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ILLEGAL AND IMMORAL CONTRACTS IN THE CONTEXT OF THE ROMANIAN CIVIL CODE

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Abstract: The article deals with the current regulation of contractual invalidity in the Romanian Civil Code in force from the 1st of October 2011. Based on millennial traditions of Roman law, the regulation is influenced by all the modern solutions or developments of civil law codification, resulting in a complex system of rules, sometimes shaped by the legal practice. The article focuses on the overall design of invalidity and its specific forms: nullity, voidability, and unwritten clauses. An emphasis stands on the specificities of the Romanian rules and also on some current developments of legal cases.

Keywords: *Romanian Civil Code, invalidity, nullity, voidability, unwritten clauses*

1. INVALIDITY: GENERAL ASPECTS AND DELIMITATION

Contractual invalidity is the sanction affecting illegal or immoral contracts. Traditionally, a distinction has to be made between invalidity and other civil law sanctions, opening the question of how to integrate invalidity into the broader system of civil law sanctions.

First, a distinction between invalidity and cancellation of the contract has to be made. Under Romanian civil law, cancellation is a sanction for breach of contract by the obligor, which terminates the valid contract according to the unilateral will of the obligee, with retroactive effect to the date of conclusion of the contract (*ex tunc* cancellation, in Romanian: *rezoluțiune*), or with prospective effect (*ex nunc* cancellation, in Romanian: *reziliere*).

Ex nunc cancellation is a sanction for breach of a contract that involves continuous or periodic performance, where it is impossible to return to the situation before the contract was concluded. For example, a tenant fails to pay the rent for three months in bad faith, and the landlord unilaterally cancels the contract. In the example, thus, it is not possible to return the use of the dwelling made by the tenant, and it would be pointless to return the rent previously paid. *Ex nunc* cancellation, therefore, terminates the lease with effect only for the future.

If Primus is the seller and Secundus is the buyer, and Primus does not deliver the property over which the contract has transferred ownership within the contractual deadline, Secundus may cancel the contract. The otherwise valid contract will be cancelled retroactively, and therefore if Secundus has paid the price or part of the price, Primus will have to pay it back. This is the case of *ex tunc* cancellation.

A clear distinction must be made between invalidity and cancellation, as both have very similar legal effects. The fundamental differences are:

Invalidity can arise concerning any legal transaction, not only contracts (for example, wills); cancellation can only occur in the case of bilateral (synallagmatic) contracts (a contract is bilateral, or synallagmatic when the parties obligate themselves reciprocally so that the obligation of each party is correlative to the obligation of the other).

Invalidity is caused by reasons existing at the time of the conclusion of the contract (the sanction is for the breach of the rules governing the valid formation of that agreement). In contrast, the cancellation can only be considered in the case of valid bilateral contracts because of the obligor's default occurring after the conclusion of that contract.

The cause of the civil sanction is also different: in the case of invalidity, the cause is the breach of the law; in the case of cancellation, the cause is the partial or total non-performance of the obligor.

A separation must also be made between invalidity and frailty *(caducitas)*. The frailty of a legal transaction cannot be identified with the invalidity. In the first case, the legal transaction is valid but does not produce legal effects due to specific subsequent causes. For example, if the beneficiary predeceases the testator, the will is terminated by the effect of frailty.

2. ILLEGAL CONTRACTS

Contracts infringing mandatory norms or, in general, the public order are considered illegal (Romanian Civil Code, hereinafter: RCC, Art. 1169, 1246). The sanction is invalidity. Invalidity plays both a preventive role (the parties, knowing that the contract will be invalid, should not enter into it) and a repressive, sanctioning role (if the parties do enter into an illegal contract, that agreement cannot produce the desired effects) (Boroi et al., 2021, p. 532). The law uses the institution of invalidity as a defense against the creation of contracts that are contrary to the public or private interest. A contract is invalid if it appears to exist (materially) but does not produce the legal consequences intended by the parties under the existing law. The cause of invalidity must exist at the moment the contract is concluded.

Invalidity is, therefore, a sanction affecting a contract depriving it of the legal effects for which it was concluded. The essential sanction of invalidity is that it precludes the intended legal effect: the invalid contract does not bind the parties (the invalid contract does not have to be performed), nor can the invalid contract be enforced by the state or by the courts. It is not sufficient to identify invalidity simply with the lack of any legal effects. It must be stressed that the invalid contract also

produces legal consequences, but these are not the same as those that the parties intended to achieve. For example, services performed under an invalid contract must be returned *(restitutio in integrum)*, even though the parties intended that the services performed should remain valid.

What causes a contract to be invalid? Invalidity is caused by the absence of one of the general conditions of validity of contracts (capacity, consent, a definite, permissible, and possible object, a legitimate scope, or form, in the case when this represents a condition of validity). Also, invalidity can be caused by the infringement of a specific condition of validity, resulting in the breach of the prohibitory and mandatory rules of the law.

The invalidity, under Romanian law, has two general and one specific forms. The two general forms are also degrees of invalidity: nullity and voidability. The specific form is the institution of unwritten clauses, existent in the Romanian legal system from 1st October 2011.

Invalidity = nulitate	*nullity*	*nulitate absolută*	*negotium nullum*
	voidability	*nulitate relativă*	*negotium rescissibile*
	unwritten clauses	*clauză considerată nescrisă*	*clausa pro non scripto habetur*

Source: own editing

3. NULLITY

The nullity (RCC, Art. 1247) of a contract is a civil sanction that occurs when the norms protecting the public interest have been violated, and therefore the contract has no intended, legal transactional effect at all.

A contract is sanctioned by nullity in *the following cases*: (For further details, see Boroi et al., 2021, pp. 289–294; Nicolae, 2018, pp. 552–555)

a) there is a total absence of (legal) intention to conclude the contract, for example, if the signature on the contract is not that of the contracting party (obviously if the signatory has no right of representation either, but the signature is forged, for example);
b) it comes from a person who does not have the legal capacity to conclude the contract in question;
c) it is in direct breach of a mandatory norm protecting a general interest; for example, Primus agrees with Secundus to sell him his kidney. The contract is null because it is contrary to the Romanian Civil Code (Art. 66 provides that any transactions which have as their object conferring of a pecuniary value on the human body, its elements, or its products are subject to nullity, except in the cases expressly provided for by law);

d) it is in indirect breach of a mandatory norm protecting a general interest, representing an evasion of the law *(in fraudem legis)*, that is to say, a contract which, although not directly prohibited, are intended to circumvent the purpose of a prohibitory law by a roundabout way;
e) contracts contrary to public policy (ordinea publică) or good morals (bunele moravuri). Contracts contrary to public policy include those that are not in themselves immoral, nor are they expressly prohibited, but which contravene legal principles that are generally the basis of the legal order or of certain institutions of public law. For example, a contract that excessively restricts individual freedom contradicts public policy. There is no doubt that the vagueness, indefiniteness, and elasticity of the public policy concept raises interpretation problems.[1]
f) does not comply with the prescribed formalities, provided that the contract is subject to a formality, for example, authentic form.

The following consequences characterize nullity: (For further details, see Nicolae, 2018, pp. 557–560; Veress, 2021, pp. 132–133)

a) The nullity exists whether or not proceedings for a declaration of nullity have been brought. The nullity is independent of the will of the parties. Since the contract does not exist, if proceedings for a declaration of nullity have been brought, the court does not annul the contract but merely finds that it is null.
b) In principle, nullity may be sought by any person, therefore it may also be sought by (interested) third parties. The contract must be declared null even against the will of the parties who may be interested in its maintenance. Nullity is also effective against all parties before the contract is declared null, e.g., the invalidity of a contract of gift (contract de donație) in a private deed can be successfully invoked against the creditors of the donee (donataire).
c) The court of its own motion can also establish the nullity. This is the case even if both parties request that the nullity to be disregarded.
d) It follows from the foregoing that the nullity of a contract cannot be remedied by the parties' subsequent confirmation of it *(quod ab initio vitiosum est, non potest tractu temporis convalescere)*, since confirmation is tantamount to waiving the action for a declaration of nullity. This action belongs not only to the contracting parties. However, according to Art. 1260 of the Romanian Civil Code, it is possible to reclassify a null contract (conversiunea contractului lovit de nulitate absolută). This refers to a situation where the contract sanctioned by nullity contains the essential elements of another valid contract and can therefore be reclassified as valid if this is not contrary to the parties' presumed intention. For example, a contract for the sale of immovable property concluded as a private deed (which is void for lack of authentic form) can be reclassified as a preliminary contract for sale (which is also valid as a private deed).

[1] For contracts breaching good morals, see sub-chapter 8.

e) An action for a declaration of nullity of a void contract is not time-barred. "Time cannot hide the illegality of such a nature because it would mean legitimizing a practice by which the system of law itself can collapse." (Rizoiu, 2021, p. 572) A declaration of nullity may be sought even where it appears that the contract has ceased to have an effect due to its performance.

4. VOIDABILITY

The voidability (RCC, Art. 1248) of a contract is a consequence of breaching legal norms protecting private interests, and therefore voidability of the contract can be invoked by the party whose interests are protected by the violated norm.

Therefore, the voidable contract creates a contingency situation: the contract is provisionally in force, but the law gives one of the parties (except third parties) the power to ask for a retroactive annulment. The principle of freedom of contract permeates the legal institution of voidability because the party entitled to initiate the annulment is free to choose whether to accept the voidable contract or to exercise the action for annulment. If the contract is annulled, it becomes void with retroactive effect *(ex tunc)*.

In cases where the nature of the invalidity is not determined or is not clear from the law, the contract is voidable.

A contract may be voided if: (For further details, see Boroi et al., 2021, pp. 294–296; Nicolae, 2018, pp. 555–556)

a) the will of one of the parties has been manifested in a defective manner (mistake, deceit, duress, disproportionality);
b) the contract lacks the scope *(causa)*;
c) it comes from a person who could only have made a valid contract with the prior consent of another person, which was lacking;
d) the law expressly provides for the sanction of voidability in the event of a breach.

Voidability has the following characteristics: (For further details, see Nicolae, 2018, p. 560–563; Veress, 2021, pp. 134–136)

a) The contract exists until a court decision annuls it. However, if this happens, the contract is deemed not to have been concluded from the outset. If the contract is annulled, the effects of the contract hitherto acquired are retroactively extinguished. Once the contract has been annulled, the voidability is therefore no different from nullity. Therefore, the difference between the two forms of invalidity (nullity and voidability) is primarily one of degree, which is reflected in the conditions and not in the effects. Once successfully challenged, the consequences of a voidable contract must therefore be judged according to the same principles as those of a null contract. The agreement of the parties may also specify the voidability of the contract.
b) Unlike nullity, voidability, whether by action or by plea, may be raised only by the party who has suffered an infringement of his interests as a result of the

contract, for example, a person subjected to duress or deceit. Neither the other party nor a third party may successfully ask for annulment (there is one exception in this respect: the prosecutor may bring an action for invalidity to protect the interests of incapacitated persons).

c) Since the invalidity of a contract depends solely on the party, the latter has the right to enforce the invalid contract by confirmation. By this, the uncertainty hanging over the contract is removed, and it is considered as if it had been valid from the moment it was concluded. The confirmation is, therefore, retroactive. Confirmation does not affect rights acquired by *bona fide* third parties (RCC, Art. 1265). Confirmation can only be valid if it is made with knowledge of the grounds for the voidability and if the circumstances giving rise to the infringement of a legal norm do not exist at the time of confirmation (otherwise, the confirmation itself may be challenged). In order to remove uncertainty, the law recognizes the possibility to ask the person entitled to either challenge or confirm the contract. If the person does not challenge the contract within six months of receiving the notice, he loses his right to challenge (RCC, Art. 1263). Confirmation may also be implied. Voluntary performance of the voidable contract after the ground for voidance has ceased to exist tacitly confirms the contract. For example, after the cessation of the duress, the obligor may perform the contract, knowing the ground for voidance, but not asserting his right to challenge the contract.

Voidability can only be raised in court action ("attack") within the limitation period. This is usually three years. By contrast, it can be raised at any time by way of a plea ("defense") *(quae temporalia sunt ad agendum perpetua sunt ad excipiendum)*. There is, exceptionally, a time limit on the voidability by way of a plea. For example, a plea of disproportionality *(laesio)* can only be raised within the limitation period of one year (RCC, Art. 1223).

5. FURTHER TYPES OF INVALIDITY

Further forms of invalidity (which may also refer to nullity or voidability):

a. *Total invalidity (nulitate totală) or partial invalidity (nulitate parțială)*, depending on whether the invalidity deprives the contract of its legal effects in whole or partially (Boroi et al., 2021, p. 273; Nicolae, 2018, p. 549). If part of the contract is illegal, the general question arises whether this affects the whole contract or whether only the relevant part contrary to the law is invalid. In other words, the question is whether the invalidity is total or partial. The main rule is partial invalidity, where the contract binds the parties by omitting the invalid part. The invalidity of certain clauses does not void the contract as a whole if it can be presumed that the contract would have been concluded without the invalid part being included. In such cases, the contract remains valid as a whole,

and only the illegal part becomes void.[2] The corresponding legal norms replace the illegal part, or, if possible and equitable, the invalid part is simply deemed not to exist. Total invalidity is established when it is found that there is such a relationship of interdependence between the invalid part and the rest of the contract that it is reasonable to assume that the parties would not have consented to the contract without the invalid clauses (RCC, Art. 1255).

A specific problem in Romanian case law is related to unfair contract terms and total or partial nullity. Law 193/2000 establishes that unfair terms are ineffective (Art. 6). This legal text has been equated with the sanction of nullity. The law further states that the contract will persist, but only if it can continue after the unfair terms have been removed. The problem arose when the courts found that the interest in a credit agreement between a financial institution and a consumer was fixed by an unfair term.

The application of the penalty of total nullity is undoubtedly not the right one, as in this case, the consumer would have to pay the entire debt. Thus, some courts have removed this clause, practically turning the contract into a gratuitous one. The borrower only had to pay the principal instalments. But such a solution is clearly contrary to the parties' intention at the time of contracting. Other courts have struck out the unfair clause but forced the parties to negotiate a new, this time non-abusive, interest clause. These solutions have given rise to new problems: the parties have failed to reach an agreement as ordered by the court.

The European Court of Justice has ruled that these guidelines must be specific: if the variable interest rate in a loan agreement have been found to be unfair,

> "and when that contract cannot continue to exist following the removal of the unfair terms in question, annulment of the contract would have particularly unfavourable consequences for the consumer and there are no supplementary provisions under national law, the national court must, while taking into account all of its national law, take all the measures necessary to protect the consumer from the particularly unfavourable consequences which could result from annulment of the loan agreement in question. In circumstances such as those in question in the main proceedings, nothing precludes the national court from, inter alia, inviting the parties to negotiate with the aim of establishing the method for calculating the interest rate, provided that that court sets out the framework for those negotiations and that those negotiations seek to establish an effective balance between the rights and obligations of the parties taking into account in particular the objective of consumer protection."[3]

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[2] As it was stated, "It only affects that part of the transaction, which is contrary to the law. Its purpose is not to abolish the act but to ensure its legality, its conformity with the law. Like Procust's bed, it cuts away only what is in excess, leaving the rest intact. That is why, as a rule, it acts only surgically, removing the spoilt part of the content of the transaction. The principle of *favor contractus* imposes the rule of partial nullity." (Rizoiu, 2021, p. 554)

[3] Judgment of the Court (First Chamber) of 25 November 2020 in case Banca B. SA v A.A.A (C-269/19; ECLI:EU:C:2020:954).

b. *Express invalidity (nulitate expresă) or virtual invalidity (nulitate virtuală)*, where in the first case, the law expressly provides for the sanction of invalidity. However, in the second case, invalidity is not expressly provided for by the law but is undoubtedly implied from the mandatory norm governing the conditions of validity of the contract (RCC, Art. 1253). (See Boroi et al., 2021, p. 275; Nicolae, 2018, p. 547)

6. THE UNWRITTEN CLAUSES

Besides nullity and voidability, the actual Romanian Civil Code also introduced a specific, transitional form of invalidity: the unwritten *(pro non scripto habetur)* clauses *(clauză considerată nescrisă)*. Similar rules are also contained in the French, Belgian, and Swiss Civil Codes and the Civil Code of the Canadian province of Quebec.

The legal nature of the unwritten clauses is disputed. According to the opinions expressed in the legal literature, such clauses are forms of partial nullity or partial voidability, and there is also a view that they are a distinct, *sui generis* type of sanction. In our opinion, unwritten clauses represent a specific form (subtype) of partial nullity *(nulitatea absolută parțială)*, where a provision of the parties included in a contract and which is contrary to the law and is eliminated from the contract as null and void automatically, and is automatically replaced by the mandatory provisions of the law, thus saving the contract but making it legal (Veress, 2021, pp. 137–139).

In general, partial invalidity (nullity or voidability) can only exist if the invalidity does not affect the essential elements of the contract. However, an unwritten clause may be an essential element, but it does not lead to the total invalidity of the contract because the mandatory rules of law replace the omitted provision.

Thus, for example, the following clauses are unwritten:

- the penalty provided for in the contract of engagement in the event of termination of the engagement [RCC, Art. 267(2)];
- a contract concluded for an indefinite period may be unilaterally terminated by either party subject to a reasonable period of notice, and any clause to the contrary or stipulation of a benefit in exchange for termination of the contract is deemed unwritten (RCC, Art. 1277);
- an impossible condition, contrary to law or good morals is considered unwritten, and if it is the cause of the contract itself, it entails the nullity of the contract (RCC, Art. 1402);[4]
- in the case of renting a dwelling, if the tenancy is for a fixed term, the tenant may unilaterally terminate the contract by giving at least 60 days' notice; any clause to the contrary shall be deemed not to have been written (RCC, Art.

[4] From this text also follows the distinguishing criterion between nullity and unwritten clause. The unwritten clause saves the contract by restoring the legality of the breach, eliminating the condition contrary to the law, morality, or the impossible condition. But in case that such a condition is the very cause of the contract, then the contract cannot be saved, as the destructive effects of nullity, in this case, are total.

1825); in the case of the same contract, any clause under which the tenant is obliged to take out insurance with an insurer imposed by the owner is unwritten (RCC, Art. 1826);
- in case of a partnership contract, any clause setting a guaranteed minimum level of benefits for one or some of the partners is considered unwritten [RCC, Art. 1953(5)];
- termination if it is based on the conduct of the other party, which makes it impossible to perform the contract following good morals or if it is based on unjustified non-performance of the maintenance obligation, may only be ordered by the court, any clause to the contrary is deemed to be unwritten (RCC, Art. 2263);
- any contractual clause limiting the carrier's legal liability [RCC, Art. 1995(1)], etc.

In judicial practice, it has been held that unwritten clauses and nullity are similar in their effects, the distinction being based on the fact that the unwritten clause in itself is sanction-remedy *(sancțiune remediu)* which does not require the intervention of the courts and that the corresponding legal text replaces the unwritten clause by the effect of the law. Consequently, if a contract contains an unwritten clause, this clause will not have any effect, and the relevant mandatory rule of law will inevitably take the place of the clause. The other provisions of the contract will have effect as if the unwritten clause had not been included in the contract. However, if the unwritten clause has been performed, the effects of the clause will be retroactively discharged, as in the case of invalidity.

Looking at the list of unwritten clauses mentioned in the legislation, we can conclude that the relevant provisions of the Romanian Civil Code in these cases mainly protect private interests and are therefore closer to voidability.[5]

Therefore, the fundamental question is who can rely on the unwritten character of a contractual clause: only the protected contracting party or any interested person? In our view, when the law deems a contractual provision to be unwritten, the effects of the law in eliminating the clause, in purifying the contract from the unlawful provision, are automatic and without any party's discretion. Therefore, the unwritten character of a clause may be invoked by any interested person so that the institution of unwritten clauses is in fact, closer to nullity than to voidability. However, unlike nullity, which also exists in a virtual form, a contractual clause can only be declared unwritten if there is an express legal basis for it (Veress, 2021, pp. 137–139).

[5] Mainly, because in some cases, such clauses protect general interest as well. For example, debtor protection can be an issue of general interest. Therefore, the legal text, for example, according to which "the clause authorizing the mortgagee to possess the mortgaged immovable property or to appropriate its fruits or revenues until the date of the commencement of enforcement shall be deemed not to be written" (RCC. Art. 2385), is a text close to a nullity and not voidability.

7. IMMORAL CONTRACTS

The Romanian Civil Code has several rules on contractual immorality, practically creating a set of rules to ensure morality. It does not contain a definition of good morals since this concept depends on the changing values of a particular society, and it is up to the judge to define its precise boundaries at a given time. As it was stated, good morals are a set of rules imposed by a certain social morality, existing at a given time and in a given place which, together with public order, represents a norm, a standard against which human behaviour is refereed. (Ungureanu, 2015, p. 33). Good morals were defined as

> "the totality of the rules of good conduct in society, rules which have taken shape in the consciousness of the majority of the members of society and the observance of which has become obligatory, through long experience and practice, in order to ensure social order and the common good, i.e. the achievement of the general interests of a given society". (Pop, 2019, p. 384)

In general, the law expresses in itself good morals. If such a specific mandatory rule which translates a moral value is infringed, we are in the presence of an illegal contract. But besides this, through general rules on good morals, are sanctioned also those contracts which are prejudicial to morality apart from any infringement of a specific legal text. In this way, the judge will have a more comprehensive power of appreciation and will be able to void a particular provision that affects public morality even when it is not contrary to a particular mandatory rule. The judges' power of appreciation, as it was considered, could give rise to arbitrariness and abuses if judges were too rigid or too keen in assessing what is and what is not contrary to morality. It is, therefore, necessary to be measured and prudent in this assessment (Hamangiu et al., 1928, p. 93).

We can group these above-mentioned general rules on good morals of the Romanian Civil Code in three clusters. The first set of rules is included in the general principles of civil law. In this context, no derogation may be made by agreements or unilateral legal acts from laws concerning good morals (RCC, Art. 11), and any natural or legal person must exercise their rights and fulfill their civil obligations in good faith and following good morals (RCC, Art. 14).[6] Good faith is an example of the intertwining of moral and legal norms (Gherasim, 1981, p. 228).

The second group of norms are included in the regulation of partnerships and legal persons. Every partnership must have a definite and lawful object in accordance with morality (RCC, Art. 1882). In the case of legal persons, invalidity is the sanction if the object of activity is contrary to good morals (RCC, Art. 196).

The third set of rules refers to contracts in general,[7] even if one of these articles is situated in the Book III of the Romanian Civil Code, which deals with the rights

[6] Good faith shall be presumed until proven otherwise.

[7] In completing the general rules, Romania has a specific regulation in the case of the maintenance contract. Where the other party's conduct makes it impossible to perform the

in rem. According to this legal text, the owner may consent to limit his right by a contract if it does not violate good morals (RCC, Art. 626). The other rules are also definitive for any contract. Regulating freedom of contract, the Romanian Civil Code states that the parties are free to conclude any contracts and determine their content within limits imposed by law, public policy, and good morals (RCC, Art. 1169). The subject matter of the contract must also be in accordance with good morals (RCC, Art. 1225), as the same condition is mandatory for the scope (causa) of the contract (RCC, Art. 1236). A contractual condition contrary to morality is considered unwritten (RCC, Art. 1402), and if it is the cause of the contract itself, it entails the nullity of the contract. However, as a general rule, the invalidity is partial: clauses which are contrary to good morals shall render the contract invalid in its entirety only if they are, by their nature, essential or if, in their absence, the contract would not have been concluded (RCC, Art. 1255).

In Romanian jurisprudence were measured as immoral contracts like the gift if the donor's purpose was to induce the recipient to enter into or continue a cohabiting relationship; or the gift if the donor's purpose was to induce the recipient to enter into a fictitious marriage, for the sole purpose of avoiding criminal liability for the crime of rape (Ionaşcu et al., 1973, pp. 47–51 and 62–63).

Where the criminal law leaves the punishment of certain offenses to the initiative of the injured party, allowing the offense committed by the defendant to remain unsanctioned by reconciling the parties or withdrawing the prior complaint, it has done so in order to make it possible for normal relations between the offender and the victim to resume, but not in order to open up to the person injured by the offense the possibility of making material profits disproportionately large in relation to the damage actually suffered, by speculating on the situation in which the offender finds himself. Of course, within the limit of reasonable compensation, the injured party may settle with the offender, who thus validly undertakes to cover the actual damage assessed by the parties themselves, but in this case, the victim of the offense is seeking to satisfy a legitimate interest, such a transaction having in itself nothing unlawful. The situation is quite different where taking advantage of his position in the criminal proceedings, the injured party obtains from the offender a sum considerably disproportionate to the actual damage, because in this case, the subjective right, recognized by civil law, to obtain compensation for the damage, is diverted from its economic and social purpose and can no longer enjoy legal protection (Supreme Tribunal of Romania, civil decision no. 107/1960).

Also, it was considered immoral the agreement by which a married man, temporarily abandoned by his wife, promised his concubine that he would marry her in case of his divorce and undertook to compensate his concubine with a sum of money if the wife returned to the marital home (Supreme Tribunal of Romania, civil decision no. 1912/1955).

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maintenance contract under good morals, the party concerned may request termination (RCC, Art. 2263).

8. CONSEQUENCES OF INVALIDITY

If the parties have agreed on the recognition of invalidity, there is no need for a judicial declaration of the consequences. However, as such recognition is rare, in the vast majority of cases a judicial finding is required, even if the invalidity is very obvious.

There are two ways of establishing invalidity (nullity and voidability) in court: an action for invalidity *(acțiune în nulitate)* before or after performance, and a plea of invalidity *(excepția de nulitate)* against an action for performance of the invalid contract.

An action is an act of enforcement, i.e., a means of asserting a right before a court in the form of an independent attack. In procedural law, an action is an act by which the plaintiff seeks the assistance of the court against the defendant in order to obtain recognition of a right or satisfaction of a claim. In private law, the action is the means of enforcing a right before a court, i.e., the *actio* is a component of the one person's right. A plea is a defence raised by the defendant. In the case of a plea of invalidity, the rightholder claims performance under the contract, but the defendant guards himself: challenges the validity of the contract, i.e., he uses the plea of invalidity.

The two forms of action for invalidity are: an action for a declaration of nullity (acțiune în nulitate absolută) and an action of annulment (acțiune în anulare) for voidability. While the action in the case of nullity is not time-barred, and is time-barred in the case of voidability, a plea may be successfully raised at any time in either case.

Until the court decision declaring invalidity, the parties are linked by an apparent legal relationship, and if performance has taken place by that time, a factual situation has also arisen. If the court has declared the invalidity, it has refused to recognize that the contractual relationship exists between the parties. Consequently, an invalid contract can have no legal effect either in the past or in the future *(quod nullum est, nullum producit effectum)*.

A declaration of invalidity, whether nullity or voidability, produces the following legal effects:

a) the nullity is retroactive, i.e. it deprives the contract of its effects from the moment of its conclusion;
b) the services rendered must be returned in full *(restitutio in integrum)*;
c) legal transactions entered subsequently into, on the basis of an invalid contract, are also invalid *(resoluto iure dantis, resolvitur ius accipientis)*.

These will be examined briefly.

The retroactivity is a natural consequence of invalidity: the law cannot recognize the legal effects of an invalid contract. Exceptions exist in family law and in relation to the invalidity of legal persons.[8]

[8] For example, in the case of a putative marriage, prior to the annulment of the marriage, the *bona fide* spouse legally retains his or her status as spouse for the period between the marriage and the annulment (RCC, Art. 304). Likewise, if a minor marries and, as a consequence, is recognized by law as having full capacity to act, the minor retains that capacity even if the marriage is dissolved (RCC. Art. 39). A legal person is dissolved only

Since an invalid contract cannot have legal effects, it is natural that the services received must also be fully returned. Indeed, the services received have no legal basis whatsoever and therefore cannot be kept by the parties. Restoration of the original situation may be sought in an action for a declaration of nullity or in an action for annulment, respectively in a separate action.

There are exceptions to restoration (restitution). Although the invalidity of a contract has a retroactive effect, i.e. the contract is lacking effects both in the past and in the future (it is to be regarded as having never having taken place), it does not always follow that the previous situation must be restored. This is not only because it is impossible in some cases (for example, the thing transferred has been destroyed), but also because the legislator does not wish to apply the rigour of full restoration in all situations. The legislator, on the contrary, wishes to protect persons whose transactions are invalid because they have been made in breach of the law.

For example:

a) A *bona fide* person is not obliged to refund the fruits (RCC, Art. 948). For example, if a person became the owner of a thing bearing fruit under an invalid contract, he must return the thing, but not the fruit brought by the thing during his period of good faith.
b) According to the provisions of the Romanian Civil Code, in the case of invalidity of contracts concluded by persons who are incapacitated or by persons with limited capacity, these persons are required to return only that part of the performances received during their incapacity which represents unjust enrichment for them (RCC, Art. 47). For example, if the minor has squandered the services received, he or she has no obligation to return them because he or she has not been enriched at all. The exception is if the incapacitated person intentionally or with gross negligence prevented the return. In such cases, full restitution may be ordered (RCC, Art. 1647).
c) A *bona fide* third party who has acquired title to and possession of movable property for consideration may retain the movable property (RCC, Art. 937), etc.

The problem of so-called subsequent legal transactions concluded on the basis of an invalid contract is the third issue to be examined. The consequence of the invalidity of the contract is the invalidity of the subsequent legal transactions.

This principle is also not without exceptions:

a) Legal acts intended to preserve and administer the thing remain valid. Thus, for example, if the landlord has acquired ownership invalidly, the lease will still be valid for most of a year if the tenant was in good faith (not knowing that the landlord's ownership was invalid).
b) In the case of immovable property, the *bona fide* third party retains ownership if no action has been brought against him/her after the registration of this right in the land register for 3 years (or 1 year if the real owner has also been served

by a court decision declaring its invalidity, i.e. in this case the invalidity has no retroactive effect (RCC, Art. 198).

with the registration order). In all cases, this period is 5 years in the case of gratuitous contracts.[9]

9. CONCLUSIONS

The above is necessarily a sketchy overview of the regulation of invalidity in Romanian law. This topic is extremely large, given the very high potential number of cases of invalidity. The aim was therefore rather to give an overview of the general rules. The number of relevant court decisions is also very large, but an analysis of these it is beyond the scope of this study, because an interpretation of the specific situations would require an opening up of the regulation of particular cases of invalidity, which was not the purpose of this introductory study. However, a concise description of the overall regime of invalidity is not without interest.

REFERENCES

[1] Boroi, G. – Anghelescu, C. A. (2021). *Drept civil. Partea generală.* București: Ed. Hamangiu.

[2] Gherasim, D. (1981). *Buna-credinţă în raporturile juridice civile.* București: Ed. Academiei.

[3] Hamangiu, C. – Rosetti-Bălănescu, I. – Băicoianu, A. (1928). *Tratat de drept civil român I.* București: Ed. Naţională S. Ciornei.

[4] Ionaşcu, A. – Costin, M. N. – Mureşan, M. – Surdu, C. (1973). *Contribuţia practicii judecătoreşti la dezvoltarea principiilor dreptului civil român I.* București: Ed. Academiei.

[5] Nicolae, M. (2018). *Drept civil. Teoria generală. Vol. II. Teoria drepturilor subiective civile*. București: Ed. Solomon.

[6] Pop, L. (2009). *Tratat de drept civil. Obligațiile. Vol. II. Contractul.* București: Ed. Universul Juridic.

[7] Rizoiu, R. (2021). *Curs de teoria actului juridic civil.* București: Ed. Hamangiu.

[8] Ungureanu, O. (2007). *Drept civil. Introducere.* București: Ed. C.H. Beck.

[9] Veress E. (2021). *Román polgári jog. Általános rész.* 6th, expanded and updated edition. Cluj-Napoca: Forum Iuris.

[9] Exceptions exists also in the field of family law. For example, if the bona fide spouse of a person declared dead remarries, the new marriage remains valid despite the annulment of court decision declaring the death of a living person (Art. 293 RCC).