Considerations on the void or voidable agreement under Romanian law

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Abstract. *The concept of nullity under New Civil Code enacted on 1st of October 2011 has been amended. Thus, the New Civil Code brings more clarity and amends partially some of the former concepts of nullity and its legal regime. In this respect, new legal provisions have been enacted for the purpose of clarifying the nature and the effects, respectively the option to confirm/remedy or, to restore the null and/or voidable legal acts. The notary public becomes a new competence through which the nullity can be confirmed upon parties' request. Such new procedure saves a lot of resources for the parties with no/low appetite to initiate and to be part of the court action. This paper aims to critically to analyze the novelties and to identify the upsides and the downsides which may incur in practice when implementing such new concepts.*

Keywords: Nullity, void and voidable agreements, effects.

Short considerations on the notion of nullity in the light of the Civil Code

The legal doctrine defines the nullity as a civil law sanction that intervenes when the validity conditions of an agreement, respectively the formal and substantial conditions of the agreement, are violated and has the effect of annulling the agreement and retroactively erasing its legal effects.

The new legal regulation stipulated in the New Civil Code ("NCC") regarding the institution of nullity is much more comprehensive than the old regulation (the old Civil Code), which did not expressly define the institution of nullity.

The NCC determines the general nullity regime by introducing 20 articles (art. 1.246-1.265 NCC), which coherently regulates this institution, from general provisions regarding nullity, the effects of nullity to the validation measures of the agreement struck by nullity.

The effects of nullity are governed by three principles:

1. Principle of retroactivity (ex tunc) (quod nullum este, nullum producit effectum).

Nullity has effects not only for the future, but also for the past, meaning that the effects of nullity occur from the moment of the execution of agreement, so that it is generally deemed that the agreement was never concluded.

Due to the underlying specific issues in the background, the legislator also provided some exceptions to the principle of the retroactivity, in the sense that the effects of nullity do not occur retroactively, but only for the future. Such cases are, for example, the case of declaring the nullity of a legal entity (art. 198 NCC - from the definitive court ruling which declares the nullity of a legal entity, the latter ceases having a legal personality without retroactive effect and enters into liquidation), the case of the putative marriage (art. 304 para. (1) NCC - the good-faith spouse retains the spouse status from a valid marriage for the period between the conclusion of the marriage and the definitive court ruling which annuls the marriage), the case of the minor acting in good faith on the date of marriage which retains the full exercise capacity which he acquired under the annulled marriage (art. 39 NCC) etc. Such exceptions are logically justified by the need to protect the civil circuit. Otherwise, if the exceptions would have not been enacted in these specific cases, the

downsides would have potentially significantly impact the persons involved in such cases in a unjustified manner.

2. The termination of the agreement shall, according to the law, also entail the termination of the deeds concluded thereupon (*resoluto iure dantis, resolvitur ius accipientis*). Under this principle it is meant that the termination of the initial agreement also entails the termination of all subsequent deeds, because of their legal connection, because by canceling the initial agreement, the person which transferred the right under the subsequent deed (the person which acquired the right under the initial agreement) is deemed to have never had the right, so that he transferred a right that he did not have, so that neither the sub-acquirer could acquire the right;

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Similar as in the case of the first principle indicated before, the legislator enacted some exceptions which in some cases, the cancellation of the initial agreement does not trigger the cancellation of the deeds concluded thereupon. In such case, the subsequent deed will be maintained, although it is legally linked to the initial deed. The aforementioned rationale applies *mutatis mutandis* in the case of the second principle. Such cases are, for example, the case of the lessee acting in good faith (the lease agreement shall remain effective even after the cancellation of the lessor's title, throughout the term stipulated by the parties, but without exceeding one year from the cancellation of the lessor's title - Article 1819 paragraph (2) NCC). This example offered by NCC also brings counterbalance and it aims minimizing the effects for persons who were out the sphere of control when the cause of nullity intervened.

3. Restitution of the performances received on the basis of the contract declared null, in accordance with the provisions of art. 1.639-1.647 Civil NCC (*restitutio in integrum*) – each party should return to the other the performance received on the basis of the contract declared null, as if the contract had not been concluded. This means that the parties should reimburse the received benefits as these have no legal ground anymore.

Exceptions from the principle of *restitutio in integrum* are those situations, in which the benefits made under the annulled agreement are not subject to restitution and these are maintained in whole or in part. Such exceptions are, for example, the case of acquisition of fruits by bona-fide possession (art. 948 NCC), or the case of the acquirer of the property right or of another real right which shall keep the right he has acquired under an agreement struck by nullity by invoking acquisitive prescription, etc.

The present work will, mainly, deal with the legal possibilities under which nullity can be ascertained, respectively declared and the operating mode of these legal possibilities.

The classification of the methods of declaring nullity

The new Civil Code regulates two methods of ascertaining, respectively of declaring nullity:

- a) **Declaring nullity by a court ruling;**
- b) **Declaring nullity by agreement (*amicable nullity*).**

Therefore, under the new regulation (as, in fact also under the old regulation), the sanction of nullity operates by a court ruling when the interested party requests the court to either ascertain absolute nullity or declare relative nullity of an agreement.

Both the ascertainment of the absolute nullity / and the declaration of the relative nullity are according to art. 35 of the Civil Code Procedure actions for performance, and not declaratory judgement actions. Therefore, for reasons of terminological consistency, the terminology which should be used for both, absolute nullity and for the relative nullity is to declare nullity, because

absolute nullity does not operate by default. Both in the case of relative nullity and in the case of absolute nullity, the court or parties must assess the existence or non-existence of the cause of nullity and, if so, to declare the nullity and annul the agreement.

The classification of nullity

i. Absolute nullity and relative nullity

It is important to distinguish between absolute nullity, which will be ascertained (either by a court ruling or amicable), and relative nullity, which will be declared (either by a court ruling or amicable).

Even if there is no difference in terms of effects between relative nullity and absolute nullity, there are differences in terms of the legal regime of absolute and relative nullity. These differences will be further briefly summarized below:

- Absolute nullity can be invoked by anyone who has an interest, as well as by the court ex officio, the latter having even the legal obligation to invoke it, while relative nullity can be invoked, basically, only by the one whose interest was disregarded at the conclusion of the agreement. Such distinction is made depending upon the (general or particular) interest protected by the legal norm whose breach is ascertained.
- The absolute nullity is immune from extinctive prescription, while the legal action for relative nullity of a legal deed shall be statute-barred within the general extinctive prescription period. Nevertheless, the party that is required to perform the contract may, at any time, plead for the relative nullity of the contract, even subsequent to the expiry of the extinctive prescription period set for the right to file a legal action for annulment.
- If absolute nullity, in principle, cannot be covered by confirmation, the relative nullity can be confirmed, expressly or tacitly.

ii. Total nullity and partial nullity

NCC also distinguishes between total and partial nullity.

By total nullity the agreement will be annulled in its entirety, by partial nullity only part of the agreement is annulled, the other effects of the partially annulled agreement being maintained, as they do not contravene the law and are not essential, thus so as to cause the termination of the entire contract.

Thus, according to art. 1255 paragraph (1) NCC “clauses affected by nullity (other than those deemed unwritten) shall entail the nullity of the contract in its entirety only if they are, by their nature, essential or if, in their absence, the contract would not have been concluded.”

What is interesting is that the NCC has established an automatic mechanism for repairing the partially annulled agreement, in the sense that if the contract is partially maintained, the null clauses shall be de jure replaced by legal enforceable provisions (art. 1.255 para. (2) NCC).

There is also a provision in the NCC regarding partial nullity in the case of several contracting parties agreement which has the following content: „in the case of a contract with several contracting parties, contract nullity as regards one such party shall not entail the cancellation of the entire contract, except for the case when the participation of the respective party is essential to the existence of the contract.”

iii. Virtual and express nullity

The NCC makes a distinction between express nullity, that nullity which is expressly mentioned in a legal provision and virtual nullity, which is not expressly mentioned in a legal provision, but which results doubtlessly out of the way in which a certain validity condition is regulated.

Also, from the terminological point of view, the legislator refers to the phrase nullity when there is a cause of absolute nullity, respectively to the phrase to annul, when there is a cause of relative nullity. The type of nullity is established, first of all by the legislator's indication, in the sense that the absolute nullity is designated by the terms "ascertainment of nullity", and the relative nullity is designated by the terms "voidable contract". If the type of nullity does not result out of the legal text (neither of the two terms was mentioned), then the nullity will be determined in relation to the nature of the interest protected by the legal provision which was not fulfilled on the conclusion of the agreement.

iv. Unwritten clauses

The NCC also refers to a new category of nullity, respectively the unwritten clauses. According to some authors, unwritten clauses are considered absolute partial nullity clauses, which operate by effect of law, other authors qualify them as an autonomous institution (a variety of non-existent clauses).

The unwritten clauses are only those expressly provided by law and cannot be pre-agreed among the parties which are forbidden to create / add to the law in this respect.

We bring a critical to the NCC because it does not offer a definition of the unwritten clause. Thus, the legislator referred to it in a general manner in art. 1255 Code Civil on the partial nullity, which causes confusion between the two legal institutions (unwritten clauses and partial nullity).

The legal scholars deem that unwritten clauses cannot be opposed to anyone as such clauses neither have been written, nor have been existed.

The agreement on nullity

A new element, introduced by the NCC, is the agreement on nullity:

the parties can conclude an agreement (a bilateral legal act/ a convention) which states the nullity of a pre-existing agreement concluded between them.

The so called "nullity agreement" applies to both the contracts and the legal acts under which legal entities were set-up, as we will see below.

The main argument for which the nullity agreement was not recognized under the Civil Code of 1864 was that "no-one is judge in his own cause."

The only reference in the new Civil Code of the possibility of declaring nullity by agreement can be found at art. 1,246 paragraph (3) NCC which states as follows:

"Unless otherwise provided by law, the absolute or relative nullity of the agreement may be established or declared by the parties' agreement".

This is the only reference regarding the nullity agreement in the New Civil Code, following that the legal nature, scope, limits and effects of this nullity agreement shall be established in practice, to the extent that all general rules upon conclusion of an agreement shall be applicable (i.e. the public order, the moral norms, respectively the imperative rules, etc). In this respect, as nullity agreement is a contract between the parties, it is necessary to specify that the agreement shall comply with all essential elements of a valid contract (capacity, consent, object, cause and form, etc.).

The limits of the nullity agreement

Although the parties are free to choose (i) the content of the nullity agreement, exercising the principle of contractual freedom, (ii) the time when the nullity will occur, and (iii) the way in which the performances received under the annulled contract will be returned (i.e. the effects of the nullity), there are a number of contracts whose nullity cannot be declared through an agreement. These are:

- unilateral legal acts (which are irrevocable and produce their legal effects only with respect to a single party, and by declaring nullity of the unilateral legal act the principle of irrevocability could be violated), and
- contracts which have a special and derogatory regulation, which cannot be terminated by the will of the parties (for example, marriage or recognition of affiliation). Obviously, as regards the marriage, the parties will be able to terminate the marriage by mutual agreement, but the annulment of the marriage is subject to a special procedure, with special legal effects, which is why it can be annulled only by a court ruling).

It should also be specified that the parties are forbidden to create or eliminate by agreement nullity cases and to act as a “private legislator” in this aspect. Thus, art. 1246 paragraph (4) NCC expressly provides that “nullity causes may neither be established, nor repealed by the parties’ agreement. Any contrary agreement or clause shall be deemed to be unwritten.”

If the parties could create or repeal nullity causes by agreement, then the parties would become legislators, since, on the one hand, the norms regarding nullity are imperative, and according to art. 11 NCC “the parties cannot derogate by agreements from the laws that interest the public order or the moral order”, and, on the other hand, the nullity is a civil sanction, and according to art. 10 NCC “laws that provide civil sanctions can be applied only in the express and limiting cases provided by law”.

Nothing stops the parties to apply other contractual penalty mechanisms in case of breach of contractual obligations assumed by the parties under a contract (i.e. penalty clauses, delay penalties, resolution / termination, etc.). According to the principle *pacta sunt servanda*, any agreement concluded between parties is governed by the principle of the mandatory power of the contract, the agreement becomes mandatory and the parties must be compliant with it as it would be a legal obligation.

Form and legal nature of the nullity agreement

The NCC does not establish the legal form of the nullity agreement. However, the nullity agreement, as we mentioned before, is a contract which has to contain all main elements of a valid contract provided by art. 1179 NCC: capacity, consent, a determined and legal object, a legal and moral cause.

Moreover, as regards the formal conditions of the nullity agreement, the principle of symmetry of forms is applicable. Therefore, for instance, whenever a contract in authentic form is to be annulled, the nullity agreement to this contract should also be concluded in an authentic form.

Given the importance of this institution, *de lege ferenda*, we consider that a legislative amendment regarding the form of the nullity agreement is required, introducing the written form of this agreement *ad probationem*, taking into account that the nullity agreement may have effects on third parties of good faith.

There are also opinions that the nullity agreement would have the legal nature of a extrajudicial settlement agreement. Although under the nullity agreement the parties seek to either

close an ongoing process, either to prevent an imminent process generated by a cause of nullity, or to establish as effectively as possible the effects of nullity, we consider that this is not an actual extrajudicial settlement agreement. A major difference between the two types of contracts is, for example, the fact that the settlement agreement produces *ex nunc* effects, and not *ex tunc* effects as the nullity agreement.

Moreover, art. 2273 NCC expressly provides that the settlement may be affected by the same grounds of nullity as any other contract. However, it cannot be annulled due law error or unfair exploitation (*lesion - laesio enormis*).

The legislator also eliminates the possibility of concluding a settlement agreement over a void contract. Thus, according to art. 2274 paragraph (1) NCC the settlement agreement is null if it is concluded for the purpose of fulfilling a contract struck by absolute nullity, unless the parties have expressly concluded a settlement regarding the nullity, and paragraph (2) states the fact that, "in case the settlement agreement was concluded for a void contract, the annulment can only be requested by the party which at the time of the conclusion of the settlement did not know the nullity cause".

Art. 2275 NCC expressly specifies a special reason to annul the settlement agreement, respectively when the settlement was concluded on the basis of documents which subsequently were proved to be false.

That's why we can see notable differences between the two categories of contracts. It is obvious that these two institutions cannot be easily assimilated or confused.

Regarding the registration of the nullity agreement in the land book register, we consider that the nullity agreement can either serve as a title of property and can be registered as this in the land book of a building, or it can be registered in the land book under art. 903 NCC. Art.903 also institutes exceptions from the rule of ensuring enforceability against third parties by land book notation, itemizing the categories of acts or facts which are opposable against third parties even if there is no land book notation.

The legal effects of the nullity agreement

Regarding the effects of the nullity agreement, we believe that it should have the same effects as the nullity declared by a court ruling, respectively the contract declared null by agreement, will be considered to have never existed, with all the effects deriving from this principle. (i. e: *restitutio in integrum* - restitution of the performances and *resolutio iure dantis, resolvitur ius accipientis* - annulment of the subsequent acts).

The effects of nullity are the same regardless of the method we use, respectively whether the nullity is pronounced by a court ruling or by the parties' agreement. In both cases (by court or amicable nullity), the contract struck by nullity will be deprived of its effects, which contravene the legal provisions which refer to the validity of the contract.

By the nullity agreement the parties can also determine its effects, such as the restitution of the performances received under the annulled contract.

Because the nullity agreement is a contract, it will mainly have effects between the parties, based on the relativity principle of the contract, and will not directly apply to third parties. Therefore, the nullity agreement retains its retroactive character, but according to the principle of relativity, it will not have retroactive effects against third parties acting in good faith and will not affect their rights acquired prior to the nullity agreement.

However, the nullity agreement will have legal consequences on both the contract and the subsequent contracts, therefore, it will affect third parties indirectly (as if the nullity of the contract

had been pronounced in court), third parties which will be obliged to return the performances received under the subsequent contracts (e.g. the ownership right which was transferred to them), if the extinctive prescription is not applicable, as we will show below.

Therefore, if acquiring a property under a contract affected by a cause of nullity, the acquirer will transfer it to a third party, and then the initial acquirer will decide to conclude a nullity agreement with the initial vendor, the initial acquirer will not be able to claim the property from the third party, as the initial acquirer is obliged to provide warranty against eviction for the third. However, the initial vendor of the annulled contract will be able to claim the property from the third party, in two situations:

- If the third party is of bad faith, then the initial vendor will be able to introduce the property claim against the third party and, simultaneously or separately after the property claim has been admitted, a land book rectification claim against the third party, and the latter one will not be able to invoke acquisitive prescription in his defense.
- If the third party is of good faith, the vendor will be able to introduce a land book rectification claim against the third party under 908 para. (1) paragraph 1 of the Civil Code (simultaneously or separately after the property claim has been admitted), if not more than three years have elapsed from the date of the land book registration made by the direct acquirer (or five years in the case of free of charge deeds). We have to specify that the third party of good faith can successfully invoke the acquisitive prescription in this case.

The nullity of the legal acts establishing or merging legal entities

The question arises whether it is possible to declare nullity of the contracts / operations under which legal entities were set-up or reorganized, by an agreement concluded between the associates / founders / members of the legal entity, so that (if the associates agree unanimously / by absolute majority), they would no longer have to file a claim in court.

From my point of view, the nullity of the legal constitutive acts of the legal entities are also subject to the provisions of art. 1.246 paragraph (3) NCC.

Law 31/1990 on companies is the special law regarding the establishment and reorganization of legal entities, and the provisions of the Civil Code represent the common law regarding the constitution and reorganization of the legal entities.

However, the provisions of art. 1.246 paragraph (3) of NCC represents the common law regarding the declaration of nullity of a legal entity by the parties' agreement.

Even though Law 31/1990 at art. 251 provides, for instance, that the nullity of a merger or division of a legal entity can be declared only by a court decision, we specify that this does not exclude the application of the nullity agreement regarding the matter of legal entities, from two points of view:

The possibility of the nullity agreement was adopted by the New Civil Code after the date on which Law 31/1990 came into force, the legislator omitting to amend/align at the same time the provisions of the special law (Law 31/1990) for legal entities;

Given that the provisions of the new Civil Code are subsequent to Law 31/1990, the provisions regarding the nullity agreement of the Civil Code are applied on the basis of the principle according to which what is not forbidden, is expressly allowed. If the legislator did not expressly forbid the nullity agreement in the matter of legal entities, respectively for the operations performed by them or for the legal acts concluded by them, we come to the conclusion that they are allowed.

The methods of the validation of/safeguarding the annulled agreement

It is important that the nullity agreement will not be confused with the validation methods/safeguarding methods of the contract struck by nullity.

The validations methods are: (a) the confirmation of the contract, (b) the renewal of the void contract, (c) the conversion of the void agreement and the common and unavoidable error. These are operations by which the parties express their intention to validate the void contracts. All validation methods of the void contract can be applied after the conclusion of the nullity agreement.

a) Validation of the agreement by confirmation

Confirmation is defined by art. 1.262 NCC, according to which " the express or tacit will expressed by a person in the sense of waiving the right to assert the nullity of a voidable contract".

Confirmation can only be used when the parties agree to waive the right to assert the nullity of a void agreement. Therefore, like the nullity agreement, the confirmation contract is also an agreement/ a contract.

Regarding the kind of nullity, which can be confirmed, we specify that an agreement struck by absolute nullity, in general, cannot be confirmed, only the contract struck by relative nullity. There are some legal exceptions too, when the absolute nullity can be confirmed according to art. 1,247 NCC.

In order to confirm an agreement struck by nullity, the following four conditions provided expressly by the NCC must be met:

- The will to waive the right to assert the nullity of a void agreement by confirmation must be certain,
- The law should allow the confirmation of the void agreement,
- At the time of confirmation, all the other validity conditions of the agreement must be fulfilled,
- The person confirming the void agreement must know the nullity cause when he decides to waive the right to assert the nullity or, in case of violence, after the termination of the violence which is exercised over him.

To be valid, the confirmatory act must include the object, cause and nature of the obligation and mention the reason for the nullity, as well as the intention of the parties to repair the nullity cause. The confirmation produces retroactive effects (*ex tunc*), respectively from the date of conclusion of the confirmed agreement. Thus, according to art. 1265 para. (1) NCC, the confirmation causes retroactive effects from the moment of the conclusion of the contract and is deemed as a waiver of the methods and the exceptions that could be opposed to the other party, but with the protection of the rights acquired by the third parties acting in good faith.

b) The renewal of the void agreement

According to art. 1.259 Civil code "The void agreement can be totally or partly renewed, in observance of all the requirements provided by law upon such renewal. In all cases, the renewed agreement will only produce effects in the future, and not in the past" .

The essential differences opposed to confirmation consists of two aspects:

- Firstly, the renewed agreement is another contract concluded by the parties, which shall fulfill all the validity conditions, including those validity conditions that the void agreement did

not fulfill. In the case of confirmation, the effects of the void agreement are validated by the parties, without being necessary to conclude another agreement.

- Secondly, as expressly provided in the NCC, the renewed agreement will produce effects only in the future, and not in the past (as the confirmation does).

c) The conversion of the void agreement

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By conversion the parties understand to consider their manifestation of will as a valid agreement/contract, and not only as a void agreement.

In other words, in the case of conversion, the manifestation of will is qualified as equivalent to a certain valid contract, even if it is not valid as another agreement.

Art.1260 of the NCC expressly provides the rule of the null contract's conversion, according to which a contract affected by nullity shall, nevertheless, produce the effects of a legal deed for which the substantial and formal conditions provided by law are fulfilled (except for the case when the parties' intention of excluding the possibility of conversion is established).

The essential condition in order to be able to operate the conversion is, therefore, that the act considered valid fulfills all the legal conditions, and all this legal conditions must be found in the void agreement.

The replacement of the void agreement by the law conversion is an effect which is applied automatically without the need to conclude a nullity agreement, unless it has been expressly excluded by the parties. Thus, in the case of a purchase and sales agreement of a building concluded under private signature (not in authentic form) becomes a pre-sales agreement, without a nullity agreement being necessary for the lack of form, if the conversion of the contract was not expressly excluded according to art. 1260 paragraph (2) NCC.

Conclusions

Taking into considerations the above, we consider that the nullity agreement produces the same effects as the declaration of nullity by a court ruling, even against the third parties which act in good faith (with certain legal limits, which we have shown above).

Under the nullity agreement the parties also can determine the restitution of the performances received under the void contract.

The NCC brings for the first time the possibility for the parties to conclude a nullity agreement. By doing so, the parties can avoid lengthy, costly processes and enjoy a fast non-contentious procedure. This does not exclude simultaneously the eventual renewal of the void agreement. However, the nullity agreement is not a precondition for the renewal/confirmation of the void agreement as it can be interpreted by some authors.

The parties are free to choose which method of declaration of nullity they want to use and can agree the effects, respectively they can find and renew the void agreement, or they can renew the void agreement, without concluding a nullity agreement before renewal. The renewal of the void agreement contains a "implicit recognition" of the existing nullity cause of an agreement. However, the nullity agreement shall for example serve as a property title to be registered in the land book of an immovable asset.

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