U N I V E R S I T A T Y "N I C O L A E T I T U L E S C U"
F A C U L T Y O F L A W
D O C T O R A L S C H O O L

THE LEGAL CONCEPT OF LIMITATION UNDER THE NEW CIVIL CODE

- PhD THESIS SUMMARY -

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II. THE THEME OF THE RESEARCH AND ITS SCIENTIFIC IMPORTANCE

This PhD paper is called "The legal concept of limitation under de new Civil Code".

Given the severe legal consequences that the incidence of the substantive law institution of limitation may cause, as well as the need for a clear delimitation of the limitation in relation to other similar legal concepts, Law no. 287/2009 regarding the Civil Code[1] has regulated for the first time in Romanian law, the general framework of the limitation.

Before the entry into force of the new Civil Code, although the substantive law limitation was acknowledged and debated in the doctrine since immemorial time, being applied as well in their case law by the courts or arbitration bodies, this legal concept did not benefit from a specific regulation, with a general scope, in the legislative texts.

Currently, the limitation benefits from a set of general and specific legal rules comprised in the new Civil Code, namely Title II from the VIth Book, called "General scheme of the limitation periods".

The need to regulate limitation has resulted from its topicality and importance in the conduct of the legal relations, these being at the same time, the reasons that led to the choice of the theme for this paper, to which was added the undeniable beauty of the legal problems related to the legal concept under debate.

[1] Law no. 287/2009 was published in the Official Gazette of Romania, Part I, no. 511 of 24 July 2009, it was amended by Law no. 71/2011 for the enforcement of Law no. 287/2009 regarding the Civil Code, published in the Official Gazette of Romania, Part I, no. 409 of 10 June 2011, and it was corrected in the Official Gazette of Romania, Part I, no. 427 of 17 June 2011 and in the Official Gazette of Romania, Part I, no. 489 of 8 July 2011. Law no. 287/2009 was republished based on art. 218 of the Law no. 71/2011.

To establish the legal nature of a period as a limitation period, distinguishing it from the periods specific to other legal institutions, having regard that there are rules about periods the qualification of which is not expressly provided by the law, represents one of the most important processes in the study of limitation since it is only assuming that the legal nature has been correctly established that the legal effects of a concept can be accurately outlined and the concept can be legally applied.

The limitation can engender serious legal effects for the holder of the substantive right in terms of legal relations, given that, once invoked and applied, it leads to the very loss of the subjective civil right (primary right); the right ceases to exist in its holder's patrimony and consequently, it can no longer be defended by a legal action or, as the case may be, by pleas on the merits of the case. In other cases, the limitation also extinguishes the discretionary right (secondary right), preventing beyond the limitation period, the performance of unilateral acts through which the right would have been exercised.

Therefore, the importance of knowing this legal institution is undeniable, which is why this paper attempted a gradual deepening of the subject, seeking reasoned solutions for the interesting problems in the matter, both theoretical and practical.

Concerning the placement of the theme in the whole of the scientific studies in the field of law, before the entry into force of the new Civil Code, probably due to the lack of a legal regulation of general scope, the limitation has most often been academically analyzed in the national law by comparison to the prescription, the latter constituting the main subject of the studies, or at the time of identifying within a subject matter, a period having the nature of a limitation period, by only declaring the effects of its disregard.

After the entry into force of the new Civil Code, the legal academics turned their attention towards the new regulation in the field of limitation, analyzing it within the works dedicated to the general part of the civil law, but without

publishing a monograph as a scientific study focused exclusively on limitation, thus comprising a detailed and quasi-exhaustive treatment.

On an interdisciplinary background, limitation is a concept known not only in the field of civil law, but also in the field of labour law[2], administrative law[3], as well as other branches of law, this paper focusing however only on the general rules applicable to the substantive law limitation in the new Civil Code, rules that will be relevant in any other areas where the limitation concept is present, in the absence of specific derogatory rules.

III. THE PURPOSE AND THE OBJECTIVES OF THE RESEARCH

In this case, the scientific research has pursued a detailed and complex analysis of the limitation concept, by combining the theoretical aspects with case-law issue, from national and comparative law, with a view to offering a grounded perspective over the subject. I also intended to highlight the legal problems subject to controversy in the legal doctrine and which are in the same time, a source of disparate practice among the courts, as well as the detailed reasoning of the appropriate solutions along with formulating some proposals *de lege ferenda* for a better understanding and application of the existing legal provisions. A particular emphasis was placed on the comparative analysis between limitation and the other

[2] For example, limitation periods are those stipulated in art. 31 par. (1) and (2) of Law no. 53/2003 on the Labour Code (published in the Official Gazette no. 72 of 5 February 2003), during or at the end of which the individual employment contract may be terminated only by written notice, without prior notice, at the initiative of either party, with no need for reasoning, according to par. (3) of the same article, the contract no longer terminating in such a way after the expiry of the trial period.

[3] According to art. 11 par. (1), (2) and (5) of Law no. 554/2004 on administrative litigation (published in the Official Gazette of Romania, Part I, no. 1154 of 07 December 2004), the application for the annulment of an individual administrative act can be brought for solid grounds, after the expiry of the period stipulated in par. (1), but not later than one year from the communication of the act, the date of acknowledgement, the date on which the application was submitted or the date of the conclusion of the conciliation minutes, as the case may be, the one year period being a limitation one.

legal concepts similarly configured in order to reflect correctly the legal effects of each of them.

The discovery of the solutions judged right in the analysis of this subject required an in-depth study of the national and comparative law legal doctrine, capable of highlighting the thinking effort of many personalities in the field, for designing the rules applicable to the limitation, as well as a study of the case-law through which these legal mechanisms are implemented, coming to life.

IV. THE STRUCTURE OF THE WORK

The importance of knowing the legal concept of substantive law limitation is undeniable, in the context of the severity of the legal effects that it can have on the holder of the subjective right, since, once invoked and applied, it leads to the very loss of the subjective right (primary right) or, as the case may be, to the extinguishment of the discretionary right (secondary right), preventing beyond the limitation period, the performance of unilateral acts through which the right would have been exercised.

Through the approach materialized in the conception of this paper I sought to deepen this legal concept, without considering in any way its analysis fully exhausted and, in the same time, I tried to offer reasoned solutions to the plethora of interesting legal problems raised by the application of limitation.

In particular, the work contains six chapters divided into sections, the latter being in turn divided into subsections.

The first chapter concerns the concept, the legal nature and the classification of substantive law limitation.

Thus, it was defined as the civil law institution applicable in the case of non-observance of the periods established by the law or by the parties, consisting in the loss of the subjective right (primary right) or, as the case may be, in the extinguishment of the discretionary right (secondary right).

The characteristic of limitation can be derived from its definition as follows:

- the limitation of the subjective civil right or the discretionary right is a civil law concept[4];
- the limitation implies periods the non-observance of which constitutes the premise for the application of its effects[5];
- the limitation is based on the inaction of the holder of the right during the limitation period;
- as a rule, the limitation operates independently on the fault of the holder of the right in the non-observance of the limitation period;
- the effect of the limitation consists in the loss of the subjective right (primary right) or, as the case may be, in the extinguishment of the discretionary right (secondary right);

Taking an example for the better understanding of the concept of substantive law limitation, I underline that in the case of art. 937 par. (2) of the Civil Code (containing an express limitation period), if the owner who has lost a good or this has been stolen from him/her, a good that is presently held by a *bona fide* possessor, does not claim it within 3 years from the date at which he/she has lost possession of the good, following the application of the limitation, the owner loses the very ownership of the good (primary subjective right).

Likewise, the failure to exercise the right to accept or forgo a succession (a discretionary right) within the period stipulated by art. 1103 Civ. Code, leads to the extinguishment of this right, the inheritor losing the faculty of expressing his/her will to accept or forgo the inheritance of the deceased.

[4] In order to be qualified as a civil law concept, it is necessary to specify that the limitation concerns a civil subjective right, given that limitation is also an institution of civil procedural law in the cases where it concerns a procedural right.

[5] In the civil law, the concept of limitation is also used for naming other legal institutions that do not involve periods and are not subject to this analysis (for example, termination of the parental authority regulated by art. 508 – 512 Civ. Code).

From the point of view of the legal nature, the limitation represents a way of extinguishment of the civil subjective right, either primary or secondary, material or non-material.

Furthermore, within this chapter, I have classified the limitation as public policy limitation and private limitation, using the criterion of the nature of the interest protected by the legal rule establishing the period, and as express limitation and tacit limitation, using the criterion of its way of establishment by the law or in the legal act.

The **second chapter** is dedicated to the temporal application of the civil law concerning the limitation, the analysis being divided according to the temporal application of a civil law or of the Civil Code itself, stressing the fact that the provisions in art. 6 Civ. Code, as a whole, concern the temporal application of new civil laws adopted after the entry into force of the new Civil Code, not the application of the latter, given that for the application of the new Civil Code have been enacted specific transitional rules contained in Law no. 71/2011 for the enforcement of Law no. 287/2009 on the Civil Code.

Thus, regarding the temporal application of the new civil law on the matter, art. 6 par. (4) Civ. Code is applicable, according to which prescriptions, limitations and usucaptions started but unfinished by the date of entry into force of the new law are entirely subject to the legal provisions that established them.

Starting from the reasons that grounded the solution enshrined in art. 6 par. (4) Civ. Code, I estimated that the periods stipulated by the regulation before the new code and qualified by the doctrine and the case-law as limitation periods, that had started but had not ended by the date of entry into force of the new code are entirely subject to the legal provisions that established them.

The third chapter of the paper concern the differentiation between the substantive law limitation and other legal concepts, namely the prescription, the procedural law limitation and the extinctive delay point. I have written brief

considerations regarding each legal concept then I highlighted the similarities and the differences between them.

For the determination of the legal nature of a period as a prescription period or a substantive law limitation period, I started from the text of art. 2547 Civ. Code according to which the prescription rules apply as long as the law or the contract does not clearly provide whether a period is a prescription or a limitation one.

Consequently, whenever the legal nature of a period does arise with certainty in the legal or conventional regulation, a situation that can only be imagined in relation to periods for the exercise of a legal action, the law requires the application of the legal scheme of the prescription, the rule being stipulated in art. 2547 Civ. Code.

However, it should be emphasized that art. 2457 Civ. Code does not qualify as prescription periods all the periods the legal nature of which is not expressly provided by the law or by the parties. The law establishes a presumption regarding the legal nature of the periods related to the exercise of a legal action only in the case where their legal nature does not arise with certainty from their regulation, considering them prescription periods.

There is thus the possibility that a period might be a tacit (virtual) limitation period, without the law or as the case may be, the legal act expressly providing the name of the sanction applicable for the non-observance of the period, but its legal nature arising indisputably from the effects inserted into the law or the act or in other provisions.

A period can be qualified as a (tacit) limitation period where it follows that in case of non-observance, the substantive subjective right is lost [for instance, the situation regulated by art. 576 par. (3) Civ. Code concerning the claim of the honeybee colony passed on another's property].

Further, a second criterion to establish that a period is a (tacit) limitation and not a prescription one, is conferred by the legislative technique of referring to

certain legal provisions regarding the prescription for the determination of the legal regime of a period, in which case it is clear that the period cannot be a prescription one, otherwise the reference for correspondence is pointless [e.g. the case of the right to accept or forgo a succession, where art. 1103 par. (3) Civ. Code specifies that the right to accept or forgo a succession is subject to the provisions in Book VI concerning the suspension and the relief from the expiry of the prescription period].

Each time that the exercise of the right does not involve the bringing of a legal action, the period being established for the performance of an unilateral act through which a discretionary right is exercised (e.g. the period stipulated for the expression of the unilateral declaration with a view to exercise the discretionary right to terminate or cancel a contract, the period established to communicate to the vendor the agreement to conclude the sale contract and to deposit the price at the seller's disposal with a view to exercise the right of pre-emption by the holder of this right etc.) or for the preservation of a primary subjective right [e.g. the 2 day period for the pursuit of the honeybee colony, stipulated by art. 576 par. (3) Civ. Code], the legal nature of the period is the substantive law limitation, not the prescription. Thus, given that the prescription extinguishes the substantive right to action, the prescription period shall be necessarily established for its exercise in relation to the action, not with the right.

Concluding, in case a period is not established for the exercise of a legal action but for the performance of an unilateral act for the exercise of a discretionary right or for the preservation of a primary subjective right, this period will always be a limitation not a prescription one. Furthermore, the period shall be a prescription one if it is established in relation to the exercise of a legal action, as long as the law or the act do not provide that the non-observance of the period leads to the loss of the subjective right itself or as long as there are no other elements to exclude its qualification as a prescription period (the reference to certain dispositions concerning the prescription, for instance).

Continuing the ideas presented above, given that I estimated that one of the most important stages in the devising mechanism for the correct application of the legal concept of limitation is represented by the delimitation between the substantive law limitation, the procedural law limitation and the prescription of the substantive law to action when the exercise of the right involves bringing a legal action, this theme has been assigned a distinct section in the paper.

Thus, I concluded that a period established in relation to bringing a legal claim can be either a prescription period or a substantive law limitation, but not a procedural law limitation.

The procedural law periods are those established for the performance of a procedural act, which necessarily implies the initiation of the civil proceedings. Even if the statement of claim represents a procedural act, the period for its introduction is established before the commencement of the civil proceedings. This period is related to the expression of will of bringing a legal action, not to the procedural act represented by the statement of claim. There are no procedural periods for the introduction of the statement of claim, there are only prescription periods for the substantive right to action or substantive law limitation periods.

Next, I considered that the periods established in relation to the introduction of a statement of claim are prescription periods, not substantive law limitation periods, even if the exercise of the (primary) subjective right or of the discretionary right involves the bringing of a legal action.

In the case of prescription, the period is attached to the substantive right to action, not to the subjective right which is not affected by its expiry. In the case of substantive law limitation, the period is attached to the subjective right, not to the substantive right to action. As a consequence, I estimated that when the parties or the law have established a substantive law limitation period, it shall run together with the prescription period of the substantive right to action, without excluding each other.

Finally, I considered that if a period is established for the exercise of a right and this does not involve a legal action, the period shall always be a substantive law limitation, not a prescription one, the latter only being related to the substantive right to action.

Chapter IV analyzes the concept, the characteristics and the classification of limitation periods.

Thus, the substantive law limitation period represents the legally or conventionally established interval of time during which the holder of a (primary) subjective right or of a discretionary right must exercise the right, having an imperative and absolute, whether the limitation is public or private.

With regard to the classification of the limitation periods, they have been divided in legal and conventional limitation periods, according to the criterion of their source, in limitation periods expressed in hours, weeks, months and years, according to the criterion of their length, as well as in successive and regressive limitation periods, depending on the way of calculation.

The second section of this chapter is dedicated to the analysis of certain limitation periods contained in the Civil Code, since in the field of limitation, the law has not stipulated a general period, nor a rule concerning the beginning of the limitation period, which is why the length and the moment expressly provided by the law or agreed contractually by the parties for each limitation period are applicable.

More specifically, I have analysed the periods stipulated in relation to the action for the rectification of the land register against the *bona fide* sub-buyer of the right *in rem*, the action for the recovery of the lost or stolen property from the *bone fide* holder, the right to return the property found or to pay the amount of money representing the price obtained from the alienation of the found good, the action for the declaration of debarment from succession, the right to accept or to waiver a succession, the action for the annulment of a legal act in the situation of

putting in default concerning the confirmation of the legal act or the bringing of the action for annulment, as well as the right to the termination or the unilateral cancellation of a contract.

For instance, in relation to the action for the annulment of a legal act in the situation of putting in default concerning the confirmation of the legal act or the bringing of the action for annulment, it was held that the right to seek the annulment of a contract can be lost as a consequence of limitation, according to art. 1263 par. (6) Civ. Code, in case the person entitled to the annulment is put in default by means of a notice in which the party concerned claimed either to confirm the voidable contract or to bring the annulment action, and he/she has not decided either way within 6 months from the notice.

This 6 months period is a legal successive limitation period expressed in months. In the same time, the limitation that may occur as a result of the non-observance of the period analysed is an express private limitation that has the effect of extinguishing a discretionary right, namely the right to bring the action for the annulment of the legal act. It should be mentioned that by failing to exercise the discretionary right within the limitation period established by the law, only the right to seek the annulment of the legal act in court is extinguished, without the right to confirm the act.

In case the claimant has not exercised the above mentioned discretionary right within the limitation period established by the law but brings nonetheless an action for the annulment of the legal act, the defendant has the right to invoke the plea of inadmissibility of the statement of claim, by reason of losing the claimant's faculty to obtain the annulment of the legal act, namely to bring the proper legal action (the extinguishment of the discretionary right entails the incidence of a ground for the rejection of the action). In this case, the court shall uphold the procedural plea mentioned above and shall reject the claim as inadmissible. It

must be stressed that the court cannot invoke of its own motion the limitation as a ground of inadmissibility of the claim since in this case, the limitation is private.

The discussed limitation shall also have consequences on the invocation as a substantive law exception, of the relative invalidity of the legal act. Thus, in case the party who notified the person who could seek the annulment of or confirm the legal act brings an action for the enforcement of this act, the notified defendant cannot invoke as a defence on the merits, the relative invalidity of the legal act, since the limitation of his/her right occurred.

On the other hand, given that the 6 months limitation period influences the discretionary right, not the substantive or procedural right to action for the declaration of the relative invalidity, I estimate that it continues to be subject to the general 3 years prescription period, stipulated by art. 2517 Civ. Code. There is no reason why the limitation period concerning the discretionary right should not coexist with the prescription period concerning the substantive right to the action in annulment.

Therefore, we can be in one of the following cases:

- both the limitation and the prescription periods are fulfilled, but the defendant does not raise their non-observance in the proceedings, which why the court cannot raise of its own motion neither the limitation (this being private), nor the prescription (given the regime of this concept under the new code). In this case, if the other conditions stipulated by text are met, the action for annulment can be upheld;
- both the limitation and the prescription periods are fulfilled, but the defendant only invokes the limitation of the claimant's right to seek annulment. In this case, the court cannot raise of its own motion the prescription, but it shall dismiss the action as inadmissible, given the incidence of the limitation of the claimant's right to bring the action for annulment.

The solution is the same in the case that the prescription period has not ended;

- both the limitation and the prescription periods are fulfilled, but the defendant only invokes the prescription of the substantive right to the action for annulment. In this case, the court upholds the plea concerning the prescription of the substantive right to the action for annulment and therefore dismisses the action as expired, without analysing the possible limitation of the claimant's discretionary right, since it cannot raise of its own motion the private limitation;
- both the limitation and the prescription periods are fulfilled and the defendant raises both the limitation of the claimant's discretionary right as a plea of inadmissibility of the action for annulment, and the prescription of the substantive right to the action for annulment. I estimate that in the situation described, the court shall rule primarily on the plea of inadmissibility, as a ground for the dismissal of the claim, therefore dismissing the action for annulment as inadmissible without analysing the prescription of the substantive right to action.

Chapter V concerns the legal regime of the limitation periods, commencing with the general rule in the field, namely that the limitation periods are not subject to suspension and interruption, unless otherwise provided by the law.

Then, as a rule, given that the law makes no reference to the applicability of the relief from the expiry of the period in the case of substantive law limitation, I have shown that the party is not entitled to claim relief from the expiry of a limitation period. Exceptionally, in certain cases, the law expressly provided the application of the rules of the prescription concerning the relief from expiry to the limitation periods, such as the case of the right to accept or to forgo a succession [art. 1103 par. (3) Civ. Code].

Further, the paper contains a thorough analysis of the suspension and interruption of the limitation periods.

The Civil Code has regulated a general case of suspension in the field of limitation, namely the *force majeure*. Other cases of suspension can be stipulated

by the special rules, according to the provisions of art. 2548 Civ. Code. The Civil Code also stipulated two general cases of interruption in the field of limitation, where the exercise of the subjective right involves the bringing of a legal action, namely to register a statement of claim or an arbitration request and to put in default the person to whose benefit runs the limitation period. Other cases of interruption can be stipulated by the special rules, according to the provisions of the same article.

At the end of the chapter, I have detailed the method of calculation of the limitation periods depending on their length, also discussing the extension and the presumption of the performance of the acts in due time.

Chapter VI contains a particularization of the effects of the limitation and a detailed explanation of the aspects pertaining to its invocation.

Concerning the effects of limitation, it was estimated that if the (primary) subjective right is subject to a limitation period established for its exercise, the failure to exercise the right within that period leads to the loss of the subjective right invoked by that person. Once the (primary) subjective right lost as an effect of the substantive law limitation, it can no longer be defended within legal proceedings, on the offensive path of a legal action or the defensive one of a the defence on the merits (both being dismissed as unfounded, the legal action within the grounds and the operative part of the judicial decision, the defence on the merits only within its grounds).

At the same time, if the (secondary) discretionary right is subject to a limitation period established for its exercise, the failure to exercise the right within that period leads to the extinguishment of this right.

In case the discretionary right is exercised through the performance of unilateral legal acts, in the event that the limitation of the discretionary right has occurred and the holder of the right performed nonetheless the unilateral act, the latter is null and void. The invalidity of the unilateral act comes as a consequence

of the limitation of the right to perform the act in the exercise of the extinguished discretionary right.

Likewise, when the discretionary right is exercised through the performance of substantive unilateral acts, in case the limitation of the discretionary right occurs and its holder tries nonetheless to perform the act, the performance of the act will be prevented.

In case the discretionary right is exercised by bringing a legal action, in case the limitation of the discretionary right occurs and its holder brings nonetheless the legal action, it will be dismissed as inadmissible, as a result of the plea for inadmissibility, the limitation operating as a ground of dismissal of the claim.

With regard to the invocation of the limitation, the subject matter has been analysed depending on the nature of the right subject to limitation, (primary) subjective right or (secondary) discretionary right, and then depending on the type of the limitation, public or private policy limitation.

Thus, if the (primary) subjective right is subject to a limitation period established for its exercise, the failure to exercise the right within the period leads to the loss of the subjective right invoked by that person.

The public policy limitation can be invoked by the court of its own motion, as well as by the interested party (to the benefit of which runs the limitation period). Moreover, the court has the obligation to invoke the public policy limitation; the invocation is not left to its discretion, in case of failure to observe the above mentioned legal provision, the judgement thus issued is subject to annulment in appeal.

This type of limitation can be invoked until the closure of the discussion on the merits of the case, as any public policy defence.

Although art. 2550 par. (1) Civ. Code stipulates that the limitation can be invoked by the interested party according to the conditions in art. 2513 Civ. Code

(only in the first instance through the statement of defence or in the absence of a plea, no later than the first hearing to which the parties have been legally cited), I estimate that in relation to the public policy limitation, it can be invoked by the party concerned until the closure of the discussions on the merits of the case, since the court has the legal obligation to invoke it and is not limited in time by any procedural stage. In other words, there is no reason why the limitation plea of the concerned party should be considered out of time and should not be taken into account for the delivery of the judgement but the same limitation should operate once invoked by the court of its own motion.

The concerned party invokes the limitation as a plea on the merits, not a procedural exception on the merits, since the limitation concerns the exercise of the primary subjective right, not the bringing of the legal action.

The limitation, as a plea on the merits, is subject to the court's analysis, the reasons why it was upheld or dismissed being contained in the grounds of the judgement, without separately specifying the solution on the limitation within the operative part of the judgement.

Even if the court does not settle the issue of limitation within the operative part, the grounds of the judgement where it is analysed have the force of *res iudicata* in a subsequent litigation, according to art. 430 par. (2) Civ. Proc. Code, in relation to which the force of *res iudicata* concerns the operative part as well as the grounds of the judgement, including those that settle a matter of dispute.

The law does not stipulate a special manner for the invocation of limitation; it can be inserted in the statement of defence or in the meeting minute, with the possibility to raise it verbally in court, followed by the recording by the Registrar in the summary judgement.

The defence on the merits concerning the limitation is not subject to stamp duties, precisely because it is not a claim of the person invoking it, but only a means to dismiss the claims formulated against him/her.

Likewise, the defence on the merits concerning the limitation cannot be disjoined from the rest of the claims, since it is not contained in a claim the settlement of which must be found in the operative part of the judgement and furthermore, its analysis is intimately linked to that of the claim in relation to which it has been invoked.

According to art. 124 par. (1) Civ. Proc. Code, the court competent to hear the main claim shall also settle the defences and the exceptions, except those representing preliminary questions and which according to the law, fall within the exclusive competence of other court. The rule established by the legislator has envisaged the need that the court should settle the matter in its entirety in order to give a unitary solution and in order to avoid the delivery of conflicting judgements. Therefore, the limitation defence shall be settled by the court invested with the settlement of the main claim.

If limitation is upheld by the court, it will dismiss the claim of the party that has lost the (primary) subjective right as unfounded.

If the court invokes the limitation of its own motion, it will submit it to the debate of the parties in order to observe the adversarial principle governing the civil process.

To conclude, the public policy limitation can be invoked as it follows:

- the defendant is entitled to invoke verbally or in writing, the limitation of the claimant's (primary) subjective right, at any moment until the closure of the debates on the merits of the case in front of the first instance, even if he/she has not submitted a statement of defence or has done so after the expiry of the procedural period or he/she has not invoked this plea on the merits within the statement of defence submitted in due time;
- the court is entitled to invoke of its own motion, at any time, the limitation of the claimant's primary subjective right, in the first instance stage or as a ground for appeal or second appeal, in the stage of the judgement of the review procedures;

- if a first instance ruling has been issued with the violation of the provisions regarding the limitation of the claimant's subjective civil right, the defendant or the prosecutor can appeal such a ruling, if the ruling is subject to such remedy. In the described situation, the judicial control court shall uphold the appeal, shall entirely change the ruling of the first instance and shall dismiss the statement of claim as unfounded, according to art. 480 par. (2) Civ. Proc. Code;
- if a first instance ruling has been issued with the violation of the provisions regarding the limitation of the claimant's subjective civil right and this is subject only to second appeal, the party concerned or the prosecutor can appeal such a ruling on the ground provided by art. 488 par. (1) pt. 8 Civ. Proc. Code. In this situation, the court of appeal (other than the supreme court) shall uphold the second appeal, shall invalidate the ruling and, settling the trial on the merits, shall dismiss the statement of claim as unfounded. The above mentioned are also applicable in case the appeal court has issued a ruling in violation of the provisions regarding the limitation of the claimant's subjective civil right, a ruling that is subject to second appeal;
- the defendant can invoke the limitation of the claimant's subjective right, for the first time in appeal or in second appeal if the ruling of the first instance is only subject to second appeal, as a ground of the remedy, even if it was not invoked in first instance;
- in case only the claimant appealed against the ruling partly upholding the main claim, the defendant is no longer entitled to invoke the limitation of the claimant's subjective right, since this would be a ground for the annulment of the entire ruling in first instance, as the defendant did not appeal and the part of the ruling that has not been challenged has become final. In case the limitation of the claimant's subjective right has indeed occurred, the judicial control court can raise this plea of its own motion, dismissing the claimant's appeal as unfounded, but without invalidating the entire ruling of the first instance, since, as shown above, the part of the ruling that has not been challenged has become final and this would

also violate the principle of *non reformation in pejus*, according to art. 481 and 502 Civ. Proc. Code;

- if the defendant did not raise in appeal the invalidity of the ruling in first instance resulting from the violation of the provisions concerning the limitation of the claimant's subjective right, he/she can no longer attack the appeal ruling on this ground as the provisions in art. 488 par. (2) Civ. Proc. Code prohibit it.

With regard to the invocation of the private limitation, the following must be highlighted:

- the defendant is entitled to raise the limitation of the claimant's (primary) subjective right, as a plea on the merits, within the statement of defence or otherwise, no later than the first hearing to which the parties have been legally cited, in this case, verbally or in writing;
- the court is not entitled to raise the limitation of the claimant's (primary) subjective right during the settlement in first instance, nor as a public policy ground in appeal;
- the defendant cannot invoke the limitation of the claimant's subjective right, for the first time in appeal or in second appeal if the ruling of the court of first instance is only subject to second appeal, as a ground for the remedy.

If the limitation concerns a (secondary) discretionary right, the failure to exercise the right within the period leads to the extinguishment of the right.

The discretionary rights for which the law or the parties have established a limitation period can be exercised either through the performance of certain unilateral acts (legal or material), or by bringing a legal action.

In the first case (when the discretionary right is exercised through the performance of unilateral legal acts), if the limitation of the discretionary right occurs and its holder performed nonetheless the unilateral act, the latter is null and void.

This invalidity of the unilateral legal act through which the discretionary right was exercised can be invoked either by action or as a defense on the merits.

If the party intends to bring an action for the annulment of the unilateral legal act, within the grounds of the statement of claim, he/she shall invoke the extinguishment of the defendant's discretionary right as a result of limitation.

On the contrary, if such party is sued by the holder of the discretionary right, then he/she has the possibility to invoke the invalidity of the unilateral legal act through which the discretionary right was exercised, as a defense on the merits or within a counter claim.

In case the discretionary right is exercised through the performance of unilateral material acts, if the limitation of the discretionary right occurs and its holder tries to perform the act, the party concerned can oppose it, preventing the performance of the act, such opposition not being abusive.

If the limitation of a discretionary right involves losing a legal action, in case the limitation of the discretionary right occurs and the holder registers nonetheless the statement of claim, this shall be dismissed as inadmissible following the upholding of the inadmissibility plea, the limitation operating as a ground of inadmissibility.

In this case, from the procedural perspective of the invocation, there must be made a distinction between the public policy limitation and the private limitation, which will imprint to the plea of inadmissibility of the statement of claim the same character, depending on the type of the limitation invoked as its base, the above mentioned concerning the limitation of the primary subjective right being correspondingly applicable.

Within the same section I have also analyzed the waiver of the benefit of limitation, stating the conditions required for its operation.

With regard to the **proposals *de lege ferenda,*** without daring to criticize the remarkable work of the new Civil Code, a result of the conjugation of the

efforts of our great professors and reputed scholarly scientists, I estimate that some of the legal provisions in the field of the substantive law limitation, capable of raising different interpretations in doctrine and jurisprudence, could be improved as I shall suggest.

a) Exactly establishing the period for the request for relief from the expiry of the prescription (limitation) period [art. 2522 par. (2) Civ. Code].

According to art. 2522 par. (2) Civ. Code, the relief form expiry cannot be allowed if the party has exercised the right to action before the expiry of a 30 days period from the day he/she was or should have been aware of the cessation of the reasons justifying the non-observance of the prescription period.

As I have shown in the content of the paper, the manner in which the text is written suggests that the 30 days period is not linked to the period for submitting the request for relief of the expiry of the prescription, but to the period for bringing the legal action, in other words, bringing the legal action within the 30 days prescription period is a substantive condition for allowing the relief from the expiry of the prescription. For this reasons, at this moment, I tend to assert that the request for relief from the expiry of the prescription period does not have to respect the 30 days period stipulated for bringing the legal action; it can be formulated until the settlement of the plea concerning the prescription of the substantive right to action, to the extent that the latter has been invoked.

The problem is treated differently in the legal doctrine, some authors embracing essentially the above mentioned solution, others estimating that the request for relief of the prescription must be formulated at the time as with the statement of claim, within the 30 days period from the day that the claimant was or should have been aware of the cessation of the reasons justifying the non-observance of the prescription period.

b) The exclusion from art. 2539 par. (1) Civ. Code of the mention concerning the interruption of the prescription (limitation) period even if the referral is invalid

for the non-observance of the form, or the correlation of this statement with the second paragraph of the article.

According to art. 2539 par. (1) Civ. Code, in the cases stipulated by art. 2537 pt. 2 and 3, the prescription is interrupted even if the referral has been made to a jurisdictional or prosecution body lacking jurisdiction or *even if it is null and void for non-observance of the form*.

I estimate that in case the application is null and void for non-observance of the form, a correlation with paragraph (2) of the same article must be made, the interruptive effect disappearing retroactively as a result of the invalidity of the application, otherwise, the interpretation of the text would lead to the unacceptable conclusion that the prescription (limitation) remain permanently interrupted if the party brings an informal action.

c) The establishment until which the prescription (private limitation) can be invoked, with the clear fixing of a sole limit [art. 2513 Civ. Code].

Thus, according to art. 2513 Civ. Code, the prescription can only be opposed in first instance, through the statement of defence or otherwise, no later than the first hearing to which the parties have been legally cited.

One can notice that the text imposes two limits for the invocation, without indicating the situation in which each limit is applicable, leaving the choice to the defendant's discretion. In this version of the text, the only limit actually imposed is the first hearing.

I estimate that a recast of the text would be appropriate, either with the meaning that the defendant can rely on the private limitation until the first hearing (a preferable wording of the text as it offers the defendant a easier way to notice, in case the statement of claim has been submitted through postal or telegraphic services or by courier or other specialized communication services, whether the subjective right has been exercised within the limitation period, by studying the evidence of the case), or with the meaning that the defendant can invoke the

limitation within the statement of defence or if this not compulsory, no later than the first hearing to which the parties have been legally cited.

d) The reference by art. 2548 par. (2) sentence I Civ. Code not only to art. 2534 par. (1) Civ. Code, but also to the provisions concerning the suspension of the prescription, which should be correspondingly applied.

According to art. 2548 par. (2) Civ. Code, the *force majeure* prevents in all cases, the running of the period and if the period begins to run, it is suspended, the provisions of art. 2534 par. (1) being applicable.

In relation to the interruption of the limitation period, art. 2548 par. (3) Civ. Code has referred to the provisions of the interruption of the prescription as a whole, but it didn't do the same when regulating the suspension, although such limitation is not warranted, all the more that art. 2535 and 2536 Civ. Code should be applicable to the limitation as well.

Moreover, other legal provisions from the code concerning the suspension of the prescription must be applied to the limitation as well. For instance, I estimate that the provisions of art. 1.441 par. (1) Civ. Code according to which the suspension of the prescription to the benefit of one of the joint creditors can be invoked by the other creditors as well, are also applicable in the field of limitation. Likewise, in the relations between the creditor and the joint debtors, according to art. 1.449 par. (1) Civ. Code, the suspension of the prescription towards one of the joint debtors also produces effects towards the other joint debtors, a text that should be applied in the field of limitation as well.

If the intention was only to derogate from art. 2534 par. (2) Civ. Code, such mention could have been explicit.

e) The regulation of the possibility for the concerned party to invoke the public policy limitation until the closing of the debates in the first instance (art. 2550 Civ. Code).

According to art. 2550 par. (1) Civ. Code, the limitation can be invoked by the concerned party under the conditions in art. 2.513. According to par. (2) of the same article, the jurisdictional body has the obligation to invoke and to apply of its own motion the limitation period, irrespective of whether the concerned party raises it or not, unless the limitation concerns a right which the parties can freely dispose of.

Given that the public policy limitation can be invoked by the court of its own motion and it does not have to observe art. 2513 Civ. Code, there is no reason why the concerned party should be limited in its invocation, to the first hearing.

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