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ABSOLUTE AND RELATIVE NULLITY OF LEGAL TRANSACTIONS UNDER THE NEW CIVIL CODE

G. TIȚA-NICOLESCU[1] S.VOINESCU[2]

Abstract: *This article is aimed at a very detailed approach of the question of nullity of legal deed as provided by the New Civil Code, which brings important new elements in this matter. The research is based on the theoretical considerations of the article writer, who also quotes other writers, on the conclusions derived from the national and european case law on nullity, as well as on the relevant elements of comparative law. Several civil codes have been taken into consideration, firstly the Civil Code of Quebec and have been used as correction source and comparison model for the regulations of the Romanian New Civil Code on the matter of nullity.*

Key words: *nullity, absolute nullity, relative nullity, acknowledging / ratifying cancellation.*

1. Introductory remarks on the classification of nullity.

In the literature as well as in the case law previous to the passing of the new civil code, several classifications of nullity were formulated, some of them having been deliberately taken over by the current regulation, while others remaining only legal literature theories. We hereby remind the readership that the old civil code did not contain a chapter on nullity as a legal institution, as is the case with the new civil code, and therefore, there was no express classification of nullity types. Currently, the law regulates and defines three nullity categories:

- Absolute nullity / relative nullity;
- Express nullity / virtual nullity;
- In full nullity / partial nullity.

Currently, other two categories (of a lesser importance) are possible without any error, namely:

- Nullity of form / substantive nullity;
- Nullity by party agreement / judicial nullity.

The most significant classification of nullity is that based on the importance of violated legal provisions or on the nature of the interest envisaged by the violated legal provisions – general or individual (as often distinguished between in doctrine); from this viewpoint, there are two types of nullity: absolute and relative nullity.

In terms of terminology, the civil code refers to two distinct concepts: we may speak about a *null* contract (or absolutely null) or *void* contract when we have absolute nullity, or about an *annullable* contract when we have relative nullity.

[1] Associate Professor *Transilvania* University of Braşov, Lawyer Brasov Bar.
[2] Lawyer Brasov Bar.

The two concepts (*nu*ll *and annu*llable) have been accepted over time and have been expressly regulated by the current civil code based on the distinctions made by the case law and previous doctrine). Consequently, they are two different concepts, namely the *acknowledgement* of nullity (for the absolute nullity) and the *declaration* of nullity (for the relative nullity).

However, we hold serious reservations concerning this „distinction". If, as regards the discrimination between a document under absolute nullity (and not a null document) and an annullable document, we believe that it may be accepted in principle, on the contrary, we believe, along with other authors [1], that the concepts of *declaration* / *acknowledgement* of nullity should not be used for at least two reasons:

- We cannot speak about nullity as of right without the intervention of a court (except for the clauses that are not written, which represent a different matter and shall be dealt with hereinafter);
- The effects of admitting a legal action aimed at proving the invalidity of a legal document are completely identical, irrespective of whether we refer to absolute or relative nullity.

Therefore, we wonder what would be the difference between the acknowledgement of nullity and the declaration of nullity in order to make such a distinction?

None, so such discrimination is useless in our view. We have approached these two types, the acknowledgement and the declaration of nullity, as they are regulated by the current civil code and are frequently used in the doctrine.

As another introductory remark, what we should bear in mind is the lawmakers' vision, which is completely different from the previous regulations on cases of absolute or relative nullity and, consequently, on the fate of a legal transaction governed by one of the nullity causes.

Therefore, before elaborating on these aspects, it is important to highlight the essential differences in the new legal regulation, of which the most important in our opinion are:

- the cases of absolute nullity are fewer in the new legal regulation and, basically, as we will see, such regulation focuses rather on the *protection of a civi*l legal transaction than on its cancellation;
- the law requires expressly the *relative nullity presumption*, which means that, when the nature of nullity has not been determined or does not arise unequivocally from the law, a contract is cancellable, but it is not under absolute nullity;
- the matters referring to the *prescription* of the right to action for the purpose of nullity are also different in the new regulations and, most importantly, are expressly regulated by the new civil code;
- the new regulation allows, as an exception, the *acknowledgement* of the transaction under absolute nullity, which was inadmissible under the old civil code.

2. Absolute nullity

2.1. Natures of absolute nullity

Absolute nullity is defined in principle, by the provisions of art. 1.247 par. (1) and 1.250 of the New Civil Code; according to them, the absolute nullity of a contract occurs in certain cases stipulated by the law, as well as when it results without any doubt that the protected interest is a *general* [2] interest (unlike, as we will see, the relative nullity, which is incidental in case of violation of provisions protecting a

private interest). The elements of absolute nullity are important and they establish in principle the legal status applying to all the facts where such nullity is concerned. Three aspects are of essence in this case.

a) Absolute nullity may be claimed by any *stakeholding party* (the court is even under the obligation to summon them *by defaul*t), both by way of main issue and by way of exception;

b) Absolute nullity may be called upon *at any time* either by way of action or by way of exception, which means that it is not subject to prescription, i.e. it is *imprescriptible*;

c) Absolute nullity *may not be confirmed* except in certain cases stipulated by law; there are such cases stipulated by law in company matters (and those of legal entities in general), which will be dealt with hereinafter.

2.2. Causes of absolute nullity

In terms of the causes of absolute nullity, we must first bear in mind that, besides the definition provided by law, we may come across two possible situations; in fact, absolute nullity may be express or virtual according to art. 1.250 of the New Civil Code mentioned above, in accordance to which a contract is under absolute nullity in the cases specified by law, as well as when there is no legal doubt that the protected interest is a general interest.

However, hereinafter we will try, although not exhaustively, to list the most relevant cases of absolute nullity (especially from the perspective of contract and company law), either express or virtual.

E*xpress cases* of absolute nullity occurring in contract law may be found in the civil code and some of them are:

- Failure to observe the *substantive* conditions concerning the *object* of the contract and the *cause* of the contract, but only in certain cases restrictively provided by law; practically, under the express sanction of absolute nullity, the object of the contract shall be *determined* and lawful, and the cause shall be *lawful and moral*, calling for absolute nullity only if it is a joint cause or, if not joint, at least the other party will or, where applicable should have been aware of it ;

- Failure to observe the conditions of *form*, namely the contract concluded in the absence of form which, without any doubt, the law requires for its valid conclusion; for instance, absolute nullity occurs for covenants whereby real rights are assigned or constituted, which are to be recorded in the land register, when such covenants were not concluded in true form;

- *Complete lack of consent* [3], a condition of general interest required by law, a public order requirement bringing along absolute nullity, such as forged writing, that is when the party did not sign the document, therefore they did not give their consent upon the conclusion of the legal document;

- The conclusion of any other legal instruments aimed at *property* of the human body, its elements or products comes under absolute nullity, except for cases specified by law ;

- The conclusion of legal instruments by violating express *incapacities or interdictions*, such as sale contracts whose subject matter are disputable rights governed by the courts of law where judges, prosecutors, court clerks, bailiffs, lawyers, public notaries, legal advisers and insolvency practitioners activate, any of these categories cannot have the capacity of purchaser in such contracts;

- The conclusion of documents and operations *without the approv*als required by law, provided only that the laws require that the right of conducting such activities shall occur only when such approval has been obtained;

- Failure to fulfill a*dministrative* operations that are expressly sanctioned by absolute nullity of document, such as failure to register trust contracts and changes thereto with the tax authority (art. 780 NCC);

- *A transaction conc*luded for the enforcement of a legal document under absolute nullity, except when the parties have transacted expressly with regard to nullity (art. 2274 NCC);

- *Other cases* stipulated by law, such as partition without the participation of all co-owners (art. 684 par. (2) NCC), full or partial sub-letting which is forbidden by law under sanction of absolute nullity (art. 1847 NCC), life annuity for a third party who was deceased upon the conclusion of document (art. 2246 NCC), sale of inheritance in any form but genuine, irrespective of whether such inheritance contains only movable assets (1747 NCC) or failure to observe the preemptive right in certain cases (in other cases, relative nullity occurs) etc.

In company law, absolute nullity occurs in the special cases stipulated by the civil code in force in terms of legal entities and companies (of which we will speak hereinafter), but also in the special company law. The following are governed by absolute nullity:

- legal instruments developed by a legal entity, whose subject matter are civil rights and obligations which, by their nature or as required by law, can only belong to a *natural entity*;

- legal documents concluded between non-profit legal entities violating the principle of specialist legal capacity, as they may have only the civil rights and obligations needed to attain the *goal* set by law, the articles of association or the memorandum;

- in a limited liability company with a sole shareholder, the contracts between the limited liability company and the natural or legal entity who is also the sole shareholder of the former, which are concluded in *writing*, under the sanction of absolute nullity (art. 15 of Law no. 31/1990);

3. Relative nullity

3.1. Nature of relative nullity

As with the absolute nullity, the law provides a general definition of relative nullity.

For this purpose, art. 1.248 paragraph (1) NCC reads that a contract concluded in violation of a legal provision aimed at the protection of a private interest is annullable, which means it is governed by relative nullity. The elements of relative nullity are easy to remember, as they are to be listed in opposition with the elements of absolute nullity, for, in our opinion, it is the most eloquent and appropriate manner.

- Relative nullity may be called upon only by the party whose *interest* is protected by the violated legal provision and not by any party justifying an interest, in general; by way of consequence, relative nullity cannot be claimed by default by the court of law, as is the case with absolute nullity;

– Relative nullity is *limited by action*, but only by means of direct action, therefore it may be claimed by means of an introductory action only within the prescription time set by law, or the general prescription time of 3 years respectively, or, where applicable, within the special time [4]; however, relative nullity is not prescriptible by way of exception, so that the party required to proceed to contract execution may oppose at any time the contract relative nullity, even after the lapse of the time of prescription of the right to an action for annulment (even here there are exceptions [5]).

- Relative nullity stems from a principle that is completely opposite to that of absolute nullity in terms of the possibility of confirmation, which means that it is always *confirmable* (unlike absolute nullity, which, on the contrary, is confirmable only in the cases expressly provided by law).

3.2. Causes of relative nullity

3.2.1. Preliminary information

What the current civil code solves with regard to the causes of relative nullity is the clear distinction of some practical circumstances leading to relative nullity, unlike the previous civil code, which gave rise to ample and controversial debates concerning mainly the occurrence of defects bearing consequences on the capacity or consent of the legal deed.

However, currently the law shows expressly that a contract is annullable (relative nullity) when such sanction is stipulated, as well as when the legal provisions regarding the legal capacity have been disregarded and when the consent of one party was vitiated.

Let us clarify the occurrence of defects of the two substantive conditions in the matter of nullity.

3.2.2. Capacity

With regard to legal capacity, there are two solutions. Firstly, there is the case where there is no capacity, i.e. we deal with the lack of legal capacity. In such cases, the legal document concluded is governed by *absolute nullity*. Secondly, there may be the case where legal capacity exists, but it has many defects, such as (even temporarily) impaired judgment. In such cases, nullity is *relative*.

3.2.3. Consent

The new civil code also clarifies the matter of *consent*. Firstly, let us note that the current civil code brings significant novelty especially when it comes to imperfect consent, and such novelty bears decisive consequences on the cases of nullity.

Therefore, in the matter of *error*, with the new civil code we can no longer have the conventional classification (that existed for decades in the legal literature and case law) of the imperfect consent, i.e. in error in negotio or in corpore (causing absolute nullity), *the error of imperfect consent (*causing relative nullity) and false representation (which, theoretically, did not bear any effect). We are now operating with two concepts clearly regulated as *lege lata*, namely essential error and non-essential error.

Only the essential error and not the non-essential one may entail contract nullity (theoretically, relative nullity), as the law lists e*xpress*ly and restrictively the cases of essential error, namely: when it bears effect on the nature or the subject matter of contract, when it bears effect on the identity of the subject of performance (or on one of its capacities or on another circumstance deemed essential by the parties in the absence of which the contract would not have been concluded) and, finally, when it bears effect on one person's identity (or on one of their capacities in the absence of which the contract would not have been concluded).

On the other hand, in the matter of *fraud*, the party whose consent was vitiated by fraud may request the annulment of the contract, even if their error was not essential, while in the matter of *violence* (relative) nullity may be claimed every time one party has entered into a contract out of justified fear caused, with no right, by the other party or by a third party

(except when the contract was concluded based on reverential fear).

Finally, the occurrence of the fourth type of imperfect consent is highly diminished in the matter of nullity. Thus, according to art. 1.222 NCC, the party whose consent was impaired by *damage* may choose to request the annulment of contract or their obligations to be reduced by the value of damages to which such party is entitled.

Therefore, as deemed appropriate, the party claiming damage may request the court for either the *annul*ment of contract (by action for annulment or redhibition), or *the reduction of* obligations (by petitory action or estimating action).

However it is important to note that nullity may be ordered provided that certain conditions have been fulfilled (strictly connected to the disproportion between performances, namely such disproportion shall be higher than half of the value of the performance promised or executed by the injured party at the time of contract conclusion and, at the same time, shall be in existence until the day of the action for annulment).

Furthermore, even when such conditions are met, the court may maintain the contract provided that the other party provides a fair reduction of their own debt or, where applicable, an increase of their own obligation, in which case the rules of contract adjustment apply (therefore, we are confronted with a legal situation where the court is entitled to deny the action for annulment and the judge may order the preservation of contract effects „in all cases", as provided by law).

3.2.4. Other causes of relative nullity.

As for the other substantive conditions, the failure of observing the essential requirements for the subject matter and cause of contract leads to, as mentioned before, the absolute nullity of the contract, more specifically, such sanction may apply when the subject matter or cause are unlawful or when the subject matter is not determined or cannot be determined.

On the other hand, if the subject matter of a contract has other defects, it shall be governed by relative nullity, such as for shadow prices or give away prices in sales. And the lack of cause brings along the relative nullity of contract.

Given these remarks, we will try to list (as we did before for absolute nullity) other *express* cases of relative nullity. Thus, for natural entities, relative nullity occurs when it comes to:

- documents signed by individuals lacking legal capacity or with limited legal capacity, as well as documents concluded by individuals whose incapacity has been adjudicated;
- documents signed by the caregiver without authorisation by guardianship authority, when such authorisation is required, as well as documents entered into between the caregiver and their spouse or other relatives, on the one hand, and the underage child, on the other hand;
- mentally incompetent individuals.

For the legal entities, relative nullity occurs when it comes to:

- legal documents concluded by management (director and managers) of the legal entity, who were appointed in such positions in violation of the regulations concerning *incapacities* and *incompatibilities*, provided that there is evidence of *damage*.
- legal documents concluded between members of directing bodies in *conflict of interest*, namely those legal instruments concluded in order to fraud of the legal entity by a member of the directing bodies, if such member, their spouse, ascendants or descendants, in-law relatives or in-laws, up to relatives four times removed inclusively, who had a personal interest;

- The resolutions and decisions against the law and against the articles of association, both those passed by the decision-making bodies (general assemblies) and those passed by managing bodies (directing bodies), when grounds for relative nullity are claimed (according to laws, one may request the suspension of the effects of such decisions in court [6]).

4. Conclusions

The nullity (la nullite) of contracts as a legal institution has been and will be largely debated in the national and foreign doctrine, as the arguments mainly arise from the previous regulations (or more accurately, the lack of previous regulations), where there was no unitary approach of the topic, hence the controversies concerning the causes, as well as the effects of nullity.

In this paper we have seen all the theories formulated in the legal literature, for the mere reason that the current regulation on nullity gives clear explanations on some essential aspects, namely that this sanction applies for the failure of observing the validity requirements and that it stipulates for different reasons for the two main nullity types, the absolute nullity and the relative nullity.

Therefore, unlike other views formulated in the recent legal literature, we believe that the current legal framework of nullity suffices, and we will approach the matter exclusively in terms of its *de lege lata* nature, emphasizing, where applicable, the essential aspects stemming from comparative law.

In the absence of express regulations in the Civil Code of 1864, most law courses and works (both Romanian and French) did not approach this matter by making such distinction in terms of nullity, as was also the case with the civil code which made scarce reference to nullity, as part of the matter of contracts, especially the sale contracts (nullity was sometimes dealt with as part of imperfect consent).

As far as we are concerned, we regard the matter under discussion as very important for at least two reasons:

- firstly, nullity is a legal institution that may apply to *a*ll legal transactions and, consequently, to all contracts, as a contract is the main source of civil obligations ; knowledge about the legal status of nullity generally helps us to understand a so-called *genera*l *theory of nullity* that may be applied to any contract and any legal transaction;
- secondly (but not of a lesser importance), knowledge about the conditions and effects of nullity helps us clarify implicitly but unequivocally very important aspects in connection to the validity requirements which an agreement must observe, which refer both to the form of the contract and to its substantive conditions; in other words, it will be easier to bear in mind the essential matters referring to an agreement *validity*, and to its consent *defects*.

Our current regulation is therefore quite comprehensive as compared to that in the old Romanian Civil Code and the French Civil Code still in force (which did not have different approaches for the matter of nullity) and even to our main sources of inspiration, the Civil Code of Quebec and the Italian Civil Code, which, although they make distinctions in terms of nullity, contain very few general provisions.

However, such an approach has been required in our law system because of the numerous debates on this matter, for, as shown earlier, the French Civil Code does not have an express regulation on nullity, as neither did our old civil code, which was practically a copy of the French law.

Taking into consideration everything above and the fact that, as shown earlier, currently the matter under discussion has a separate legal regulation, we believe that nullity, as a distinct legal institution, should be approached carefully and in detail by the legal literature and such approach should be based exclusively on the new Civil Code.

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2. *** Art. 1.417 Civil Code of Quebec (C.C.Q.).
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4. For instance, the one year time provided by de art. 1.223 NCC on damage.
5. *** Art. 1.223 alin. (2) NCC on damage.
6. *** According to laws, one may request the suspension of challenged decisions – art. 217 NCC.