

DETERMINING THE ABSOLUTE NULLITY OF SUCCESSIVE EXECUTION CONTRACTS CONCLUDED UNDER THE OLD CIVIL CODE IN REGARD TO THE PROVISIONS OF THE NEW CIVIL CODE

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Abstract

Absolute nullity is regulated by the provisions of article 1247 of the Civil Code¹ as that legal sanction which applies to the contract "concluded with the violation of a legal provision which protects a general interest". Article 1247 represents the legal background of absolute nullity, regulating general aspects of this institution, the people who can invoke absolute nullity, the ways by which it can be invoked and the interdiction of confirming contracts which are null. The current article aims to analyze in situation in which a legal provision regulated as a special norm of law states the sanction of absolute nullity in regard to successive execution civil contracts, concluded under the current Civil Code, but fully executed at the time the absolute nullity is analyzed.

Keywords: *absolute nullity, civil contracts, contracts with successive execution, sanctions, New Civil Code.*

Introduction

Although our current legislation did not provide a definition of the nullity of the civil act, we appreciate that such a definition can be drafted based on the regulation of article 1247 of the Civil Code. Based on our own opinion, *the nullity of the civil act appears to be a sanction which applies to a civil legal act, which deprives this act of its legal effects because when the act was concluded, its validity conditions were not respected.*

In order to analyze whether this sanction applies at the present time, we believe it is both important and appropriate to analyze the way in which the conception of this institution has evolved across time. As a result, it is necessary to

¹ **Article 1247 Absolute nullity**

(1) The contract which is concluded with the violation of legal provisions which protect a general interest is null.

6. Absolute nullity can be invoked by any interested party, by action or by exception.

7. The court is held to invoke absolute nullity.

8. The absolutely null contract is not to be confirmed except for the cases stated by law.

mention that, in the past, nullity was analyzed by applying the rule *quod nullum est, nullum producit effectum*, meaning that a null act can't cause any legal effect.

Subsequently, considering the idea according to which nullity is a *legal means by which legality is reestablished* after it was violated when the act was concluded, the *thesis of the adequacy of the effects of nullity*, in regard to the purpose of the law, was established. According to this idea, *only those effects which violate the law must be removed*, as the other effects of the law can be maintained. It was starting with this conception that nullity was seen as partial and subject to remedy².

In order to fully understand and apply nullity, we believe that it must be limited by similar legal provisions, as the rescission and dissolution of the contract, the caduceus character of the contract, the revoke or lack of publicity of the civil legal act. If, in case of nullity, its cause is contemporary with the conclusion of the act, in case of rescission or dissolution, the cause is the guilty non execution by one of the parties, thus being subsequent to the conclusion of the civil act. The same distinction is valid in case of caducity, as the ineffectiveness cause is subsequent to the conclusion of the civil act and is independent from the will of the author. Thus, whereas nullity entails a non valid judicial civil act, caducity entails a valid legal act. In case of the lack of publicity, this institution is to be applied for not performing a publicity operation subsequent to the valid conclusion of a legal act, as it is not a cause which deprives the legal act of its effect and is contemporary with its conclusion.

An analysis of the law which applies

Absolute nullity is that specific type of nullity which sanctions the disrespect, when concluding a civil legal act, of a legal provision which protects a general interest. The legal background of absolute nullity is article 1247 of the Civil Code, but it is also regulated in numerous special legal texts, such as article 23 first alignment of Law no 176/2010³ regarding integrity in exercising public functions and offices⁴.

Absolute nullity can be invoked by whomever has an interest according to article 1247 first alignment; we must mention that, in the new regulation, invoking

² Ghe. Beleiu, *Romanian Civil Law*, eighth revised and completed edition by M. Nicolae si P. Trusca, Universul Juridic Publishing House, 2003, pages 215-216,

³ Published in the Official Bulletin of Romania no 621 of September 2nd 2010

⁴ **Law no 176/2010, article 23**

(1) In case of a conflict of interest, if they are connected to the situation of conflict, all legal or administrative acts concluded, directly or through other people, with the violation of legal provisions regarding conflict of interest, are subject to absolute nullity.

(1) The complaint for establishing absolute nullity of legal or administrative acts concluded with the violation of legal obligations regarding conflict of interest can be filed by the agency even if the person no longer holds that office.

(2) The court will rule on absolute nullity and the reinstating of parties in the previous situation.

absolute nullity by the court of law is not only a mere possibility, it is an obligation of the court.

Absolute nullity is not subject to the statute of limitation, if the law does not state otherwise. Absolute nullity can't be remedied by confirmation. While the old code did not expressly state this possibility, practitioners assumed this was the case, based on an article in regard to donation; however, the new Civil Code expressly states in article 1247 fourth alignment that a contract which is absolutely null is not subject to confirmation, except for the cases stated by law⁵.

The example of absolute nullity regulated by article 26 of Law no 176/2010 was not random, as the present article aims to analyze the enforcement of absolute nullity regulated by this special text of law, by corroborating it with the civil contract of successive execution, fully executed when the complaint was filed before the court of law, based on the provisions of article 23 of Law no 176/2010.

In analyzing this legal provision, we believe it is necessary to detail the nature and effects of the successive execution contract, as regulated by the current Civil Code. Thus, we can define the successive execution contract as that mutual legal act, in which the obligations of one or both parties are set to be executed in time, by a continuous performance or a series of actions repeated at a certain period of time.

According to the principle of *retroactivity* of the effects of nullity, *it causes effect not only for the future but also for the past*, as this principle derives from the principle of legality, which entails reestablishing the law after it was violated at the conclusion of the legal act.

In the old regulation of the Civil Code, the retroactive annulment of successive execution contracts was a true exception from the principle of retro-activity, based on a legal deficiency and also given the effective impossibility of reversing the performed actions which had already been executed. Thus, doctrine provided the example of lease, which was determined to be absolutely null, the parties were unable to return to the previous conditions; if returning rent money was not a problem, returning the use of a certain location was a major obstacle in establishing annulment is retroactive and also in enforcing the principle which derives from it, namely *restitutio in integrum* (reestablishing the previous situation). The same arguments fully apply in case of other successive execution contracts, as performing services in public restaurants, in case of the support contract and so on.

The reasons for the old regulation entailed the impossibility of reinstating the parties in their previous situation; it also entailed that fact that the restitution of certain performances is impossible (as is the case of the lease contract); in some cases, the person who is obliged to return performances is not a professional able to return successive performances which were fully executed (as is the case of a performance which consists of delivering food products by a professional towards a beneficiary).

⁵ <http://www.ziaruldeiasi.ro/recomandari-zdi/regimul-si-efectele-nulitatii-in-noul-cod-civil~ni8qn8> – website accessed August 23rd, 2017

However, in the current regulation of the Civil Code, the lawmaker changed its optics. According to article 1254 of the Civil Code, the null contract is considered to never have been concluded. In this situation, “*each party must return to the other party, in nature or by equivalent, the received performance, according to the provisions of article 1639 - article 1647 even if these performances were successively executed or had a continuous character*”. Thus, in the current regulation, the absolute nullity of some successive execution contracts no longer represents an exception from the principle of the retroactivity of nullity, thus regulating the principle of the retroactive dissolution of the annulled contract, but also the principle of the restitution of the parties’ performances, based on the same null contract.

In regard to the *restitutio in integrum principle*, legislative technique is mixed, as the legal text states the ways in which performances can be returned regardless of the cause of restitution. As for the effects of nullity, articles 1639-1647 of the new Civil Code are meant to ensure the practice of the principle of the restitution of performances by pointing out its limits and exceptions. As a result, this legislative solution found in article 1254 third alignment of the Civil Code contains merely general solutions, mandatory in case the nullity of the contract was established previous to the execution of performances, regardless of whether it is unilateral or reciprocal, the amount or means of execution (successive or continuous)⁶.

According to article 1640 of the Civil Code, *if restitution can't occur in nature, because of impossibility or a serious impediment or if restitution regards the already performed services, restitution is made by equivalent*. In this situation, the value of performances at the time the debtor received what must be returned will be considered.

Restitution by equivalent is an indirect execution of the obligation as is legally regulated by article 1073 and 1530 of the Civil Code. There are numerous impediments for the restitution of performances, starting with the *intuitu personae* character of the obligation to do (executed by the creditor of the obligation of restitution) until the lack of specific quality needed for the person who must return the performance. These specific cases will be subject to the courts’ analysis as the situation is inevitably becoming contentious. Unlike the old approach of the retroactive character of the effects of nullity, in regard to successive execution acts, given the impossibility of reestablishing the previous situation, nullity causes effects only for the future - *ex nunc*- similar to the situation of dissolution of contract; article 1254 third alignment of the Civil Code expressly regulates retroactivity, the *ex tunc* effect in case of successive execution contracts or continuous contracts (in regard to the equivalent of the lack of use and the restitution of fruits). This new approach ensures the coherence of the principle of

⁶ Fl. A. Baias, E. Chelaru, R. Constantinovici, I Macovei (coordinators), *New Civil Code, comments by articles, articles 1-2664*, C. H. Beck Publishing House, Bucharest, 2012, pages 1313-1314

retroactivity of nullity, according to which the absolutely null contract is considered to never have been concluded⁷.

The analysis of the principle of retroactivity of nullity in case of successive execution contracts is closely connected with the interpretation of article 6 of the new Civil Code, as there are quite a few situations in which absolute nullity of successive execution contracts concluded during the old regulation is analyzed and established after the coming into force of the new Civil Code. In such situations, the following question arises: *does absolute nullity cause retroactive effects according to the old regulation or these contracts concluded during the old regulation are true exceptions from the principle of retroactivity of absolute nullity?*

Article 6 first alignment of the current Civil Code states that *civil law is applied as long as it is in force and legal acts concluded before the coming into force of the new law can't generate other legal effects except those stated by the law which was in force when they were concluded*. However, the previously mentioned text discusses legal acts concluded during the old regulation, but does not mention legal acts which are null at the time they were concluded. The answer is also provided by the current lawmaker in article 6 third alignment which states that *"legal acts which are null when the new law comes into force are subject to the provisions of the old law, as they can't be considered valid according to the provisions of the new law"*. The current regulation is mainly based on the non retroactivity of the new civil law, but also on the ultra activity of the old civil law. These principles entail the fact that the new civil law does not affect the past and can't impair on judicial situations established (created, modified or ended) nor the effects they caused before it came into force.

As a result, a court of law which is invested based on the new Civil Code with a complaint in determining absolute nullity of successive execution contracts concluded and executed during the old law, will have to make a clear distinction in regard to applying civil law in time, in order to give way to the principle of ultra activity of the old criminal law and non retroactivity of the new civil law.

Case study

Judicial practice has seen situations in which complaints were filed for establishing the absolute nullity of successive execution contracts concluded and fully executed during the old Civil Code, based on legal provisions of special character, as is article 23 of Law no 176/2010. The situation which was the basis of such a complaint was the fact that, previous to filing this complaint, the National Integrity Agency started a control in order to track the existence of situations in which people who held public offices were in any conflict of interest at the time their contract was concluded, thus executing civil contracts by which public finances were spent.

⁷ Fl. A. Baias, E. Chelaru, R. Constantinovici, I Macovei (coordinators), *New Civil Code*, pages 1725-1726

Once the conflict of interest was definitively established, the person who occupied a public office, the public servant who helped conclude successive execution civil contracts (either by not contesting the report of the Agency, or by unsuccessfully contesting it), the Agency acted as regulated by article 23 and the following of Law no 176/2010 by filing a complaint for the establishing of absolute nullity and reestablishing of the previous situation. In such cases, although the judge is sovereign and his ruling is mandatory, we believe that judicial practice must also be considered and analyzed as it presents several similar cases.

Judicial practice

On a national level, there are a series of court decisions which provide a strong starting point in creating a unified national judicial practice. According to one of these decisions⁸, the clear distinction in regulation between the old Civil Code and the new one is analyzed, thus *“the court states that successive execution contracts represented an exception from the principle of reestablishing the previous situation (restitutio in integrum) and from the principle of retroactivity of the effects of nullity as opposed to the objective impossibility of reestablishing the previous situation, as the effects of nullity will only occur in the future (ex nunc). According to article 1254 of the new Civil Code, (1) The absolutely null or annulled contract is considered to never have been concluded. (2) The dissolution of the contract entails the dissolution of all subsequent acts concluded as a result of the contract. (3) In case the contract is dissolute, each party must return to the other party, in nature or by equivalent, the received performances, according to the provisions of articles 1639-1647, even if these performances were executed successively or are of continuous character. In case of contracts which were analyzed by the courts of law, the performances which can't be returned in nature are catering services or security services which were performed in the benefit of third parties. For all the previously mentioned reasons, the court will dismiss as unfounded the complaint of the National Integrity Agency”*.

As a result, the distinction made in the present analysis coincides with the previously quoted point of view, as the timeframe of the enforcement of the civil law must be thoroughly analyzed. This analysis is particularly important as the institution of absolute nullity was subject to a change in the legislative approach as opposed to the old regulation; thus, contracts or acts with successive or continuous execution were treated differently.

Conclusions

If, before the coming into force of the current Civil Code, establishing the absolute nullity in regard to this type of contracts or acts was a true exception from the principle of retroactivity of the effects of nullity and from the principle of reestablishing the previous situation, at the present time, establishing absolute

⁸ Civil sentence no 1155/CA/14.11.2016 of Brasov Tribunal - not definitive at the time this article was drafted.

nullity in case of successive execution contracts is fully regulated, thus causing the effects which are specific to the institution of nullity as regulated by article 1639-1648 of the Civil Code.

The transition issues between the old regulation and the current one, as discussed and analyzed in the present paper are still matters of interest, as they require special attentions from practitioners and all people involved in analyzing the effects of absolute nullity based on the new regulation, in regard to the contracts concluded during the old legislation. Such situations are frequently seen in practice and resolved based on current laws, thus creating a unified and constant practice.

However, we believed this analysis is important both for practitioners and for the general receivers of the civil common law, in order to establish clear conclusions and well documented answers to the question mentioned in the introductory part of this material: *does absolute nullity cause retroactive effects according to the old regulation or successive execution contracts concluded during the old law continue to represent true exceptions from the principle of retroactivity of absolute nullity?*

Our conclusions supports the idea according to which new civil law is not retroactive, whereas old civil law is ultra active (as it applies to successive execution contracts concluded during the old law, but analyzed during the present regulation of the new Civil Code).

Thus, the analysis for establishing absolute nullity after the coming into force of the new Civil Code in regard to successive execution contracts or continuous contracts concluded during the old law, must always regard the civil law which was in force when the civil acts were concluded, namely the old regulation. Hence, this category of successive execution acts is a true exception from the retroactivity of the effects of absolute nullity but also from the principle of reestablishing the previous situation (*restitutio in integrum*), even if the establishing of absolute nullity occurs after the coming into force of the new Civil Code.

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