

SUMMARY OF THE PH.D. THESIS

TITLE I. CIVIL SANCTIONS ON THE LIBERTIES PROVIDED FOR IN THE NEW CIVIL CODE SUMMARY

Chapter I. Introductory remarks about civil sanctions

1.1. What are the civil sanctions?

Although the notion of civil sanction, which is basically a reference point, compulsory to any social construction, instills the lawyer an image of something ordinary, to a more careful analysis of this institution “*it consists of taking disadvantageous measures against those who have breached the civil legal relations, namely the property rights or the personal – non property rights*”.¹

A possible source of confusion to be annihilated is the difference between the concept of civil sanction and the civil punishment. Thus, if the first is characterized by a predominantly repairing role, the latter focuses on its punitive function. At the same time, we mention that the civil sanction ultimately prejudices the personal assets of the sanctioned person (for example, the termination of an agreement, everything involving this operation), while the civil punishment is directed primarily against the punished subject (for example, unworthiness of inheritance, etc.) having a clear personal nature, and therefore non-transferable, respectively inaccessible.²

1.1.1. Distinctive features of civil sanctions

The illegal sanctionable act derives from the breach of a legal rule governing civil legal relations.³

They may be applied to both the individual and legal entity, as opposed to civil punishments (for example, termination of parental rights, unworthiness, etc.), criminal punishments, etc.

¹ I. Dogaru, N. Popa, D. C. Dănișor, S. Cercel, op.cit., Ed. Ch. Beck, Bucharest, 2008, p. 979.

² See I. Dogaru, N. Popa, D. C. Dănișor, S. Cercel, op. Cit., Ed. Ch. Beck, Bucharest, 2008, p. 980.

³ See D. Chirică, op. Cit. p. 82.

Civil punishments apply regardless of the personal circumstances of the perpetrator of the punishable illegal act, regardless of his / her age or the frequency or repetition of offenses or quasi-offenses.

The source of civil law sanctions consists either in a regulation or an expression of the individuals' will in this regard.

Its application is not subject to an indispensable intervention of the courts or other jurisdictional authority.

The enforcement of the civil sanction may be done voluntarily, without the intervention of the coercive force of the state, the latter hypothesis being specific to other purely repressive law branches.

1.1.2. The difference between civil sanction – legal liability

Therefore, as some doctrine promoters emphasize, it is noticed that the concept of civil sanction is a narrower notion than the civil legal liability notion.

1.1.3. Effects of civil sanctions

By applying the sanction, the disturbed legal situation, prior to the illegal act of the perpetrator in question, is restored.

1.2. The purpose of civil sanctions in general

Through the sanctions, the prejudice caused by breaching a subjective right or legitimate interest is repaired, respectively the legal situation prior to the punishable illegal act is restored.

1.3. Types civil sanctions

1.3.1. Nullity

1. Nullity is a civil sanction; 2. Nullity operates only in the case of legal documents, not in the case of legal deeds; 3. Nullity affects the effects of the legal document; 4. Nullity occurs when there is a discrepancy between the validity requirements (content and form) provided by the law and how a legal document is presented, in our case, a civil one.⁴

A novelty brought by the current civil code in relation to the former regulation is the express legislative definition of amicable nullity. Thus, according to article 1246,

⁴ See C. Herlea, op.cit. , p. 4-5.

paragraph (3), *unless otherwise provided by the law, the nullity of the contract may be established or declared by the agreement of the parties.*

1.3.2. Comparison between nullity and other civil sanctions

1.3.2.1 Comparison between nullity and dissolution

The doctrine defines the dissolution as the civil sanction that consists of retroactive annulment of the synallagmatic contract immediately enforced, in case of culpable failure to fulfill the obligations by one of the parties of the legal document⁵.

1.3.2.2. Comparison between nullity and termination

Termination is the civil sanction that occurs "*in the case of culpable failure to fulfill a synallagmatic contract of successive performance and it consists of the end of the contract effects, respectively only for the future*".

1.3.2.3. Comparison between nullity and revocation

However, lato sensu, the concept of revocation defines the situation when a legal document validly concluded is retracted by a party or by both parties⁶, thus lacking all or part of its strength.

1.3.2.4. Comparison between nullity and caducity

Caducity represents the inefficiency cause consisting of depriving the civil document validly concluded of any effects, due to the occurrence of a future situation beyond the control and independent of the will of the author of the legal document⁷.

1.3.2.5. Comparison between nullity and reduction

Reduction represents the civil sanction applicable to legal documents concluded in violation of interdictions established by law for the protection of persons or to restore the balance of the consideration in a synallagmatic commutative onerous contract⁸.

1.3.2.6. Comparison between nullity and unenforceability

⁵ See for further discussion: C. Stătescu, C. Birsan, *Drept civil. Teoria generală a obligațiilor*, Ed. All, București, 1999, p. 86-91; V. Stoica, *Rezoluțiunea și rezilierea contractelor civile*, Ed. All, București, 1997; L. Pop, *Drept civil. Teoria generală a obligațiilor*.Tratat, Ed. Fundația „Chemarea”, Iasi, 1994, p. 76-85.

⁶ See D. Cosma, *Teoria generală a actului juridic civil*, Ed. Stiintifică, Bucharest, 1969, p. 425

⁷ Ibidem, p.484; D. Cosma, op.cit., p. 437-441

⁸ See G. Boroi, op.cit., p. 226.

Unenforceability is the sanction applicable in the case of disregarding the disclosure requirements to third parties, provided by law for certain legal documents or the lack or overrunning the representation power⁹.

1.4. Applicability of civil penalties to various categories of civil legal documents, civil contracts, unilateral civil documents

1.5. The question of the relation between the inefficiency of a civil legal document and the lack of the document

A previous line between absolute nullity and inexistence, considered by a part of the doctrine as a mere form of the first category mentioned, was expressed in the following terms: if it is necessary to find the error of the null and void document through the decision of the court, the inexistence is characterized by a state of intrinsic inefficiency that does not compel the individuals to go to court.

1.5.1. The legal status of inexistence

As related to the legal status of the nonexistent document, the literature expressed the following guiding ideas: the inefficiency of an inexistent legal document may not be covered by endorsement, ratification or voluntary enforcement, or by prescription, and this inefficiency is independent of any court or legislative statement.¹⁰

CHAPTER II. General considerations about liberalities as unilateral legal acts

2.1. The notion of liberality

The free legal acts are divided into liberalities and disinterested acts. The detached acts involve making profit for the debtor, without reducing the assets of the grantor. Disinterested acts: gratuitous loan, free mandate, free deposit etc.

The novelty of the New Civil Code is the notion of *residual liberality*. The grantor establishes a residual liberality when he stipulates that the beneficiary should be

⁹ See Gh. Beleiu, op. cit., p. 226, I. Deleanu, *Opozabilitatea. Consideratii generale*, in Dreptul nr. 7/2001, p. 87-105

¹⁰ See I. Dogaru, op. Cit, p. 1074.

rewarded with the rest of the donations or legacies, upon the death of the trustee, in the favor of the latter.

2.2. Civil legal documents by which a liberality may be made

The legal documents by which one may make liberalities are the donation and legacy included in the will.

2.2.1. DONATION

The donation is a contract by which one party, called donor, disposes irrevocably of an asset he owns, having the intention to award it in the favor of the other party, called donee.

2.2.1.1. Indirect donations

Indirect donations are the legal documents signed (non-simulated), with the intent to award, (therefore subject to rules provided for liberalities), but performed as a legal act different from the donation agreement.¹¹ *Renunciation to a right, payment of a duty, stipulation in the favor of a third party*

2.2.1.2. Disguised donations

According to article 992 of the New Civil Code, disguised liberalities as a gratuitous contract or made for an intermediary are sanctioned by **relative nullity**.

2.2.1.3. Gifts

The gift is a variety donation contract, which is validly concluded by the agreement of the parties, accompanied by the transfer of the asset. The transfer of the asset means the material delivery of the asset given.

Being conditioned by the delivery of the asset, the manual gift is a real contract.

In the current regulation (article 1011 paragraph (4) New Civil Code), the value of the movable assets that may be subject to manual gift is 25,000 RON, except for the cases provided for by the law.

2.2.2. LEGACY

¹¹ F. DEAK op.cit.

The legacy is the will provision by which the testator provides that upon his death or one or several heirs should acquire free of charge, his entire assets, a part of the assets and certain assets individually established. Types of legacies: *universal legacy, universal title legacy, particular legacy, simple legacy, suspensive term legacy, extinctive term legacy, legacy subject to suspensive condition, legacy subject to resolution condition, duty legacy.*

2.3. May we discuss if there still are other legal documents by which liberalities are made?

Compared to the New Civil Code, which strictly defines legal documents by which liberalities may be made, namely exclusively by donation or legacy included in the will, we may ask if there are other legal acts by which liberalities may be made.

Does matrimonial convention having preciput clause include a liberality in the favor of the surviving spouse?

2.3.1. Preciput clause

The New Civil Code, Book II "About Family" Chapter VI "Spouses' rights and obligations related to assets", article 33, regulates the *preciput clause*.

"The matrimonial convention stipulates that the surviving spouse may take freely, before the heritage division, one or several of the common property, held in joint ownership or co-ownership".¹² The preciput clause may be stipulated in the favor of each spouse or only for one of them.

CHAPTER III. CIVIL SANCTIONS ON THE ABILITY TO GIVE AND RECEIVE LIBERALITIES

3.1. Rules on the capacity of using the liberalities

Next, we mention that, as shown and article 957 of the Civil Code, *a person may inherit only if he / she exists upon the opening of the inheritance.* We also mention that

¹² Art. 333 paragraph 1 of the new Civil Code

the provisions of article 987 paragraph (1) Civil Code provides that: *Any person may give and receive liberalities, observing the rules on capacity.*¹³

3.2. Rules related to the capacity of exercise of the grantor

*Thus, the exercise capacity is the ability of a person to exercise his / her rights and undertake the obligations by concluding legal documents.*¹⁴

3.3. Civil sanction invalidating the liberality by the irregularity of appointing the beneficiary of the liberality

In the absence of such determination, the donation or testament is absolutely null and void as shown in article 989 of the Civil Code: (1) Subject to the absolute nullity, the grantor should determine the beneficiary of the liberality or at least provide the criteria on which such beneficiary may be determined when the liberality enters into force.

3.4. Civil sanction applicable to special cases of incapacity to receive liberalities from a certain grantor

Actually speaking, we mention that article 990 (1) of the current Civil Code relates the following: *The liberties made for doctors, pharmacists or other persons when, directly or indirectly, the grantor was in their medical care for the illness that is the cause of his / her death, shall be annulled.*

3.5. Civil sanction for special incapacity related to legacies

For the first time, the New Civil Code regulates certain special incapacities, applicable to legacies. Thus, according to article 991, the legacies prepared in the favor of the following persons are cancellable:

- a) Notary Public who has authenticated the will, obviously assuming that we are talking about authentic wills;
- b) translator who has participated in the procedure for the authentication of the will;

¹³ See M. Mureșan, I. Urs, *Succesiuni*, Ed. Corfidial Lex, Cluj-Napoca, 2006, p.11.

¹⁴ See op. Cit. I. Dogaru, op. Cit. P. 575.

c) witnesses if the will is concluded in authentic form and in the case of privileged wills.

3.6. Civil sanction for simulating the beneficiary of liberalities in the case of disguised liberties or liberties made for an intermediary

As related to the effects of simulation, we specify the following. According to article 1289 of the current Civil Code, the secret legal document enters into force only for the parties and if the nature of the contract or the agreement between the parties does not indicate otherwise, the hidden contract will enter into force between universal successors or successors with universal title of the parties.¹⁵ Although we have noticed the above-mentioned, we also mention that the secret legal document shall not enter into force for the above-mentioned persons if the content conditions required by law are not fulfilled for the valid conclusion of that document. We notice that, starting from an interpretation per a contrario, in the case of the simulation, the parties concerned are exempt from the formalism of some legal documents, for example in the event that we discuss about the disguised donation.

Returning to the title of our subsection, we mention that, as shown in article 1293 of the Civil Code: *the provisions concerning the simulation are also applied properly to unilateral legal documents for a particular individual, which were simulated by the agreement between the person preparing the document and the addressee.*

where only some clauses of the legal act are masked, for example declaring a lower price). Compared to our specific case, if a liberality is disguised as an onerous contract, the sanction involved in this case, is as provided in article 992 of the current Civil Code, relative nullity. Consequently, the secret document is cancellable within the general prescription period of 3 years.

In the case of simulation concluded by intermediation, the public act is concluded between certain parties, and the secret document¹⁶ shall indicate the real parties.¹⁷

If by any chance, behind these legal simulated documents there is the desire to escape the legal provisions providing interdictions of certain persons, for example the document concluded by a person of age for the benefit of his former legal guardian, the

¹⁵ See I. Dogaru, op. Cit. p.498.

¹⁶ See I. Dogaru, op. Cit. P. 498.

¹⁷ See G. Boroi, op. Cit. p. 295-296.

secret document shall be cancellable. Moreover, as shown in article 992 of the current Civil Code, *the sanction of relative nullity provided in article 988 paragraph (2), articles 990 and 991 shall also apply to liberalities disguised as a onerous contract or made for an intermediary.* To ease the burden of evidence on the interposition of some people in the context of concluding a legal document, the legislator has established a relative presumption according to which the ancestors, descendants and the spouse of the person unable to receive liberalities, as well as the ancestors and descendants of that person's spouse are deemed intermediaries.

CHAPTER IV. Inefficiency sanction of the fideicommissum substitution that violates the rules related to the of incapacity to dispose of and receive unencumbered liberalities

4.1. Considerations on the possibility of the grantor to appoint a person to manage the assets that are the object of liberalities, to assign them to a third party-beneficiary appointed by the grantor

Under the **sanction of relative nullity**, not even after having the full capacity to exercise the person may not have the benefit of liberality in the favor of his / her representative or legal guardian or, before he / she has received from the guardianship court the discharge of his / her duties. The exception is when the representative or, where appropriate, the legal guardian is ascendant of the grantor.

Under the **sanction of absolute nullity**, the grantor may not give a third party the right to appoint the beneficiary of the liberality or to establish its object. However, the distribution of the assets given through legacy to certain persons appointed by the testator may be left at the appreciation of a third party.

4.2. What is fideicommissum substitution and what are the rules governing it?

The term is defined in article 993 of the new Civil Code:

"The fideicommissum substitution is the provision by which a person, called **trustee**, has the duty to manage the asset(s), object of liberality, and transfer them to a third party,

called the **beneficiary**, appointed by the grantor". This provision shall take effect only if it is allowed by the law:

4.3. Which are the residual liberalities?

According to article 1001 of the new Civil Code, our legislation establishes the possibility of residual liberalities in the case the grantor “stipulates that the beneficiary should be given what remains of the donations or bequests made in the favor of the trustee, upon the death of the latter”.

4.4. Civil nullity sanction to be taken in case of violation of the interdiction to dispose gratuitously of the assets that were the subject of a residual liberality

In the case the breaches of the interdictions imposed by the grantor are not caused by the trustee and if, because of some unforeseeable situation not attributable to the beneficiary, occurred after the acceptance of the liberality, the fulfillment of the conditions or tasks affecting the liberality has become extremely difficult or excessively onerous for the beneficiary, he may request for the review of the tasks or conditions.

4.5. The sanction of inexistence of expression of legal will that the law calls “clauses deemed unwritten”

Article 1009 of the New Civil Code establishes the situation of unwritten clauses. In this respect, it is considered unwritten clause that, under the penalty of liberality annulment or the refund of its object, the beneficiary shall not claim the validity of a inalienability clause or seek a review of the conditions or tasks.

At the same time, the testament provision which provides **disinheritance as punishment** for the breach of the obligations mentioned above or for claiming the testament provisions that prejudices the rights of the privileged heirs or that are contrary to the public order or good manners shall be deemed unwritten.

TITLE II. CIVIL SANCTIONS RELATED TO DONATIONS

CHAPTER V. Absolute nullity sanction for the lack of the donation form

5.1. Considerations on the conclusion of donation contracts

The donation is a solemn agreement, unilateral and on a free basis, by which one party, called the donor, intentionally decreases really and irrevocably his / her assets by a right (real or by receivable), increasing the assets of the other party, called the donee, having the same right, without seeking to receive anything in return.¹⁸

The validity conditions of the donation contract

To be validly concluded, the contract of donation should meet the essential requirements for validity, as shown in article 1179 of the current Civil Code.

CHAPTER VI. Causes of ineffectiveness of the donation available after its conclusion

6.1. Revocation of the donation may be made in two situations:

a. 6.2. The revocation for the failure to fulfill the duty.

b. 6.3. Revocation for ingratitude

CHAPTER VII. Sanctions for future spouses for the purpose of marriage and donations between spouses

7.1. Caducity of the donations

Article 1030 of the present Civil Code provides the followings: the donations made to the future spouses or to one of them, if the marriage is concluded, do not take effect if the marriage is not concluded.

7.3. Nullity of the donation between the spouses

Article 1032

The nullity of the donation between spouses. Nullity of marriage gets the relative nullity of the donation made to the spouse in bad faith.

7.4. Nullity of the simulated donations.

¹⁸ F. Deak, *Tratat de drept civil. Contracte speciale*, Ed. Universul Juridic, Bucharest, 2007, p.178-179.

Article 1033

Simulated donations

(1) Any simulation in which the donation represents the secret contract in order to avoid the revocation between the spouses is null and void.

(2) Any relative of the donee to whose inheritance he would be entitled upon the donation, which has not resulted from the marriage with the donor, is presumed to be intermediary.

TITLE III. SANCTIONS AS RELATED TO TESTAMENTS

CHAPTER VIII. Civil sanctions in various forms of testaments

8.1. Preliminary considerations on the testament

The new Civil Code, article 1034 defines the testament as the *unilateral, personal and revocable document, by which a person, called the testator, disposes in one of the forms required by law for the time when he is not alive.*

Section I

The notion of testament. Validity conditions

8.1.1. The notion, of legal features and content of the testament

8.1.1.1. Preliminary definitions

The legal definition of the testament. In the Romanian law, the testament was defined by the Civil Code, in article 802, (by assimilating article 895 of the Fr. Civil Code) as being a "revocable act by which the testator disposes of the entire or part of his possessions for the time of when he has passed away".

8.1.1.2. Legal features of the testament

a) The testament is a *legal document*, for the validity of the legal act in general, and for the specific liberalities¹⁹.

b) The will is a *legal unilateral document*.

c) The testament is *essentially a personal document*. Thus if a person does not have the capacity, he / she may not sign a testament through or with the approval of others.

d) *The testament is a solemn legal document*

e) The testament is a *legal document for the case of death*

f) The testament is a *legal document essentially revocable during the testator's lifetime*.

8.1.3. Conclusions on the concept of testament

The doctrine mentions two theories about the legal nature of the testament:

- traditionalist theory of the testament – legal document²⁰, according to which in the case of the legacies, the legal document is the testament – considered as *negotium iuris*, the legacies being only the causes of the testament, and

- testament theory - legal form, which prevails in the literature, according to which, "the testament is only a legal pattern, a form that the documents of last will have to take, such as legacy or testamentary fulfillment..." and "as related to the material unit of the testament, a plurality of special legal acts, each subject to its own legal status, as related to their basis, are included from the intellectual point of view."²¹

8.1.4. Interpretation of the testament content

Sometimes, the testament provisions may be obscure or interpretable, especially where its preparation has been made without legal advice, and thus, the real intention of the testator or the meaning of terms used may be

¹⁹Fr.Deak, *op.dt.I*, p. 156.

²⁰I. Albu, *Considerații „de lege lata”fi „de legeferenda”privind calificarea testamentului*, in RRD nr. 9,1975, p. 13-15.

²¹M.Eliescu, *op.dt.I*, p. 199-205; C.Stătescu, *op.dt.*, p. 156-158; St.Cârpenaru, *op.dt.I*, p. 427-428; D.Macovei, *op.dt.*, p.69-70; D.Chirică, *op.dt.II*, p. 5.

questioned, since, except for article 908²², the Romanian Civil Code does not make reference to the rules to be followed in the interpretation of the testamentary clauses, it has been accepted that in this field, the rules and provisions of contracts, respectively the provisions of articles 977 – 985 of the Civil Code are properly applicable.²³

Section II

8.1. 5. Validity conditions of the testament

8.1.5.1. Background conditions

As they are legal documents, to be valid, the testamentary provisions shall meet the basic conditions of the legal document, in general, the provisions of article 948 Civil Code: capacity to sign the document in question, valid consent, real cause, legal and moral, determined or determinable and lawful object

Formal requirements. Form should be written.

Written form. The requirement of written form is mandatory for all wills. The Romanian legislation does not recognize the nuncupative will⁷, even the testator would be in extraordinary conditions²⁴.

CHAPTER II

TYPES OF TESTAMENT

SPECIAL FORM CONDITIONS

64. Types of testament. Enumeration.

Besides the two general conditions mentioned above (the form of separate document and the written form) the law provides several other rules that the types of testaments should comply with (and which form the basis of

²² “When the legacy given is an undetermined asset, the person in charge with the legacy does not have the obligation to give the best quality asset, but at the same time, he may not offer the worst quality asset”. Thus, average quality assets are mentioned.

²³ Fr.Deak, *op.dt.I*, p. 160.

²⁴ See *testamentul cetățeanului român făcut în străinătate, infra*, nr. 91, p. 73-74.

their classification) that are made available for the testator and of which he may choose.

There are three categories of testaments:

- Ordinary or usual testaments: concluded under normal conditions, namely holograph testament, authentic testament and secret or mystical testament;

- Privileged or extraordinary testaments, concluded only in exceptional circumstances, such as the testament of soldiers; the testament made in the period of infectious diseases, and the marine testament;

- Simplified forms of testament, specifically provided for and allowed by law, such as those on certain deposits of money or of Romanian citizens who are abroad.

From a legal point of view, the value of the testaments is identical, so the principle of equivalence of testament forms that govern it is mentioned. For this purpose, the symmetry of legal forms is not required for the revocation or amendment of the testamentary dispositions²⁵. Their probative value is different, but once proving the existence of the testament in the form required by the law, their legal effect, is the same²⁶.

By derogation, the principle of equivalent testament forms, under the sanction of absolute nullity, the foundation may be established only by authentic testament (article 16 GEO no. 26/2000 on associations and foundations)²⁷.

Section IV

Sanctioning testament clauses

§1. Disinheritance

Section VI

²⁵Fr.Deak, *op.dt.I*, p. 182.

²⁶Al.Bacaci, Gh.Comănița, *op.dt.*, p. 73.

²⁷Vz și R. Dimitriu, *Discuții în legătură cu Ordonanța Guvernului nr. 26/2000 cu privire la asociații și fundații*, în *Dreptul* nr. 5, 2000, p. 7.

§2. Testament fulfillment

Regarded superficially, it might seem that the issue of testamentary fulfillment would not belong to this paper. However, we appreciate its need, because the subject of testamentary fulfillment is established through a testament that as any unilateral act may be subject to a inefficiency cause that is in fact the general theme of our paper.

CHAPTER IV.

THE LIMITS OF THE LAW TO DISPOSE THROUGH MORTIS CAUSE LEGAL DOCUMENTS

133. *Preliminary remarks.* The law establishes the principle of testamentary freedom²⁸ which gives every person the right to dispose of his / her assets according to their will for the case of death, by derogation from the suppletive legal succession rules (article 1034 new Civil Code.). This power is not discretionary, as it has some limitations. On the other hand, the heir is free to accept or repudiate the inheritance he deserves²⁹.

The limitations on the principle of contract freedom concerns:

- prohibition of agreements on future successions, unopened the law sanctioning the contracts (due to their irrevocable feature) or unilateral documents (except for the testaments) concerning the rights of future succession, unopened. The right of option of the heir may be used under the sanction of absolute nullity only after the death of the testator, which is the moment when their rights are real.

- the freedom to dispose of the property concerns the transfer of rights and only the legal documents relating to the death of the testator, as he may not determine the destiny of the assets after this moment, on the occasion of the death of his own heirs, thus the fideicommissum substitutions, which would establish a succession order in case of the death of the grantor's heirs, being prohibited.

- the most important limitation of the right to dispose by testament is the establishment of the forced heirship in the favor of legal privileged heirs. In the presence

²⁸ See and *supra*, nr. 36, p. 32.

²⁹ As related to the succession law, see *injra*, nr. 199 and the following, p. 218 and the following

of these heirs, the legacies will take effect only within the limitation of the available quotas and addresses both the free alienations between the living (donations) and the mortis causa ones (legacies).

8.4. Sanctions related to various forms of testaments

8.4.1. When is the holograph testament sanctioned by absolute nullity?

In the New Civil Code, article 1041, the legislator sets the absolute nullity sanction of the holograph testament not entirely written, dated and signed by the testator.

8.5. When the authentic testament or privileged testaments are null and void

8.5.1. Authentic testament

According to the new Civil Code article 1043, the testament is deemed authentic if it has been authenticated by a Notary Public or other person vested with public authority by the state, according to the law. Upon the authentication, the testator may be assisted by one or two witnesses

Probative force of the authentic testament.

The authentic testament has the same probative force as any notarial act. Thus, as for the mentions made by the Notary based on his own findings, according to his specific duties (the place of the testament preparation, date, identity of the testator, his declared will etc.) the authentic testament is deemed real until proven false^{30[9]}.

5.8.2. Privileged testaments

Article 1047 paragraph (1) of the New Civil Code regulates specific situations for the preparation of a valid testament:

a) in front of a competent official of the local civil authority in case of epidemics, disasters, wars or other such exceptional circumstances;

b) in front of the commander of a ship or the person who replaces him, if the testator is on board a ship under the Romanian flag, during a sea or river travel. The testament drawn up on a plane is subject to the same conditions;

³⁰ Vidi, Fr. Deak, *Op. cit.*, p. 196

c) in front of the commander of a military unit or the person replacing him, if the testator is a soldier or, without having this quality, is employed or providing services for the armed forces of Romania and is not able to contact a Notary Public;

d) in front of the Director, the chief doctor of the health institution or chief doctor or the department, in their absence, in front of the doctor on call, while the grantor is admitted to a health institution in which the Notary Public does not have access.

Paragraph (2) provides that in all cases under paragraph (1) it is imperative that the testator should be drawn up in the presence of two witnesses.

Under the **sanction of absolute nullity**, the privileged testament is signed by the testator, the agent preparing the document and two witnesses. If the testator or one of the witnesses cannot sign, the cause that prevented him from signing shall be mentioned.

8.6. The caducity sanction of the privileged testaments

A feature of the privileged testaments is that *they are valid only for a certain period* (15 days) as of the date when the cause that has justified their preparation has ceased.

8.7. Conversion of a null and void testament

Article 1050 of the New Civil Code provides that *a null and void testament because of a procedural error enters into force if it fulfills the conditions provided by the law for other testamentary form.*

CHAPTER IX. Revocation of the testament

9.1. Express voluntary revocation

A testament may not be revoked expressly, entirely or partially, except for the case when it is revoked by an authentic notarial document or by a later testament (article 1051 New Civil Code).

The testament that revokes a previous testament may be prepared differently from the revoked testament.

The express revocation of the testament made by an authentic notarial act or by an authentic testament shall be immediately registered by the Notary in the National Notarial Register.

9.2. Tacit voluntary revocation

The testator may revoke the holograph testament by destroying, tearing or cancelling it. The cancellation of a provision of the holograph testament made by the testator involves the revocation of that provision (article 1052 New Civil Code). The changes made by cancellation shall be signed by the testator.

The destruction, tear or cancellation of the holograph testament, known by the testator, also involves revocation, provided that he has the possibility to sign it again.

The further testament revokes the previous one only if it contains provisions contrary to or inconsistent with it. The effects of revocation shall not be removed in case of caducity or revocation of the testament.

9.3. Withdrawal of a sanction

The revoking provision may be expressly withdrawn through an authentic notarial document or through testament (article 1053 New Civil Code).

The withdrawal of a revoking provision removes the effects of revocation, unless the testator has expressed a contrary intention or if the intention of the testator arises from specific circumstances. The provisions of express voluntary revocation remain applicable.

The withdrawal of a revoking provision made through an authentic notarial document or authentic testament, according to paragraph 3 of article 1053 of the New Civil Code, shall be registered immediately in the National Notarial Register by the Notary Public.

CHAPTER X. Civil sanctions related to legacy in general

10.1. Annulment of the testament which bequeaths property of others

10.2. Reduction of legacies that exceed the net assets of the heritage

CHAPTER XI. Inefficiency of legacies

11.1. Voluntary revocation of the legacy

11.2. Court revocation of the legacy

11.3. Caducity of the legacy

11.4. Who benefits from the inefficiency of the encumbered legacy

The answer to this question is given by the legislator in the provision of article 1072 of the New Civil Code. Thus, it is provided that "legacy inefficiency due to nullity, revocation, caducity or dissolution for the failure to fulfill the suspensive condition or for the fulfillment of the resolution condition is in the advantage of the heirs whose inheritance rights would have been reduced or, if necessary, removed by the existence of legacy or that had the obligation to fulfill the legacy. CHAPTER XII. Disinheritance.

12.1. Removal from the lawful inheritance – sanction provided by testamentary provision

The notion of disinheritance is regulated by article 1074 of the New Civil Code.

In the light of these regulations, *disinheritance is the testament provision by which the testator removes from his inheritance, entirely or partially, on one or several of his legal heirs.*

12.2. Nullity or annulment of the disinheritance provisions

The testament provision by which the legal heirs have been disinherited is subject to the nullity causes: absolute or relative, provided by law.

CONCLUSIONS

Although the notion of civil sanction, which is basically a reference point, compulsory to any social construction, instills the lawyer an image of something ordinary, to a more careful analysis of this legal institution, we notice that due to its importance, features and concrete practical application, it needs to be studied profoundly.