longer had the right to challenge the writ if a certain time period elapsed. The term for challenge was of two years within which the debtor could file the *querela non numeratae pecuniae*. Thus, the literal obligation was born only after this term expired, when it became final and irrevocable.

The literal obligation was an strict legal obligation and the judge did not take into consideration the internal will of the parties but the letter of the act. The object of the literal obligation invariably consisted in an amount of money because the codex was limited only to monetary operations and it was sanctioned by *actio certae creditae pecuniae*.

The Institutes of Justinian refer to the *literis* obligation. The *literis* obligation at the time of Justinian had a distinct character. Thus, if the debtor admitted by a writ the receipt of an amount of money, after a certain time period elapsed, such no longer had the right to prove that he did not actually receive that amount of money. At the time of Justinian, the term was established at two years. If, within this term, the debtor did not file the *querela non numeratae pecuniae* against the writ, such could no longer be challenged.

### 3. Informal Contracts

#### a) Real Contracts

In addition to the formal contracts, the real contract also implies a material element, namely the material remittance of the good. They appeared in Ancient Rome to the end of the Republic, the following being known: loan for consumption, fiduciary, deposit, deposit,
loan of use and pledge. These contracts, except for *mutuum*, were “good faith” contracts, and, in case of conflict, the judge could assess the parties convention on grounds of equity and good faith.

The real contracts appeared in close connection with the development of the economic life. As compared to the formal contracts, the real contracts were designated by a technical term. For instance, *mutuum* was exclusively used for the achievement of the loan for consumption.

Except for the *mutuum*, all the real contracts were of good faith, so that the judge made assessments according to the equity and good faith, without being restricted to the letter of the contract.

Except for *mutuum*, the real contracts were imperfect synallagmatic contracts.

**► Loan for consumption (Mutuum)**

The etymology of the term “mutuum” comes from the expression *ex meo tuum fit* (from me it becomes yours).

The contract consists in the transfer of an amount of money or fungible goods to the debtor with the obligation to return to the creditor the same amount or money or a quantity of goods of the same type and quality. It was required that the good given as a loan is the property of the creditor. The contract was concluded at the time in which the good was remitted, and an indirect transfer of the property was allowed. Since it was a gratuitous contract, the debtor had to return only what he had borrowed, but many times, the Romans added a stipulation whereby the debtors had to pay an interest called *foenus*.

From a technical standpoint, the loan with interest took the form of stipulation. The difference between the amount effectively paid and the amount which had to be returned was paid by the debtor, although he had not received it before the conclusion of the stipulation.

Because of the wide practice of interest over the ceiling provided by the law (Law of the 12 Tables), the emperor Caracalla inserted in 215 A.D. an action called “Complaint for uncounted money”, by which the debtor could defend himself against the creditor, requesting such to prove that he counted the money mentioned in the writ.

In the classical age, the creditor could collect interest for the amount lent based on a simple convention attached to *mutuum* only in three cases: maritime loan (*nauticum foenus*), loan granted by a city, loan of commodities and loan consented by the bankers. Thus, the maritime loan was practiced between the bankers and ship owners, the loan being granted to the ship owner to conduct trade at sea. The ship owner had to return the money with interest. If the commodities disappeared before reaching the destination, the ship owner owed nothing to the bank and because the risk belonged to the bank, he could charge an interest no matter how high. For this reason, during the rule of Justinian, the interest was limited to 12%. Also, a convention on interest was also admitted in the case of loan of commodities and that made by bankers. It should be mentioned that at the beginning of the Empire, the Macedonian senatus consultum prohibited to lend money to the sons within the family, otherwise the creditors lost their right to sue them in order to recover the receivables even after the death of *pater familia*. However, if the loan was made with the approval of the *pater familia*, the *senatus consultum* was not applicable.

---

like in the case when it was impossible for the creditor to find out the capacity of the
debtor as son of the family according to the principle *error communis facit ius*.

Also, Genucia Law prohibited the practice of loan with interest. However, the
Roman citizens resorted to the substitution of a Latin in order to be able to charge interest
on the borrowed amounts.

► **Fiduciary**

The fiduciary is a contract whereby a good is transferred by mancipation or *in iure
cessio*, followed by a convention whereby the person who received the property of the
good undertakes to retransmit it to the person from whom he had received it at a certain
term. The fiduciary was used for the establishment of a real security, by transfer of the
debtor’s property to the creditor followed by a convention whereby the creditor
undertook to retransmit the property if the debtor paid at maturity. Since it was a simple
understanding, the return of the good could not be obtained by judiciary means, and this
is the reason why, to the end of the Republic, the fiduciary was sanctioned by an action
based on which the debtor could compel, by judgment, the creditor to return the property
or the respective good (**actio fiducie**)\(^8\).

There are two kinds of fiducia: fiducia *cum creditore* and fiducia *cum amico*. In the
case of fiducia *cum amico*, it was a loan given to a friend who had to use the good and
return it on time. The fiducia was also used in the family law (*mancipatio, adoptio*), and
in the field of obligations, it was used in *mortis causa donations*, donations by an agent,
returns of dowry etc.\(^9\).

At its origin, the fiduciary contract had several functions. It was used, as we saw, for
the establishment of a real security, a purpose which was subsequently taken over by the
pledge contract. Gaius called it “fiducia *cum creditore*“.

The fiduciary pact (**pactum fiduciae**) was not sanctioned and for this reason its
execution depended on the good faith of *accipiens*. *Tradens* had some possibilities to
make the proof resulting from the exterior forms of the operation (**fidi fiduciae causa**) or
from the derisory price stipulated (**numo uno**).

Of course, there were certain inconveniences because the party which transmitted
the property over the good was after the payment in the situation of a simple unsecured
creditor. This also happened in the case of fiduciary *cum amico*, the person who
transmitted the property was, at the maturity, in the situation of a simple creditor.
Because of its formal character, the fiduciary was replaced with other contract which
were more simple, based on conveyance (**tradtio**) and disappeared from the legal
practice at the end of the classical age.

► **Commodatum**

As regards the ***commodatum***, it was a loan contract whereby a good was given for
use (**rem utendum dare**), so the property itself was not transmitted, with the obligation to
return it in specie and not by an equivalent. Consequently, only tangible and
inconsumable goods could form its object. Moreover, the commodatarius had to use the

\(^8\) V. Hanga, *op. cit.*, p. 372.

\(^9\) Ş. Cocoş, *op. cit.*, p. 278.
good within the limits of the concluded convention because otherwise, it perpetrated the so-called “theft of use”.

The commodatarius had the obligation to take care of the good as a good owner, being responsible not only in case of fraud, but also in case of default. For the prosecution of his rights, the commodans disposed of a direct action and the commodatarius disposed of an indirect action resulting from the same contract. The debtor’s guilt was assessed by comparing its conduct in respect of the good with the conduct that a head of family should have in respect of his goods, *culpa levis in abstracto*.

Gaius shows that the debtor is also responsible for certain circumstances which are included in the scope of a fortuitous event, the so-called liability for custody.

The obligations of the commodatarius were sanctioned by *actio comodati directa*. Two formulas existed in the praetor’s edict: a drafted formula – *in factum* and one *in ius*.

The commodans was held to execute some obligations by *actio comodati contraria*. He had to pay to the commodatarius the expenses incurred for the preservation of the good.

**b) Consensual Contracts**

Consensual contracts were concluded by the simple meeting of the parties’ will. They are generally synallagmatic contracts because they give rise to obligations for both parties, and for this reason neither party may request the other party to fulfill its obligation as long as it fails to fulfill its own obligation. However, if it makes it, the exceptio non adimpleti contractus (exception of non fulfilled contract) may be opposed to it. These contracts are *bonae fidei* contracts, of good faith, meaning that the judge shall interpret such contracts in the spirit of equity. All the obligations within the consensual contracts result from conventions. In the classical age of the Roman law four types of consensual contracts were known: sale-purchase, lease, company and mandate.

A similarity between the sale-purchase and the lease contract was that in both cases the price had to be counted, and the transfer referred to either the property in the case of sale-purchase or the use in the case of lease. The company and mandate contracts have in common the fact that they are both contracts *intuitu persone*.

**Sale-purchase Contract**

The sale-purchase contract is a contract whereby a person called seller transmits the quiet possession of a good to another person, the purchaser, in exchange for an amount of money called price.

The sale-purchase in its consensual form appeared only at the end of the Republic. In a first stage, the sale-purchase transferred the property, in the form of the so-called mancipation sale. Because the mancipation was a solemn act, the moment of making the act coincided with its execution. Subsequently, the sale-purchase was made by two distinct stipulations. The first was that in which the seller stipulated the price from the purchaser (*venditio*), and by the second, the purchaser stipulated the good from the seller (*emptio*). Thus, the legal operation was performed through distinct acts and the obligations were executed after they were born.

---

The sale-purchase became consensual at the end of the republic, so that the mere consent of the parties was sufficient to give rise to the sale-purchase contract. The three essential elements of the sale were represented by: consent, object and price.

As regards the object, it could be either a movable or immovable asset, but also intangible assets. For instance, a receivable or an inheritance could be sold or purchased. According to Gaius, the sale-purchase contract is formed by the meeting of the wills on the object and the price.

In the field of the sale, the consent consisted in the meeting of the wills of the seller with the buyer’s. If the parties condition the conclusion of the contract on the fulfillment of certain forms, the act shall be formed subsequently. Sometimes the parties resorted to the material remittance of a good of small value or of an amount of money. In Justinian’s law, if the parties agreed to draft a writ, the contract was born at the time of drafting the respective writ. Until the drafting of the act, any party could waive the promise made.

As regards the object of the sale, it has to be in the trade, licit, possible, but a good which belonged to another person could also be the object of the sale. The object could consist in both tangible and intangible assets. The seller did not undertake to transmit the property but only the quiet possession of the good.

As regards the price, it had to be real (verum), not fictitious, determined (certum) or at least determinable, in money (pecunia numerata). The price was determined when it was established at the time of conclusion of the contract. It could also be fixed by a third person. If such person failed to fix the price, the sale did not take place.

In the post-classical age of Justinian, another quality of the price was introduced, namely that it is equitable. Thus, if the price represented less than half of the asset’s value, the sale-purchase was not valid, and the contract could be kept if the unpaid difference was paid. The seller could invoke the injury and could request the cancellation of the sale. This modification of the law made by Justinian had as its purpose to protect the poor who were many times put in the situation of selling their goods for derisory prices, in favor of the rich.

The seller had to keep the asset in good condition as a good householder, being liable for any damage caused by its fault (culpa levis in abstracto). In case of force majeure, the purchaser had to pay the price, even if the good perished before being delivered, because the risks were incumbent upon him (periculum est emptoris)\(^\text{11}\). This is explained by the fact that, before being consensual, the sale-purchase was performed by two stipulations, and the purchaser was the creditor of the good. However, the parties could agree by a stipulation so that these risks were incumbent upon the seller. The rule res perit emptori was not applicable to the sale of assets of genre or of assets subject to suspensive conditions, like in the case of the goods which had to be weighted, measured, counted.

Another obligation of the seller was to deliver the good (cacuum possesionem tradere), the seller transferred the quiet possession of the good and not the property of the good. This was more of a practical nature, because the peregrini could not acquire Roman properties. In order to facilitate the sales and purchases, including in fairs, it was admitted to transfer the possession. It was sufficient that the seller transmitted the

\(^{11}\) V. Hanga, op. cit., p. 379.
possession of the good by the simple fact of conveyance. However, it was an useful possession. The seller had to abstain from any fraud and no claims had to be filed by another person in respect of the good.

On the other hand, the transfer of possession was also executed because the proof of ownership was very difficult to make, meaning that one had to prove not only that he was the owner of that good, but to also prove the ownership of all the persons who owned the sold good before him as owners, which consisted in a diabolic proof (*probatio diabólica*). Even nowadays, this proof remained diabolic, since it is very difficult to prove ownership, because one does not only have to prove his right of ownership, but also the right of the person from whom he acquired the property, as well as of the person before him etc.

However, the seller had the obligation to transmit the very property of the sold good in two cases:

- when the seller was a *quiritar* owner of the sold good and when he transmitted the property of the good by *mancipatio* or *traditio*;
- when the parties agreed even by the contract that the seller transmits the property of the sold good.

It should be noticed that in the Roman sale, the parties were not equal, the regulation was favorable to the seller, who only transmitted the possession of the good, and the risk of fortuitous loss of the good was incurred by the purchaser (*emptor est periculum*). The explanation may be found in the origin of the sale which appeared in the relationships between the state, as main seller of slaves, and private individuals, as purchasers.

Another very important obligation of the seller is to guarantee for flaws and against eviction. In the classic Roman law, the guarantee for flaws was regulated in the sense that the seller had to guarantee for the respective good, meaning that he had to make a statement that it is not useless or harmful. If the contrary was proven, two actions were available for the purchaser: one for restitution and one for estimation, reduction of the price. Also, there was an action deriving from the contract.

As regards the eviction, the seller had to guarantee for this, too. In the age of the mancipation sale, that *actio auctoritatis* (guarantee action) was provided, namely to pay double the price. At the time when the sale-purchase became consensual, at the end of the Republic, the parties had the opportunity to request damages based on the action in the contract.

As regards the obligation to be liable for hidden flaws, in the age of classical Roman law, the flaws which regarded a surface of land were sanctioned. In the case of mancipation sale, the purchaser had two actions available against the seller – *actio de modo agri* – when the surface was smaller than the declared one, and *actio auctoritatis* (guarantee action), when it was subsequently discovered that the land was encumbered by a lien. In this case, the purchaser could request either the cancellation of the sale or the reduction of the price. In the age of consensual sale, the seller was liable for flaws in two cases: when he made a false statement regarding the qualities of the sold asset or when he was aware that the asset had certain flaws but he failed to declare them. However, if the seller was not aware of the flaws, so he was of good faith, he was liable only if there was a special stipulation in this respect.
In the system of *aediles curules*, the seller was also liable for the flaws which were not known, the liability being objective, irrespective of any fault. Emperor Justinian extended the system of *aediles curules* to the civil law.

**Obligations of the purchaser:**
The purchaser had to pay the price (*dare pretium*). In general, the principle of simultaneity operated, according to which the seller could not claim the payment of the price before having transmitted the good. However, if he did it, the purchaser could have opposed the *exceptio mercis non traditae*12. Sometimes, the purchaser also had some accessory obligations, such as the repayment of potential expenses to the seller, potential interest if he delayed in paying the price.

As regards the moment of payment of the price, when the contract provided a term, the purchaser had to make the payment until that term. If the good perished for fortuitous reasons, the seller had however the right to the price although he did not transmit anything because the risks belonged to the purchaser. If the parties considered that the rule of the common law is inequitable, they could place the risks on the seller by a convention. Also, the rule *res perit emptori* did not apply for the goods of genre or in the case of sales subject to a suspensive condition because it was assessed that previously there was no perfect sale13.

**Proof of Sale**
The sale-purchase contract was evidenced by witnesses and writs, and also in other modalities. The advance payment was often used for this purpose. Based on such, both the existence of the contract was proven and the convention could be requested and executed based on it, the so-called “confirmatory advance”14.

Emperor Justinian turned the advance payment into a means for sanctioning the person who refused to contract, which lost the advance payment or returned it double. The advance payment proved the existence of a pre-contract stage (*super facienda emtione*) which bound the parties to conclude the contract in the future. The party which denied this obligation lost the advance payment, the so-called “*arha paenitentialis*”.

4. **Innominate Contracts**
All the contracts that we have previously analyzed (formal, real and consensual) were the only contractual forms which had legal efficiency. Consequently, any convention had to take one of the known contractual forms. Because of the diversification of the economic and social relationships, there was a tendency to exceed this formal framework and to recognize legal effects of other conventions which were not in the category of standard contracts. These conventions were called by the Romans *nova negotia* (new acts) or innominate contracts (*contractus incerti*). The medieval commentators gave this name and this is the name by which we know them today.

The innominate contracts were informal contracts whose object consisted in a performance and counterperformance; the execution of the performance by one of the

---
parties compelled the other party to perform its counterperformance\textsuperscript{15}. Because of the fact that these conventions could not be classified in a category of contracts, if one of the parties executed its promise and the other party refused to, it had an extra-contractual action available, the \textit{condictio}. This was based on enrichment without cause. When the \textit{condictio} was not applicable, the praetor created an action called \textit{in factum}, under the criminal law.

As general elements, the innominate contracts have the same elements which may be found in the other contracts. However, they also have some specific elements. Thus, the contract was born only if one of the parties had executed its performance as of the date of its conclusion. Another specific element was the fact that it gave rise to obligations for both parties, even if such were executed at different times. Of course, having a subsidiary nature, the convention did not have to be part of a category of known contracts.

In the Justinian law, there were four types of innominate contracts. These types of contracts were mentioned in a text in the Digest, considered as belonging to Paul: \textit{do ut des}, \textit{do ut facias}, \textit{Facio ut des} and \textit{Facio ut facias}.

The first innominate contract is \textit{aestimatum}, or estimating contract. According to Ulpian, it was sanctioned by an \textit{estimatio} action, having a formula drafted \textit{in ius}, of good faith and uncertain under the name of \textit{actio civilis incerti}. Based on this contract, a small merchant promised to sell a good belonging to a large merchant, at a certain price and until a certain term, a convention accompanied by the material remittance of the good\textsuperscript{16}. This contract appeared in the classical age, being the only innominate contract recognized from this age.

\textit{Aestimatum} resembles the contracts of mandate, sale-purchase and lease. However, it has several distinctive features. Thus, unlike the mandate, \textit{aestimatum} was for valuable and good consideration. Also, unlike the sale, in the case of \textit{aestimatum}, the good entrusted for sale could be requested and, unlike the lease, the possession of the good was conveyed. The action which sanctioned the \textit{aestimatum} was the \textit{actio aestimatoria prescriptis verbis}.

Another innominate contract which may be found in the Roman law is \textit{permutatio} (exchange), whereby two parties promise to each other to transmit the property of a good, and the other party is bound in its turn to transmit the property of another good. Because of the resemblance with the sale, some Roman jurisconsults did not make the difference between the sale and exchange. Paul presents the differences between the sale and the exchange, dividing the contracts in contracts of the type “I give you so that you give me”, specific to the exchange, “I give so that you do for me” or “I do so that you give me”. The two contracts are also different by the fact that, in the case of the exchange, both parties undertook to transmit the ownership, the goods exchanged being in the patrimony of the parties, while in the case of the sale, as we saw it, a good belonging to another person could also be transmitted.

A third contract was \textit{precarium}, whereby a party transmitted free of charge the possession of a good to the other party which undertook to return it upon request.

\textsuperscript{15} \textit{Ibidem}.
\textsuperscript{16} E. Molcuț, D. Oancea, \textit{op. cit.}, p. 295.
Although there are some similarities with the commodatum contract, the *precarium* represents a distinct legal institution. Thus, the creditor could request at any time the return of the asset and the debtor enjoyed the protection of possession because, unlike the commodatum, he was holder and not precarious custodian. Also, his liability was much more attenuated as compared to the liability of the commodatarius.

The innominate contracts were sanctioned by an action, *actio prescriptis verbis*. The origin of the action is controversial because its field has gradually extended to a general character. Considered as a standard action, it could be used under different names, in various situations. Based on this action, the party which executed its performance could request the other party to execute its performance\(^{17}\). Also, by an action grounded on the fact of “delivery of the good” (*condictio ob rem dati*) it could request the termination of the contract and the return of the good.

At the time of Justinian, the party which failed to execute its performance was compelled to return the good only if such non-performance was caused by its fault. Unlike the classical age, when the *condictio* could be used even when it was impossible for the other party to execute its performance without being its fault. *Condictio* was a strict legal sanction, unlike *actio praescriptis verbis* which was a good faith action. For this reason, if the value of the good increased meanwhile, the respective party preferred to use the *condictio*.

Another action, *condictio propter poenitentiam* (application because of regret) was applicable in two cases. The first was when a limited term loan was granted for making a trip. Thus, the return could have been requested by an action grounded on the regret of the promise if the trip did not take place or if no expenses were made in respect of such trip. Also, in case of transfer of ownership over a slave, for the purpose of manumission. In this case, the slave could be taken if the manumission did not take place.

The application of *condictio ob rem dati* as *condictio propter poenitentiam* represents exceptions from the general rules in the field of contracts because the concluded contract was terminated by the will of a single party, instead of forcing the party which failed to fulfill its obligation to execute it.

*Condictio* was a strict legal sanction, unlike *actio praescriptis verbis* which was a good faith action. In the post classical law, *condictio* was initiated with success only if the debtor failed to execute the contract by its fault. *Condictio* implied the fulfillment of all the conditions proper to the contractual liability, with the difference that, in the end, it still led to its termination and not to the execution of the contract.

If the non-performance was the result of a fortuitous event, *condictio ob rem dati* did not apply. Also, if a term was stipulated, the application for return in the case of *condictio ob rem dati* did not occur until the expiry of the term.

Unlike the other contracts, the innominate contracts represented deviations from the principles applicable in their field. Thus, a contract could have been terminated by reason of reconsideration of the commitments, by the will of a single party, which represents a serious breach of the principle of irrevocable nature of contracts.

However, *condictio* was the only instrument for defense of the weak before the strong that the authorities, under pressure by the people, had to adopt.

\(^{17}\) V. Hanga, *op. cit.*, p. 389.
The innominate contracts appeared as a consequence of diversification of the economic and social life, imposing their legal recognition also through jurisconsults, praetors and sometimes authorities.

REFERENCES


