

## NOVELTY ASPECTS OF NULLITY IN THE LIGHT OF THE CURRENT CIVIL CODE

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### ABSTRACT:

NULLITY IS ONE OF THE OLDEST IMPOSITION OF CIVIL PENALTIES THAT EVOLVED OVER TIME AND UNDERWENT A SERIES OF TRANSFORMATIONS. CLOSELY LINKED TO THE CIVIL LEGAL ACT, IN A FIRST STAGE NULLITY WAS REGARDED AS AN ORGANIC STATE THEREOF, AND COULD ONLY BE TOTAL AND IRREVERSIBLE. SUBSEQUENTLY, NULLITY WAS NOT DESIGNED ANYMORE AS PART OF THE LEGAL ACT, BUT/AND INSTEAD IT WAS SEEN AS A PENALTY THAT OCCURS IF THE LAW HAS BEEN VIOLATED, BY REMOVING THE CONTRARY EFFECTS. BOTH THE OLD CIVIL CODE AND THE CURRENT CIVIL CODE REFLECT THIS CONCEPT. BELOW, I SHALL PRESENT THE INNOVATIONS OF THE CURRENT CIVIL CODE WITH RESPECT TO THE OLD CIVIL CODE.

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**KEYWORDS:** NULLITY, IMPOSITION OF CIVIL PENALTIES, LEGAL ACT, EFFECTS, CIVIL CODE

### INTRODUCTION

The nullity under the old Civil Code did not have a uniform rule, but of disparate provisions throughout. This changed with the entry into force of the current Civil Code which, in Articles 1246-1260, provides the general regime in the matter of nullity and reflects the modern view with regard to it. Thus, nullity is directed against the effects of the legal act which is contrary to the purpose of the violated legal provision. Therefore, the characteristics of nullity in the view of the current Civil Code are the same as shown in the literature related to the old Civil Code. It also preserves the sanctioning and preventive functions<sup>2</sup>.

### NOVELTY ASPECTS

From the wording of Art. 1246 (1) of the Civil Code is apparent that "nullity is the common law penalty for the breach/violation of the conditions required by law for its valid conclusion (*condiciones iuris*), except where the law provides another penalty/penalty"<sup>3</sup>. It is noted that largely/in the broadest sense, the definition of the doctrine related to the old Civil Code has been kept to which it has been added the specification/proviso that it occurs if the law provides no another penalty.

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<sup>2</sup> See Gabriel Boroi, Liviu Stănciulescu, "Instituții de drept civil în reglementarea noului Cod civil", (București: Hamangiu, 2012), 199

<sup>3</sup> Marian Nicolae, "Codex Iuris Civilis, Tomul 1, ediție critică", (București: Universul Juridic, 2012), 330

Regarding the acts that may be deemed null and void, the seat of the matter is represented by Art. 1244 Civil Code which specifically refers only to the nullity of the contract. However, it has been rightly noted that "*nullity is not just another penalty reserved for the contract, but is a penalty applicable to both property related unilateral legal acts and non-property acts, irrespective of their conventional or unilateral nature*"<sup>4</sup>. The applicability of nullity to property related legal acts results from Art. 1325 Civil Code, which establishes the rule that laws relating to contracts shall apply to such acts unless the law provides otherwise. The nullity of non-property legal acts is governed by express and special provisions, but if the latter prove insufficient, the rules for nullity of contract shall apply, provided that the latter are compatible with the specific of the property-related act. It has been also noted that the general rules concerning nullity in the Civil Code apply also to the nullity of legal acts concluded under the influence of other legal provisions adjacent to the same, unless special provisions exist<sup>5</sup>.

A novelty in the civil law is the introduction of agreements of finding/ascertaining or declaration of nullity. Such agreements are regulated by Art. 1246 (3) and (4), wherefrom it results that by such agreements the "*parties to a contract agree to recognize the grounds for nullity and to determine its effects without resorting to court. The terms of ascertainment and declaration are analogous to the role of courts for nullity, which is to ascertain absolute nullity and declare (rule) relative nullity*"<sup>6</sup>. According to Art. 1246 (4) of the Civil Code, agreements on nullity cannot establish or suppress grounds for nullity, or otherwise the provisions which establish or suppress the grounds for nullity are considered unwritten. Thus, there are only legal grounds for nullity, the conventional ones being banned. It has been also shown that these agreements must respect the rights of third parties and public order, and should not lead to the distinction between legal and judicial nullity<sup>7</sup>.

In the view of the current Civil Code, nullity may be classified according to the same criteria set out in the doctrine related to the old Civil Code. Thus, depending on:

- the nature of the interest protected by the violated legal provision upon the conclusion of the legal act, nullity may be absolute or relative;
- the extent of the legal effects, the distinction is made between total and partial nullity, the latter being the rule in our legal system. The express regulation of partial nullity in Art. 1255 of the Civil Code is a novelty in the Romanian legislation. According to paragraph (1) of this Article, "*the clauses contrary to law, public order or morality, and which are not considered unwritten entail the nullity of the contract as a whole only if they are, by their nature, essential or, in their absence, the contract would have not been signed/concluded*". *A contrario*, partial nullity intervene if the clauses contrary to law, public order or morality, and which are not considered unwritten are not essential or if, in their absence, the contract would have not been signed. If the nullity of certain clauses of the contract is determined, the latter are replaced by default by the applicable regulations, without prejudice to the right of the parties to insert new clauses to replace the invalid ones;
- the legislative consecration modality, nullity may be express or virtual. This distinction is apparent from the interpretation of Art. 1253 of the Civil Code, which legally establishes virtual nullity. This article provides that "*except for the cases where law provides the penalty of nullity, the contract is cancelled also when the penalty of absolute nullity or, as*

<sup>4</sup> Ionel Reghini, "Câteva caractere ale nulității contractului desprinse din reglementările Codului civil", Revista Dreptul 4 (2013): 14

<sup>5</sup> Ionel Reghini, "Câteva caractere ale nulității contractului desprinse din reglementările Codului civil"..., 14-15

<sup>6</sup> Cristina Zamșa, in "Noul Cod civil Comentariu pe articole Ediția 2", Fl.A. Baias, E. Chelaru, R.Constantinovici, I. Macovei (coordonatori), (București: C.H.Beck, 2014), 1384

<sup>7</sup> See Cristina Zamșa, in "Noul Cod civil Comentariu pe articole Ediția 2"..., 1384

*appropriate, of relative nullity must be applied so that the purpose of the violated legal provision be achieved". It is noted that this article establishes the justification of virtual nullity which lies in the achievement of the purpose of the violated legal provision. The category of express nullities is suggested by Art. 1250 of the Civil Code which stipulates that absolute nullity of the contract intervenes in the cases specifically provided by law. Also, the same article establishes the virtual absolute nullity "when it results beyond doubt that the protected interest is a general one";*

- the type of validity condition broken upon the conclusion of the legal act, is distinguished between the substantive nullity and formal nullity;

- the capitalization, the opinion accepted by the majority in the literature is that nullity may be amicable or judicial. This opinion is based on Art. 1246 (3) of the Civil Code which distinguishes between the case where the parties find or declare nullity by their own will, without recourse to the competent tribunal, and the case in which such an intervention is necessary because the parties do not agree in this regard<sup>8</sup>. This opinion is based on the presumption of validity of the legal act concluded disregarding the provisions of the law, until the removal of such presumption by judicial action. Thus, *"the court would not notice a pre-existent nullity, but would appreciate regarding the existence or absence of grounds for nullity, all the more since, under procedural aspect, the action for the declaration of nullity of a legal act is not a declaratory action/judgement, but an injunction, whether it is absolute or relative nullity"*<sup>9</sup>. In a minority opinion, it is considered that the absolute nullity operates ipso facto, the court being obliged to "hold", while relative nullity operates only on request, either by way of an action or amicably, being "declared" or "ruled" by the court which does not hold any subjective right<sup>10</sup>. This view has to the fore the legal lack of the null and void contract, *"while the contract affected by a provision of relative nullity exists as if it were fully valid, but its legal existence is not final, but only temporary"*<sup>11</sup>.

With regard to the grounds for nullity, one must distinguish between those that attract absolute nullity of the legal act and those that attract relative nullity. In the literature, the following generic cases of absolute nullity have been retained: the failure to observe the legal provisions establishing a special disability/inability to use of the individual/physical person, and protecting a general interest; an intentional act expressed with no intention to produce legal effects; the existence of an undetermined or illegal object; the existence of an immoral or illegal cause; the failure to observe the form required by law *ad validitatem*; the failure to observe the right of pre-emption/first refusal in the cases expressly and exhaustively provided by law<sup>12</sup>. Thus, some causes of absolute nullity were taken from the old Civil Code, while others are newly introduced.

Relative grounds for nullity are governed by Art. 1251 of the Civil Code, which reads as follows: *"the contract is cancellable / annulable / prone for annulment when the legal provisions on capacity to act have been disregarded, when one party consent has been vitiated, and in other cases expressly provided by law"*. Apart from non-compliance with the provisions on capacity to act, and where one party to the legal act had their consent vitiated, one may retain as causes attracting relative nullity and lack of discernment at the time of the conclusion

<sup>8</sup> See Gabriel Boroi, Liviu Stănculescu, "Instituții de drept civil în reglementarea noului Cod civil"..., 203

<sup>9</sup> Marilena Uliescu, Noul Cod civil Studii și comentarii Volumul III. Partea I Cartea a V-a, Despre obligații (art. 1164-1649), (București : Universul juridic, 2014), 153

<sup>10</sup> See Marian Nicolae, "Codex Iuris Civilis, Tomul 1, ediție critică"..., 330-331

<sup>11</sup> Marian Nicolae, "Codex Iuris Civilis, Tomul 1, ediție critică"..., nota de subsol 1), 330-331

<sup>12</sup> See Gabriel Boroi, Liviu Stănculescu, "Instituții de drept civil în reglementarea noului Cod civil"..., 213

of the civil legal act, the lack of cause or violation of the pre-emption right in the cases expressly and exhaustively provided by law<sup>13</sup>.

The legal regime of nullity is different depending on the absolute or relative nature thereof, the tradition of the old Civil Code being thus preserved. Like then, also today the relative nullity is the rule, and the absolute nullity is the exception. The presumption of relative nullity is a legislative novelty in our civil law, being established by Art. 1252 of the Civil Code. It is noted that this presumption operates only in the case of virtual nullity as only then the nature of nullity is not expressly provided by law. In the literature, it has been shown that *"although from the wording of the analysed text two alternative and independent conditions of the application of this presumption would result – the non-determination of the nature of nullity or its non-resulting beyond reasonable doubt from the law/by law - in fact, the second condition entails the first and adds to it a supplementary circumstantial evidence, the existing doubt regarding the nature of nullity. The first condition strictly refers to a legal shortfall regarding the declaration of the nature of nullity, while the second suggests difficulties in identifying the general or particular interest concerned by the rule of the law infringed, the same not resulting clearly from the interpretation of the law"*<sup>14</sup>. The presumption of relative nullity is a relative legal presumption so that the person concerned should only point out that the law does not determine the nature of nullity, or that the same does not result beyond reasonable doubt from the law for the presumption to operate/function. However, if the absolute characteristic of nullity is sought, the party concerned must prove it in order to be able to rebut such presumption. Since the relative nullity is the rule, in the first part we shall deal with the legal regime thereof, emphasizing the innovations introduced by the new Civil Code, and in the second part we shall make a brief presentation of the legal regime of absolute nullity.

The legal seat of nullity regime is represented by Art. 1248 of the Civil Code in which the same is defined according to the protected interest, the persons who can invoke it are regulated, and the possibility of its confirmation. It is also important that this article be read in conjunction with Art. 1249 (2) of the Civil Code governing the limitation of relative nullity.

Thus, relative nullity occurs when the legal act is concluded in breach of a legal provisions in place to protect a particular / private / personal interest. With this in mind, annullability of the legal act may be invoked only by the person whose interest is protected by the violated legal provision. The court cannot raise it of its own motion. It has been shown that the sphere of the persons concerned includes the parties of the legal act; the legal representative of the person lacking legal capacity or the legal guardian of the person with limited legal act; the universal or universal-title successors of the party protected by the violated legal provision, except for personal actions; the unsecured creditors through the indirect claim, except in the case of rights or *intuituu persoane* shares; the prosecutor under Art. 45 and Art. Article 46 (3) of the Civil Code; third parties if by the infringed rule of law a personal interest of the third party is also protected<sup>15</sup>. A legislative novelty is brought by Art. 1258 of the Civil Code which requires the notary public to rely on relative nullity in the case they know of its existence, and to refuse the authentication of the document whether or not the law requires the *ad validitatem* authentic form, under the possibility to order the latter to repair the damage suffered, in terms of tort for their own deed.

The confirmation of the annullable legal act is part of the validation causes of the contract. Although it benefits of a uniform and wider regulation in the current Civil Code, it

<sup>13</sup> See Gabriel Boroï, Liviu Stănciulescu, "Instituții de drept civil în reglementarea noului Cod civil"..., 214-215

<sup>14</sup> Cristina Zamșa, în "Noul Cod civil Comentariu pe articole Ediția 2"..., 1390

<sup>15</sup> See Gabriel Boroï, Liviu Stănciulescu, "Instituții de drept civil în reglementarea noului Cod civil"..., 216-217; Cristina Zamșa, în "Noul Cod civil Comentariu pe articole Ediția 2"..., 1386-1387

has retained its characteristics from the Cuza Civil Code. The confirmation remains therefore a unilateral legal act (with no need of its acceptance by the other party), accessory to the contract it comes to supplement by removing the grounds for nullity because, and an abdicative act as the party waives their right to allege nullity. The confirmation shall be certain and expressed explicitly or implied. The confirmation may be made by the person entitled to invoke the annulability of the contract, by the legal representative of the minor child for the acts concluded without the latter's consent, and by guardianship court for acts concluded without the latter's authorization. The person confirming the act must know the reason for relative nullity, and in case of violence, it must have ceased/stopped. Upon the date of confirmation, the confirmed legal act must meet all conditions for its validity. According to Art. 1264 of the Civil Code, the act of confirmation "*must contain the object, the cause, and the nature of the obligation and to mention the reason for the action for annulment, and the intention to repair the defect underpinning the action.*" Tacit confirmation occurs through voluntary execution of the obligation by the person concerned on the date on which it could be validly confirmed. A first in the legislative field is regulated in Art. 1263 (4) of the Civil Code which establishes a process through which the party concerned may put in default/give formal notice to the holder of the action for relative nullity, through a notification requiring that within 6 months confirm the act or request the cancellation thereof, subject to forfeiture of the right to demand its cancellation. This process is designed to avoid any delay on the part of the holder of the action for nullity. As in the period before the entry into force of the current Civil Code, at present as well the confirmation has retroactive effect and takes effect from the moment of conclusion of the civil legal act, and herewith, attracts waiver of the right to allege annulability by way of action or by way of exception. However, the confirmation has no effect on the rights acquired and preserved by third parties of good faith. It was shown that if the confirmatory act is favourable to third parties, the same shall be fully binding/opposable<sup>16</sup>. It is important to retain also the situation where the confirmation refers to an annulable act for fraud or or coercion or threats/violence as by confirming the act the right to invoke/allege relative nullity shall be waived, but does not in itself imply giving up the right to request damages. "*The legislative solution is explained by the legal double nature of fraud / violence, being both defect in consent, and civil offenses: or by confirmation, the defect in consent is covered, but does not solve, implicitly, the issue of damage reparation of inherent tort*"<sup>17</sup>. The current Civil Code rises to the rank of law the doctrinal assertions about the possibility of confirmation of the contract by one party, a confirmation which may not be invoked against other parties entitled to invoke relative nullity.

Limitation of the right to invoke relative nullity is governed by the current Civil Code in Art. 1249 (2). By expressly regulating the prescriptibility of the action for annulment and the imprescriptibility of the right to invoke annulability by way of exception, the doctrinal and case-law dispute under the old Civil Code was resolved in this regard.

The legal basis for the absolute nullity regime is the Art. 1247 of the Civil Code in which it is defined according to the interest protected, the persons who can invoke it are regulated, and the prohibition of confirmation thereof. It is also important to read this article in conjunction with Art. 1249 (1) of the Civil Code governing absolute nullity imprescriptibility.

Thus, absolute nullity occurs when the legal act is concluded in breach of a legal provision in place in order to protect a general or public interest. With this in mind, nullity may be invoked by any person concerned, whether by way action or by way of exception. The sphere

<sup>16</sup> See Cristina Zamșa, in "Noul Cod civil Comentariu pe articole Ediția 2"..., 1402

<sup>17</sup> Cristina Zamșa, in "Noul Cod civil Comentariu pe articole Ediția 2"..., 1402

of the persons proving an interest and who can claim absolute nullity coincides with the one presented in the literature of the old Civil Code. A legislative novelty brought by the new Civil Code is the obligation of the court to invoke of its own motion absolute nullity, unlike the previous legislation regulating only its right to invoke of its own motion absolute nullity. As regards the procedural aspects of this obligation, the ones laid down before the entry into force of the current Civil Code shall remain valid, that is the court cannot act *ex officio* with an action for establishing absolute nullity, and in the case of proceedings already started, *"the court, finding that the legal act which is the basis of the claim before the judge is null and void, shall reject the application for summons as unfounded (groundless), without ruling also the validity of the legal act in question (unless the defendant, by counterclaim, sought nullity)"*<sup>18</sup>.

In principle, the confirmation of the absolutely null legal act cannot work given that the violated the laws were established to protect a public interest. There are also exceptions from this rule including the possibility of confirmation of the donations and legacies made by their author, the universal successors or universal title successors, according to Art. 1010 of the Civil Code. Also Art. 303 of the Civil Code provides for two cases of tacit s confirmation for the marriages concluded in breach of the law provisions on matrimonial age.

As in the period before the entry into force of the current Civil Code, the confirmation, both of the relative nullity and of the absolute nullity when it is possible, should not be confused with the reconstruction of the null and void contract which may be done *"in whole or in part, in compliance with all provisions of the law upon the date of its re-drawing. In all cases, the redrawn contract shall take effects only for the future, and not for the past"*<sup>19</sup>.

The provisions of the current Civil Code reiterate the rule of imprescriptibility of absolute nullity, whether invoked by way of exception or by way of action.

Regarding the consequences of nullity, unlike the old Civil Code, the current Civil Code regulates them in a consistent manner in Articles 1254 to 1260. The principles governing the nullity effects were maintained, which are: retroactive effects of nullity, restoring the status quo ante /reinstatement, and annulment of the subsequent act following the cancellation of the initial act. Below, I shall briefly review each principle through the novelties brought by the current Civil Code.

The principle of retroactive effects of nullity is expressly provided for the first time in civil law in Art. 1254 (1) of the Civil Code. Among the exceptions to this principle covered by the current Civil Code, we note the following:

- the child of good faith upon the conclusion of the marriage retains their full legal capacity to act acquired as a result of the conclusion of the marriage, after its cancellation as well [Art. 39 (2) of the Civil Code];
- the declaration nullity of a legal person shall have no retroactive effect, and it ceases only for the future beginning from the date on which the judgment of ascertaining or declaring nullity becomes final [Art. 198 (1) of the Civil Code];
- the spouse in good faith upon the conclusion of a putative marriage, retains its status of spouse from a marriage valid for the period of time from concluding the marriage until the annulment of marriage judgment becomes final [Art. 304 (1) of the Civil Code];
- the children of an annulled marriage retain the status of children in the marriage for both past and future [Art. 305 (1) of the Civil Code].

It is noted that the current Civil Code did not retain the exception to maintain, until the date of cancellation, the effects of successive performance contract as Art. 1254, (3) of the

<sup>18</sup> Gabriel Boroï, Liviu Stănculescu, "Instituții de drept civil în reglementarea noului Cod civil"..., 220

<sup>19</sup> Art. 1259 of the Civil Code

Civil Code provides that "*the restitution of benefits shall be made even if they were not performed sequentially or have had a continuous character*".

The principle of restoring the status quo ante is provided in Art. 1254 (3) of the Civil Code. Among the exceptions to this principle covered by the current Civil Code, we note the following:

- keeping by the owner in good faith the fruit harvested within the time its good faith had lasted. The owner must have previously acquired principal real rights on a productive good by means of a translative or constitutive act of such rights, and their good faith meet the requirements of Art. 948 and Art. 1645 (1) of the Civil Code;

- reimbursement of the benefits received by the one without legal capacity to act or with limited capacity to act only within the limits of the benefit made (Art. 47 of the Civil Code). There is an exception from this rule where, intentionally or out of gross negligence, the one under the obligation to return has made it impossible, in which case they shall be ordered full refund (Art. 1647 of the Civil Code);

- invoking usucapio by the acquiring person of a legal null and void act, by means of which ownership was transmitted or constituted, or main another real right<sup>20</sup>.

It is noted that the current Civil Code did not apply the exception of non-reimbursement of benefits of the parties relying on their own turpitude as Art. 1638 of the Civil Code states that "*the benefit received or made under an illegal or immoral cause shall always remain subject to refunding*".

Refund arrangements are provided for in Art.1639-1647 of the Civil Code governing their operation on several aspects: restitution in kind or compensation if it cannot take place in kind, destruction or disposal of property, accidental destruction the goods, the partial loss of goods, expenses relating to the goods, restitution of the benefits and the equivalent for the use of the goods, costs of refund and refund of benefits by the incapable persons. To be noted that restitution in kind is the rule, and that by equivalent is the exception.

The principle of annulment of the subsequent act following the cancellation of the original act provided for in Art. 1254 (2) of the Civil Code. Among the exceptions to this principle covered by the current Civil Code, we note the following:

- the lease agreement concluded by the Lessor in good faith and shall take effect also after the dissolution of the lessor's title for the period stipulated by the parties, without exceeding one year from the date of dissolution [Art. 1819 (2) of the Civil Code];

- successive performance contracts shall continue to have effect during the time stipulated by the parties, without exceeding one year from the date of dissolution, subject to compliance with the formalities prescribed by law [Art. 1819 (2) of the Civil Code];

- the marriage concluded by the spouse of a person declared dead shall remain valid after the cancellation of the declaratory judgment of death, provided that the spouse of the person declared dead had been in good faith, the first marriage being dissolved upon the conclusion of the new marriage [Art. 293 (2) of the Civil Code].

Regarding the exceptions to the principle of ineffectiveness of the annulled legal act, the new Civil Code maintained the same exceptions stated in the corresponding doctrine of the old Civil Code: legal document conversion principle, the principle of the validity appearance by law, and of tort.

The conversion receives an express regulation in the current Civil Code, unlike in the old Civil Code containing only specific provisions on documentary evidence in Art. 1172. From the Civil Code provisions, one may note that the conditions the conversion must meet in

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<sup>20</sup> See Gabriel Boroi, Liviu Stănculescu, "Instituții de drept civil în reglementarea noului Cod civil"..., 227-228

order to operate were maintained. In the literature, it has been established that conversion can operate also in the case of a relative nullity act because the alternative act, deduced by interpretation of the initial void act, is the one that shall take effect<sup>21</sup>.

The principle of appearance validity in law (*error communis facit ius*) is legally established in Art. 17 (2) of the Civil Code. It is noted that the common and invincible error must be proved, and the application of this principle has just a judicial character. Also, its scope in real estate is limited, and in other matters where the law provides an advertising system. Its legal application to matters of civil status documents issued by a person who exercised the duties of public officer of civil status in compliance with all legal provisions, has been maintained. These documents shall remain valid, even if that person shall not have that capacity, unless the beneficiaries of these acts have known, when drawing up such act, their lack of such quality<sup>22</sup>.

The tort principle shall continue to be applied in case of a crime committed by a minor child or a person placed under judicial interdiction, upon signing of an annulable legal act. If the cancellation of the act for disability/incapacity, at the request of the minor child or the person under interdiction, would cause injury to the other party, the court may order maintenance of the act as valid, because it represents the most appropriate form of reparation of damage.

## **CONCLUSION**

The research conducted revealed that the current Civil Code has regulated nullity in a consistent manner, assigning it an entire section in the chapter on the contract. The regulation reflects the same conception in the old Civil Code, namely straightening nullity against the effects of the legal act contrary to the completion of the violated legal provision. New legislative aspects are brought, among others, regarding the introduction of finding or declaration of nullity agreements, partial nullity express regulation, legislative establishment of relative nullity presumption, the obligation of the court to invoke absolute nullity of its own motion. It is noted that while certain aspects of legislative novelty have established the doctrinal opinions related to the old Civil Code, others are absolute novelties in the Romanian system of civil law.

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<sup>21</sup> A se vedea Cristina Zamșa, în "Noul Cod civil Comentariu pe articole Ediția 2"..., 1398

<sup>22</sup> A se vedea art. 102 din Codul civil

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