

COMPARATIVE ANALYSIS OF THE CAUSES OF ABSOLUTE NULLITY OF THE CONTRACT IN THE ROMANIAN AND THE SPANISH CIVIL LAW

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Abstract

The present paper is aimed to present a comparative analysis of the causes of absolute nullity of the contract in the Romanian and the Spanish civil law. Thus, the study focuses on the presentation of both similarities and differences between the provisions of the Romanian Civil Code and the Spanish Civil Code that regulate the legal institution of the nullity of contracts, outlining the practical consequences of the conclusion.

Keywords: *absolute invalidity, capacity, object, cause, form.*

1. Introduction

The invalidity of the contract is the civil sanction that is set to put aside the effects which are contrary to the legal provisions that regulate the validity conditions that are required for a lawful civil contract.¹

Thus, the invalidity appears at the moment the contract is signed and prohibits that all or part of the illegal effects of the contract take place.

The major clasification of the invalidity is done by using the criteria consisting of the nature of the interest which is set by the parties at the moment of signing the contract.

When the nature of the interest regards private matters or is considered to have minor impacts on the parties in comparison with the security of the civil circuit, the nature of the invalidity is relative, whereas the nature of the interest taken into consideration are of major importance for society or could have important consequences on the patrimonial effects of the parties and other persons, the invalidity is considered to be of absolute character.

The major difference between the absolute invalidity and the relativa invalidity (also known as the anulability of the contract) consists of the juridical regime of the effects of the invalidity. This matters refers to who can invoke the effects of the sanction or if the court cand state ex officio the invalidity of a contract, whether the sanction can be covered through confirmation by one of the contracting parties or its author (in case of the unilateral act) or the period of time in which the invalidity can be invoked, with major references regarding if the sanction is brought up by the plaintiff or the defendant of the case.

Therefore, this study aims at presentinf the principal causes of invalidity both in the civil system of Romania as it was fundamentally changed by the

New Civil Code enacted by Law no. 287/2009 and in the Spanish civil system in order to establish a common ground for the application of the legal provisions as they are quite similarly expressed in both legislations.

Due to the specific terms used in the Spanish civil code, I have noticed that the Spanish civil law is not often presented in our legal papers or studies, although the interaction between the two countries has been evidently increasing in the last decade, mainly after Romania joined the European Union in 2007, therefore creating more legal ties based on contractual relationships.

Thus, a more profound studying of both the differences and similarities of the contract and of its effects as legal institutions would prove beneficial for the study of the European civil law in the context of the unification of the legislations of the EU Member States.

2. Content

Usually, the legal provisions specifically state the nature of the invalidity whether it is an absolute or a relative one in specific cases. But sometimes determining the nature of the cause of invalidity could become an operation of legal interpretation that has to take place before establishing if the cause of invalidity exists and what effects it has on the existence of the contract.

In order to help the persons involved in the application of the legal provisions, the New Civil Code of Romania enacted by Law no. 287/2009 brings an improvement to the clasic way of determining the nature of the cause of invalidity by stating a legal order that has to be followed in such operations. Thus, article 1252 of the New Civil Code stipulates that if the nature of the invalidity is not explicitly determined or such

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¹ Gabriel Boroï and Carla Alexandra Angheliescu, *Curs de drept civil. Partea generală, Ediția a 2-a revizuită și adăugită*, (Bucharest: Hamangiu Press, 2012), 236.

nature does not result without any doubt from the legal provision itself, then the invalidity has a relative character, also called as anulability.

This can only be applicable in the case of the virtual invalidity because only in such case the nature of the invalidity is not expressly set forth by the legal provision. Although after analysing the text there are two conditions that seem to be independent and alternative when applying this presumption of relative invalidity, that is the lack of specific determination of the nature of the invalidity and not resulting implicitly and beyond any doubt from the provision, in fact the second condition also contains the first condition.² Thus, in addition of not being explicitly determined by the regulation, the persons who is called to interpret and apply the sanction of the invalidity has doubts whereas the nature of the sanction, that is the existence of the doubt regarding the absolute or relative character of the invalidity.

Usually, according to the Romanian civil system as it has been interpreted and developed by the national jurisprudence and its relevant doctrine, the causes of nullity could be stated as regarding the following aspects: the violation of the legal provisions setting forth the rules of the civil capacity, the invalidity of the object of the contract, the invalidity of the cause (scope) of the contract, the lack of form as provided by the law *ad validitatem*, the violation of the limits of the principle of the freedom of the contracts.³

The Spanish civil Code has a similar provision, but with the opposite effects due to its formulation. According to article 6.3 of the Civil Code, the contracts which are contrary to the imperative and prohibitive provisions are void by the effect of the law, except for the case in which the provision sets another sanction for the violation of the validity condition.⁴

Therefore, the Spanish civil code sets forth the importance and the seriousness of the causes of absolute nullity, providing that, in general, every violation of the regulations that stipulate the validity conditions of the contract attracts the absolute nullity of that contract, unless a specific regulations provided otherwise or establishes another type of civil sanction for that particular case.

In regards of the causes of absolute nullity, the Romanian civil Code establishes that they appear in the following situations in general terms: the total lack of consentment, for example when a person signs a contract which had been written in a foreign language that person does not understand at all. This case also exists in the Spanish civil system, therefore this consists of a similarity between the two legal systems.

In relation to the consentment of concluding a contract, it is imperative to say that in both system the vices of the consent (the error, the violence) are seen as causes of anulability. In the Spanish civil system this is explained by the fact that article 1261 of the Spanish Civil Code stipulates that there is no contract if one of the fundamental conditions of the validity of the contract does not exist at the moment of the conclusion of the contract itself. As the vices of consent are presumed to affect an existing consent of at least one of the contracting parties, the sanction that must intervene in this case is the relative nullity of the contract and not the absolute invalidity, which only exists in case of total inexistence of the consent at the moment of the signing of the contract.⁵

Although on this point there are similarities between the two civil legal systems, one could underline that the modification brought in matters of the vices of consent by the Romanian New Civil Code might have created a difference regarding the type and nature of the nullity in case of the absolute violence, as in the Spanish civil system this case attracts the absolute nullity of the contract, whereas article 1251 of the Romanian Civil Code generally states that the presence of the vices of consent can only attract the anulability of the contract and not its absolute invalidity.

Such an observation would at first be preferable, but a thorough analysis of the matter would reveal that in fact the premise is false due to the fact that actually, in both the Romanian and the Civil systems, the absolute violence is considered to be a part, only just a cause that could lead to the total lack of consent which, as has just been established, gives way for the absolute invalidity of the contract concluded by at least one party whose consent is entirely absent due to the existing violence that prevents him from having any representation of the conclusion of the contract and of the legal consequences of such a legal operation.

Another question regarding the case of the object of the contract raises multiple similarities between the two legal systems. There should be mentioned that both the Romanian civil system and the Spanish civil system regard the existence and the validity of the object of the contract as a most important condition in regards to the validity of the contract as a whole. Therefore, the simple lack of determination of the object of the contract attracts the absolute invalidity of the contract itself. The same kind of sanction, that is the absolute nullity intervenes if the object of the contract is contrary to the public order or the morals.

A novelty introduced by the Romanian Civil Code regards the difference of concept between the

² Cristina Zamşa, in *Noul Cod civil. Comentariu pe articole. Art. 1-2664*, ed. Fl. A. Baias et al. (Bucharest: C.H. Beck Press, 2012), 1311-1312.

³ Boroi and Angheliescu, *Curs de drept civil. Partea generală*, 252.

⁴ Francisco Javier Sanchez Calero et al., *Curso de derecho civil II. Derecho de obligaciones, contratos y responsabilidad por hechos ilícitos*, (Valencia: Tirant lo Blanch Press, 2012), 212.

⁵ Carlos Lasarte, *Curso de derecho civil patrimonial. Introducción al derecho*, (Madrid: Tecnos Grupo Anaya Press, 2012, 18th Edition), 403.

object of the contract and the object of the obligation. Such difference tends not to be too obvious to the analysis of the legal provisions of the Spanish civil Code set forth in articles 1271 to 1273, although the practical importance of the dichotomy only falls in second plan.⁶

As regards to the cause of the contract, article 1238 paragraph 2 of the Romanian Civil Code stipulates that the lack of cause of the contract attracts its anulability, whereas in the Spanish civil system the lack of the cause is considered to be a motive for the absolute invalidity of the contract. Otherwise, both system consider the immoral or the illicit cause of the contract as a cause of absolute invalidity.⁷ It is noticeable that article 1237 of the Romanian Civil Code considers the fraud as subsumed to the concept of illicit cause of the contract. That is that whenever the parties or at least one party concludes the contract only with the purpose of eluding the application of an imperative regulations, that contract is submitted to absolute invalidity because it violates an imperative legal provision that protects the general interest of society over the particular interest of the parties involved.

The final condition of validity of the contracts relates to the form in which the contract is lawfully concluded by the parties. Both systems preserve the general principle based on the liberty and choice of the form of the contract, that is that the contract is concluded once the two parties have agreed on its terms, without any sacramental form of the contract, except for the cases specifically set out by special legal provisions.

A few very similar provisions of the the Civil Codes have to be underlined. First of all, article 1244 of the Romanian Civil Code imperatively stipulates that all contracts regarding the transfer of any real estate rights that have to be enlisted in the public record of the „funcionary book” (cartea funciară), a public institutionalised registry which assure the publicity of the existing properties and their current owners. The imperative form provided by article 1244 is the authentic form, which means that the contract has to be concluded and attested by a notary.

In regards of property, art. 1280 paragraph 1 of the Spanish civil Code mostly states the same thing, that the contracts and all acts that have as an object to create, transfer, modify or terminate real rights regarding immobiliary goods have to be concluded in a public form, otherwise the same sanction of the absolute nullity of the contract would apply in such cases.⁸

In terms of the relative invalidity of the contract, there are more similarities between the two legal systems.

For example, is the case of the vices con consent, the essential excusable error of the party, the dolus, the intimidation and the deep fear. As a specific of the Spanish legal system, the lesion does not represent a cause of relative nullity as it does in the Romanian civil system, it only attracts the rescission of the contract. On the other side, the New civil Code of Romania has introduced a new concept as to the sanction that intervenes in case of the lesion of the contract.

According to article 1222 paragraph 1, the party whose consent has been affected by lesion has to right to choose between asking for the contract to be annulled or the maintaining of the contract along with the diminished obligations on her behalf. Paragraph 3 of the same article introduces a difference between the case in which the party who invoked the lesion was a minor at the moment the contract was signed, in which case the party can ask for the annulment of the contract without any restrictions, and the case in which the party was of age at the moment he signed the contract. In the latter, due to the fact that adults are presumed by the law to have mental and legal representations of their acts and operations and can thus see the consequences of their acts, the action of relative invalidity based on grounds of lesion of the contract can only be admissible if the value of the lesion surpasses half the value of the contract at the time the motion is registered at the court.

Another significant similarity consists of the cause of relative nullity regarding the violation of the provisions setting forth the incapacities or better said the capacity of a person to work or, in the way the Romanian system, the capacity of a person to exercise their civil rights by signing contracts by themselves without the consent of a representative or a tutor.

3. Conclusions

The causes of the invalidity of the contract can be put in different groups. The first one refers to the violation of the legal limit stated by article 1255 of the Spanish civil Code, that is the law, the moral and the public order. A similar context is provided by article 1250 of the Romanian civil Code which stipulates that the contract is absolutely invalid in the cases explicitly provided by the law, as well as in the cases in which the absolute nullity comes as a result of disregarding a rule of general interest.

Another category comprises the absence of one of the essential requirements of the validity of the contract, such as the consent, the object of the contract (or of his main obligations) and the cause.

Part of the Spanish doctrine⁹ regard a different category of causes of invalidity when it comes to the illicit character of the cause and of the object of the

⁶ Jesús Delgado Echeverría et al., *Las nulidades de los contratos: un sistema en evolución*, (Navarra: Aranzadi Press, 2007), 150.

⁷ Luis Díez-Picazo, *Fundamentos del derecho civil patrimonial. Introducción. Teoría del contrato*, (Navarra: Civitas Press, 6th Edition, 2007), 578.

⁸ Luis Díez-Picazo, *Fundamentos*, 292.

⁹ Ángel M. López y López and Rosario Valpuesta Fernández, *Derecho civil patrimonial I*, (Valencia: Tirant lo Blanch Press, 2012), 117.

contract and not analyse these causes of nullity under the category of simply the missing fundamental conditions of the contract, the essential difference having to be that in this case the object or the cause exist, but in same way come against the public order or the moral of the society in such a way it is imperative for the absolute invalidity to operate in order to draw the effects of the contract ineffective.

The last category refers to the formal condition of the contract regarding the form *ad solemnitatem*

whose violation invariably attracts the sanction of the absolute nullity of the contract due to the important effects.

A future study could focus on the analysis of the principles that regulate the effects of the invalidity of the contracts according to both the Romanian Civil Code and the Spanish Civil Code in order to assure a continuity of the comparative studies in this area.

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