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The Extinctive prescription

- Doctorate thesis –
summary

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The extinctive prescription, also called liberatory, represents an institution of an overwhelming importance for all the branches of law that is necessary to any judicial system, representing an efficient modality of ensuring stability and security within the legal relationships; it is meant to ensure that uncertainties are done away with in the civil circuit.

The present work aims at achieving a minute analysis of the institution along its six chapters which are presented as follows:

Chapter I, entitled “**The notion of extinctive prescription**”, comprises 3 sections as follows:

Section I, “*General and historical notions*” contains reference regarding the origin, fundament and the role of the extinctive prescription, its definition and terminology.

The institution of extinctive prescription is quite widespread today being practically present in all national legislations, penetrating into the domain of international judicial relationships, on the basis of treaties, international agreements or conventions. But at the same time, the institution of prescription is very old, its roots going back to the Roman law that established it, alongside with acquisitive prescription, among the most efficient judicial means in ensuring stability and consolidating the judicial relationships resulting from situations which actually have been stabilized in a certain time interval, considered sufficiently long. From the Roman law, the prescription, under its two forms, acquisitive and extinctive, passed to the mediaeval law, reaching down to the modern law, being regulated for the first time in a unitary manner, by the Napoleonic Code of 1804. Extinctive prescription can also be found in our old law, but it has been regulated within the Civil Code of 1865, according to the French model, together with the acquisitive prescription. However, at present, the heart of the matter is no longer to be found in the Civil Code, but in Decree

D167/1958 regarding the extinctive prescription which constitutes the common right of the prescription of the material right to action, according to the terminology employed by the bill in question.

The institution of extinctive prescription does not benefit of a legal definition, irrespective of the fact that we consider the basic normative locale (Decree no 167 of April 10, 1958 regarding the extinctive prescription) or other bills possessing a special character which make reference to the extinctive prescription as well.

As a starting point in enunciating a definition for the extinctive prescription we have departed from the provisions of the first article of Decree no 167/1958 regarding the extinctive prescription which lays out that: “*the right to action, with reference to a patrimony object, ceases through prescription, if it has not been exercised within the time limit established by law*”.

We notice that article 1 of Decree no 167/1958 determines only the elements which establish the essence of the notion of extinctive prescription, that is: the right of action, the passivity of the holder of the right within the established time limit and the extinctive effect.

Moreover, the New Civil Code (Act no 287/2009), which regulates the institution of extinctive prescription in Book VI – “On the extinctive prescription, lapse, and calculation of time limit”, does not define *in terminis* the extinctive prescription, but expressly regulates, under Article 2500, the object, and implicitly, the effect of it, similarly to Decree no 167/1958 (art. 1, par.1).

The extinctive prescription presents itself as being that manner of removing the civil liability consisting in the termination of the material right to action unexercised within the time limit established by law, or by the parties, depending on the circumstances.

The fundament of the extinctive prescription is based, essentially, on the idea that it constitutes an objective mechanism, a technical means of the law to become compatible to the facts, that is a means of consolidating the factual

situations extended in time by means of transforming them into judicial situations in accordance to the objective law.

The justification of the extinctive prescription results from the functions which this very judicial institution is meant to fulfil. Thus, out of the role it detains in ensuring the stability and security of the judicial relationships there results the first function the extinctive prescription fulfils, that is the stimulating function (the educative, preventive, mobilizing one); at the same time, out of the passive attitude or negligence of the legitimate holder of the right there results the sanctioning function of this institution, while a final function fulfilled by the extinctive prescription is the function of consolidating the legal relationships and doing away with the difficulties of evidence administration.

Section II, “The judiciary nature and delimitation of the extinctive prescription”, examines minutely and solves the controversial issues of the judiciary nature of the extinctive prescription as well as that of the delimitation of this institution from other civil law institutions, that is from acquisitive prescription and loss of right.

The first problem consists in determining the belonging of the judicial institution of the extinctive prescription to the substantial civil law or to the civil processual one, and then, the second issue is consecutively, that of knowing what judicial qualification should the right to act be given within the respective legal branch (civil or civil process one).

The New Civil Code, in article 2500 and article 2506 approaches the issues of the judicial nature of the extinctive prescription from the standpoint that, under that aspect, the extinctive prescription does not extinguish the primary subjective right, but affects only the secondary subjective right, that is the right to action, so consequently it can be said that the extinctive prescription is only a means or a legal cause of doing away with the civil liability (*lato sensu*), and not a way of extinguishing the civil subjective right. Thus, the prescription is and will remain an institution of substantial, material law and not one of processual law.

As far as the delimitation of the extinctive prescriptions from other civil law institutions is concerned, we took into consideration the highlighting of both the similarities and the differences that exist between the institution of the extinctive prescription and the acquisitive prescription (*usucapio*) on the one hand, and between prescription and elapse on the other hand.

Within *section III, “The correlation of the material right to action with the subjective civil right and civil action”* we have aimed at underlining the fact that, by means of prescription the right to action is extinguished only in a material sense, and that means that the holder of the subjective unexercised right within the time limit established by law will no longer benefit from the support of the coercion power of the state in order to force the debtor to execute his or her correlative obligation, but the subjective right itself is not extinguished, as that enjoys legal protection.

Chapter II, entitled “The regulation of the extinctive prescription” comprises 3 sections as follows:

Section I, “The extinctive prescription within civil law”. Within this section we took into consideration the present day legislative framework of this institution, the correlation of Decree no 167/1958 with the provisions of the Civil Code with regard to the extinctive prescription as well as with other bills, and, at the same time, the law applicable to the extinctive prescription.

Thus, within the civil law, the juridical norms which are consecrated to the extinctive prescription are to be found in diverse sources (The Civil Code, The New Civil Code, The Family Code, The Commercial Code, The Customs Code, Act no 105/1992 regarding the regulation of private international law relationships, Act no 7/1996 regarding the land register and the real estate advertisement, Act no 31/1990 regarding the trading companies, Act 11/1991 regarding rebuting unfair competition, etc.), common law being ensured by the provisions of Decree no 167/1958 regarding the extinctive prescription, that representing “the general law”, its provisions being put into force whenever the

special laws do not make provisions otherwise. Consequently we find ourselves in a perimeter where the principle of interpretation “*the special law derogates from the general law*”, in the sense that, in case a special time limit for prescription is provided for initiating a certain action, then that is the time limit to be applied, and not the one provisioned by the general character regulation.

In what concerns *the imperative or dispositive nature of the norms which regulate the extinctive prescription*, the solution according to which the norms regulating the prescription are imperative has been constantly admitted both by the specialist literature and by jurisprudence. In arguing that solution, it has been demonstrated that the extinctive prescription is a public order institution, and the interest safeguarded by the juridical norms in that respective matter, that is doing away with the incertitude in the civil juridical relationships and ensuring their stability, is a general (common) interest. The common nature of the interest protected through that institution results from the functions of the extinctive prescription: the educative (mobilizing) function, the sanctioning function, and the function of consolidating the legal relationships and doing away with the difficulties in administering the proofs.

As a result of that conception, Decree no 167/1958 also consacrated two important juridical consequences imposed by the imperative character of the norms regulating the extinctive prescription:

- 1) the inadmissibility of derogation, through convention, from the norms of extinctive prescription (Article 1, final paragraph: “Any clause which is divergent from the legal regulation of the prescription is inept”).
- 2) the obligativity of applying the norms regarding the extinctive prescription, *ex officio*, by the jurisdiction representative (Article 18: “The court and the arbitral body are obliged by virtue of their office and position to inquire whether the right to action or repurchase agreement has been prescribed”).

Notice should be made that the latter solution runs contrary to the one consecrated by Article 1841 of the Civil Code: “In civil matters, the judges cannot apply the prescription if the interested party does not refer to that means”.

We consider that latter conception regarding the extinctive prescription to be outdated, inadequate to the private character of the civil relationships; consequently the solution that comes to the fore to be adopted, according to the principle of availability, applicable within the civil law, in general, is that of returning to the system of the Civil Code, that is: the prescription is to be applied in case the interested party (usually the defendant) appeals to it.

By consequence, within the system of the New Civil Code, the extinctive prescription, although it remains an institution of general interest, by the nature of its meaning and the functions it fulfils, it still is and remains an institution of private law so that the benefit of the prescription is reserved, in principle, solely to the party that is directly interested in it.

Consequently, although it is admitted, with a principle value, that the executive prescription is regulated by law (Article 2515 paragraph 1) the parties which enjoy full capacity of exercise, may ped down conventions with regard to the prescription (Article 2514 paragraphs 3 and 4).

Moreover, if in what concerns the remission of the prescription which has not yet started to function, that is inept, but on the other hand, such a remission is valid if it has as an object either the beneficiary of the time lapse or, in the case of an initiated prescription but which has not yet been fulfilled, the benefit of a fulfilled prescription (Article 2507).

In what concerns the appeal to and the application of the extinctive prescription in agreement to Article 1841 of the old code “the prescription may be opposed only by the party to whose benefit it follows” (Article 2512 paragraph 1), so that the jurisdiction body may not apply the prescription *ex officio*” (Article 2512 paragraph 1) irrespective whether the defendant is a simple private

person, or, according to circumstances, the state, or an administrative territorial unit.

In agreement to the dispositive character of the norms regarding the prescription, The New Civil Code, under article 2515 admits the possibility of wrapping up a convention (a pact) with reference to the prescription, on condition certain limits or conditions are observed.

On the *correlation of Decree no 167/1958 with the provisions of the Civil Code with regard to the extinctive prescription*, it can be said that before the adoption of Decree no 167/1958, the provisions regarding the prescription were grouped within the Romanian Civil Code under Book III, Title XX – “On prescription”. That regulating system within the Civil code of French inspiration, presented a major shortcoming, namely the grouping of the norms regarding the extinctive prescription alongside with the ones referring to the acquisitive prescription. That is the reason why it was necessary to adopt a bill that was proper to the extinctive prescription in order to delimitate clearly the two judicial institutions. Thus the provisions of the Civil Code constitute a source of civil law for the extinctive prescription only to the extent to which some of these have not been modified or abolished through Decree 167/1958.

With reference to the correlation of Decree no 167/1958 with the provisions of The Family Code and other bills, we show that both in The Family Code and in other bills as well, several special regulations regarding the extinctive prescription are to be found. In The Family Code, special provisions can be found, for example, under Article 21, Article 52, Article 55, Article 60, while in the juridical practice countless decisions based on these texts in The Family Code are to be found.

In what concerns *the law applicable to extinctive prescription*, we highlight the fact that in our law, the extinctive prescription is a matter of substance, not of procedure, so that the act enforcing the prescription is the act governing the background of the law and not *lex fori*. That solution provisioned

in fact by article 147 of Act 105/1992 regarding the private international legal relationships (“The extinctive prescription of the right to action is subject to the law that governs the very subjective right); it is also maintained by the provisions of article 2633 of the New Civil Code (NCC). Consequently according to the nature of the primary subjective right, the act applicable to the prescription may be according to circumstances, *lex personalis*, *lex contractus*, *lex loci delicti commissi*, *lex loci laesionis*, *lex rei sitae*, etc.)

Finally, we specify that in this matter, the enforcing law has to be unique, in the sense that it has to apply both to the prescription of the right to sentencing action and to the prescription of the right to executory action as well.

Section II, “The extinctive prescription in the civil processual law” – within this section we have debated the issue of the notion, regulation and effect of the extinctive prescription as well as the issue of the juridical nature of the prescription of the right to claim repo.

We should remind that the extinctive or liberating prescription is a means of extinguishing the material right to action due to failing to exercise it within a time limit established by law, a case in which the action will be dismissed as being prescribed, without entering the elements of the claim presented to the court in order to establish whether it is rightful or not. If the claim is sustained substantially, and the plaintiff obtains an executory title with the aim to attain his or her acknowledged or sanctioned right by a decree, he or she has to, still under sanction of the prescription, to request the repo within another time limit established by law. The same considerations which do not allow the holder of the substantial subjective right to exercise his or her right to action, except within the time limit established by law, will also be applicable in case that after being granted the executory title, he or she does not manifest the necessary diligence to bring it to force.

Neither Decree no 167/1958, nor the Civil Procedure Code define *in terminis*, the prescription of the right to claim repo as a juridical notion. The

general location of the regulation is to be found in Book V of the Civil Procedure Code - “On the repo”, provisions grouped together by the legislator along six chapters. In what concerns the prescription of the right to claim repo, the legal localization is received in Book V, Chapter I – “General provisions”, Section VI – “The Prescription of the right to claim repo”, articles 405-405³ of the Civil Procedure Code.

In what concerns the effect of the prescription of the right to claim repo notice can be made of the provisions of Article 405 paragraph 3 of the Civil Procedure Code which state that: “by reaching the time limit for prescription, any executory title loses its executory power”. In contrast to the older regulation which made provisions that the decision lost its power as an already tried issue, if it had not been executed within the prescription term, the present text states its enforceable power. The nuance is extremely important since, if under the force of the previous regulation a new decree had to be obtained, in case the material right to action had not been prescribed, at present, it would be just sufficient to initiate again the procedure for constituting a new executory title, as the decision, which constitutes an authentic written document as well, maintains its validity.

According to Article 405 paragraph 1 of the Civil Procedure Code, “the right the claim repo is prescribed within 3 years unless the law makes provisions otherwise. In case of the issued titles in the matters of real estate, the term for prescription is of 10 years”. In the future Civil Procedure Code the prescription time limit for the repo in matters of real rights is established at 5 years.

The term of prescription of 10 years targets only that part of the title which represents the solution given upon the real estate right. Thus, if by incidental or extrinsic means, the exploitation of claim rights was aimed at, as far as these are concerned, the title can be executed within the general time limit of prescription of 3 years, the solution is the same with respect to law expenses, and their exploitation can be made within a time limit of 3 years.

In *section III*, that is *the extinctive prescriptiã in other law branches*, we have proceeded to a brief introduction of the different provisions which regulate the institution of prescription in other branches of law: commercial law, international commercial law, fiscal law, fiscal processual law, contraventional law and at the same time penal (criminal) law.

Within the commercial law there are numerous special norms referring to the extinctive prescription comprised by different bills from among which we could mention: Act no 31/1990 regarding the trading companies, Act no 85/2006 regarding the procedure of insolvency, Act no 365/2002 regarding electronic trade, etc.

In commerce matters, the extinctive prescription consists in the loss of right by the creditor of obtaining a decree on the basis of which the repo could be enforced regarding the obligations, pursuant to failure to exercise action initiation within the time limit provisioned by law. It should be underlined the fact that in commerce matters the institution of prescription presents several peculiar aspects:

First of all, the main characteristic of the time limits provisioned by the Commercial Code (Articles 947, 949, 956 Commercial Code) consists in the fact that these are shorter than the time limits provisioned by the Civil Code or even by Decree no 167/1958 due to the celerity of the commercial operations;

Secondly, the provisions referring to the extinctive prescription stipulated by the Commercial Code are also applied to the judicial documents which present a unilateral or mixed trade character. Thus, according to Article 945 Commercial Code: “the actions which derive from documents which are commercial, even for only one of the parties, will be prescribed for all contracting parties, according to the provisions of the commercial law”;

Thirdly, the Commercial Code contains special regulations regarding the beginning of the course of the prescription for certain commercial operations (Articles 942, 952 and 953 Commercial Code);

All aspects of the extinctive prescription should be revised for “*lex ferenda*” in what concerns commercial issues in order to focus expressly on: the domain of enforcement, the time limits, the prescription of the right to action in a material sense, the prescription of the right to action in a processual sense, the discontinuation and interruption of the course of a limitation.

Within the international commercial relationships which are mainly concerning patrimony, the extinctive prescription is an indispensable judicial institution, being unanimously acknowledged and regulated not solely by internal norms, but by international norms as well of a material or conflictual character. The extinctive prescription may be made subject, according to the reference made by the conflictual norm that can be applied to the case and determined according to Article 147 of Act 105/1992 either to the Romanian law (that is to the Civil law), or to a foreign law system, which will be enforced, in both cases, as a *lex causae*.

We should specify that, when the case is subject to an international convention, that will be enforced with priority to any internal law system. In our law system, such a convention is part of the internal law (Article 11 paragraph 2 of the Constitution) and will possess all the characteristics of a special law (or, *specialia generalibus derogant*).

In contrast to the internal legal relationships (civil and commercial), where the provisions of Decree 167/1958 are enforced with the greatest strictness, within the international commercial relationships the extinctive prescription is governed by the principle of availability; on the basis of that principle the parties may make the extinctive prescription in an indirect manner, that is by reference to a foreign law or to the principles of equity, subject to a judicial system that is different from the one provisioned by Decree no 167/1958.

The extinctive prescription in matter of fiscal law represents the extinction of the subjective fiscal law, that is the fiscal debts of any nature, due to failure of

its exploitation within the time limit stipulated by the law. The place of regulation is to be found in the Code for fiscal procedure which debates the prescription of the right to establish fiscal obligations and the prescription of the right to claim repo under two distinct chapters.

A peculiarity of the extinctive prescription in this domain of the law which demands highlighting is that although the general time limit for prescription is of 3 years, that time limit in fiscal matters is of 5 years, with the exception of the cases in which it is provisioned otherwise (the law offers a different provision for example in case of fiscal fraud, or tax evasion, in which case the term is of 10 years).

Besides the prescription of material right, the fiscal legislation also regulates the prescription for processual right, that is the prescription of the right to claim repo of the executory titles issued for the due fiscal debts not paid of one's own free will.

Thus the right of the state to repo the fiscal promissory notes having as a patrimony object the sums owed to the state budget extinguishes by prescription if it was not enforced within the time limit established by law. Fulfillment of the time limit for the prescription of the fiscal obligation leads to the extinguishing of the right of the state to pursue the collecting of its budgetary income.

The location of the regulation of the extinctive prescription in the fiscal procedural law is to be found in the provisions of the Code for Fiscal Procedure, Articles 131-135.

The extinctive prescription in matters of contravention, that is the prescription of the execution of the contraventional sanctions, represents the cause which eliminates the contraventional liability as a consequence of failure to sanction the offender within the time limit established by law.

The location of the regulation for contraventions is to be found in G.O [Government Ordinance] no 2/2001 regarding the judicial regimen of the contraventions, approved by Act 180/2002.

As a state of fact leading to juridical consequences, the extinctive prescription is present in the domain of penal law as well, as a cause which eliminates the incidence of the penal law ceasing the conflictual penal relationship (of penal liability) if that had not been completely solutioned within a certain time interval, either by bringing the party to account and sanctioning the transgressor through a final penal decree, or by complete execution of the enforced punishment. We specify the fact that the penal prescription is regulated by Chapter II of Title VII of the general part of the Penal Code (Articles 121 – 130) and it presents itself under two forms: prescription of the penal liability, and prescription of serving the sentence.

Chapter III, entitled “*The domain of extinctive prescription*”, comprises in its turn six sections, as follows:

Section I, “*The notion and determination of the extinctive prescription*” establishes the domain in which the extinctive prescription is in force, that is the sphere of the subjective rights whose rights to action fall under the incidence of the norms regulating this institution.

Section II, “*The domain of extinctive prescription related to the right to claim*” sets out the fact that, in principle, the rights to claim, that is those subjective patrimony rights by virtue of which the active subject, named creditor, may claim the passive subject, named debtor, to give, do or do not do something, are subject to extinctive prescription. This fact results from the provisions of Article 1 paragraph 1 of the Decree no 167/1958 corroborated with the provisions of Article 22 of the same decree, as well as from the provisions contained in other bills. A different solution is justified since the extinctive prescription ensures the stability and certitude that are necessary for the civil legal relationships, since nobody can be bound legally unlimitedly. Thus, although the holder of the subjective right loses, by way of the effect of the extinctive prescription, the possibility to obtain, by coercion, the execution of the correlative obligation, he or she may still benefit of the prestation of the debtor in

case that executes it voluntarily. On the other hand, according to Article 20, paragraph 1 of Decree no 167/1958: the debtor who has executed the obligation after the right to action of the creditor has been prescribed, does not have the right to ask for the prestation to be returned, even if at the time of execution he did not know that the time limit for the prescription was reached.

The rights to claim are unlimited, and that causes the applications in this domain to be the most numerous, due to the principle of the contractual freedom which allows for the law subjects a free road to establish diverse civil legal relationships. As an example, only a few of the applications of the principle of prescriptibility of the personal actions which accompany (protect) the right to claim are mentioned: oblique action (Article 974 of Civil Code), reverse action (Article 975 of Civil Code), request of execution of a bill of sale pre-contract, claim of trover in case of unjustified enrichment, etc.

Section III, “The extinctive prescription in the domain of real rights” approaches the rule of imprescriptibility of this category of rights, establishing at the same time the classifications known to the real rights and the modality in which that institution bears upon these.

Thus, with regard to the main real rights, we bare in mind that according to the provisions of article 21 of Decree 167/1958, the provisions of that decree do not apply to the right to action regarding the right to property, life interest, use, habitation, servitude, and superficies.

However, the provisions of Article 21 do not lead to the conclusion that the extinctive prescription would not apply to the rights mentioned above. It is only that to these rights, the provisions referring to the prescription comprised by Decree no 167/1958 do not constitute an objection, but the provisions of the Civil Code referring to this institution do.

Moreover, within the present section we have presented the manner in which the prescription operates upon the extrinsic real rights (the pawn, mortgage, the special privileges, and to a certain extent, the right to retention), the regimen of the prescriptibility of actions through which the protection of these is ensured (the mortgaging action, the claiming action of the pledging

oblijee), in principle being subordinated to the prescriptibility or non-prescriptibility of the main rights to claim).

Section IV, “The domain of extinctive prescription within the intellectual rights”, treats the issues of the imprescriptibility of the right to action with regard to the intellectual rights, those being the rights resulting out of intellectual activities carried out in the domain of industry, science, literature or artistry, namely: works of art, science, and literature, artistic performance, television or radio broadcast shows, and programs, inventions in all human activity domains, scientific discoveries, drawings, or industrial models, etc.

Section V, “The domain of extinctive prescription within the framework of personality rights” consacrates the principle of imprescriptibility of the right to action regarding the personality rights, mentioning that those are part of the great category of non-patrimonial personal rights, referring mainly to the protection of the physical and psychic characteristics of the human being, to its personality or individuality.

Section VI, “Special problems regarding the domain of extinctive prescription” Although the general rule, as it could be noticed in the preceding sections, is that of prescriptibility of the real rights, and of the right to claim and imprescriptibility of the non-patrimonial personal rights, the exceptions being due to strict interpretation and enforcement for both categories mentioned, in the course of judicial practice several judicial situations which pose special problems with regard to prescriptibility can also be distinguished. Such situations are as follows:

- the situation of the civil possibilities and liberties;
- the defence of the subjective civil right by way of exception;
- the extinctive prescription and the nullity of the civil judicial action;
- the action of fact ascertainment;
- mixed actions and action duality;
- the case for recovery of moral damages;
- the action for “restitution” of the prestations executed on the basis of an avoided judicial act;
- the action regarding a potestative right, or a secondary right;
- the situation of possible rights;
- the actions in matters of land register;
- the extinctive prescription in successional matters.

Chapter IV, entitled “**Periods of extinctive prescription**” is structured under 3 sections, as follows:

Section I, „**General Concepts**” debates upon issues regarding the notion of extinctive prescription period, namely its definition and legal nature, as well as the classification thereof.

In consequence, the lapse of time provided by the law within which the right of legal action in a material sense has to be exercised subject to the penalty of losing it, constitutes what is known as *period of extinctive prescription*.

De lege lata, there is a great number of prescription time limits, established by the legislator, yet many of them are redundant, as there exists a 3-year general prescription period, long enough to ensure the real protection of the conflicting interests: on the one hand the holder’s interest to benefit from a long enough period to initiate actual legal proceedings, and on the other hand the interest of the party in favor of whom the prescription runs not to be exposed for a prolonged period to certain claims deemed as ill-founded or long forgotten.

Section II, „**General periods of extinctive prescription**” establishes that the general time limit of extinctive prescription is understood as that limitation applicable to all prescriptible actions, even those for which the law does not prescribe a certain limitation, and whenever the application of a special limitation to an actual case cannot be established.

Submitting to analysis the provisions of the New Criminal code, we notice that the legislator further preserves the 3-year general prescription, but also institutes 10-year, 2-year and 1-year periods. Therefore, according to art. 2517 of the New Criminal Code: “the prescription period is of 3 years, unless the law does not provide otherwise”.

Section III, “**Special periods of extinctive prescription**” - the special extinctive prescription time limits are those periods prescribed for certain types of actions or solely for certain actions, as established by Ordinance no. 167/1958 or other regulatory acts, which derogate from the general prescriptions.

Chapter V, entitled „**The course of extinctive prescription**” comprises, in its turn, of 5 sections, as follows:

Section I, „**Commencement of the extinctive prescription**” is dedicated to the general rule regarding the beginning of extinctive prescription, having as object the right to legal action, namely that prescription starts once with the date of actual right to legal proceedings. This (general) rule, is applied in practice whenever no special rule, established for a particular case, is applied. The New

Criminal Code provides under art. 2523 that: *the prescription begins with the date when the holder of the right to legal action knew, or, according to circumstances, ought to have known.* We note that the legislator felt the need to formulate a subjective criterion within the subject matter subjected to analysis, and therefore a law was instituted to this purpose, overbearing the criticism regarding the objective criterion set forth in Ordinance no. 167/1958 on “*the date of the right to legal action*”.

Due to the wide range of legal situations which occur in practice from the standpoint of the material right to legal action, and also due to the multitude of civil subjective rights, the legislator felt the need to institute other rules along with the general rule regarding the beginning of the extinctive prescription, meant to supplement and define the general rule.

In consequence, it is acknowledged that if the provisions of art. 7, paragraph 1 of the Ordinance no. 167/1958 establishes the general rule in the matters of the extinctive prescription beginning date, the standard in cause bearing a general nature, the other texts of law establish special rules with regard to the beginning of extinctive prescription. The special rules ought to be enforced, yet only in the situations they were created for, and extension thereof to other cases is forbidden.

With regard to the provisions of the Ordinance no. 167/1958, the following list of situations subject to special rules in what regards the beginning of the extinctive prescription ought to be kept in mind:

- the subjective sheer civil right;
- the subjective civil right affected by a suspensive term or condition precedent;
- civil liability for tort and similar situations;
- the action to be cancelled;
- liability for the defects of the work, works or construction;
- the hypothesis of the liability with subsequent performance;
- and other special situations.

Section II-a, „The suspension of the extinctive prescription” refers to the statute of prescription suspension, defined as: that amendment of the prescription course residing in the cessation, by right, of the course of the prescription for the periods while the situations persist, provided by limitation by the law, putting the holder of the right to legal action in impossibility to act.

The analyzed statute - the suspension of the extinctive prescription - is regulated by the Ordinance no. 167/11958 within articles 13, 14, 15, from the Civil Code, as well as other regulatory documents.

Art. 13 and 14 of Ordinance no. 167/1958 regulates the grounds for suspension, whereas article 15 of the same ordinance refers to the effects of the extinctive prescription suspension.

The Civil Code provides under art. 1875: “that the prescription runs against any person who may not allege an exception as established by the law”.

The New Civil Code regulates the suspension of the extinctive prescription in the 2nd Section of Chapter III - “The course of the extinctive prescription”, articles 2532-2536, respectively. Along with the cases of suspension already established and thus traditional, the New Civil Code further establishes other cases, whose efficiency in practice is undisputable. We refer in particular to the hypothesis of negotiations carried out with the purpose of amicable settlement between the parties (art. 2532, point 6) or to the hypothesis of prior legal or administrative procedures for the extralegal settlement of the dispute (art.2532 point 7).

Ordinance no. 167/1958 not only lists the grounds for suspending the prescription, but also establishes the effects caused by the suspension. Therefore, as follows from the provisions under article 15 of Ordinance no. 167/1958: after the expiry of the suspension, the prescription retakes its course, with consideration to the time lapsed prior to the suspension.

Article 15, paragraph 2 of Ordinance 167/1598 sets forth a special effect of the suspension of extinctive prescription, provided the prescription is nevertheless not fulfilled before the expiry of a 6-month period, calculated from the termination of the suspension clause, except for the prescriptions shorter than 6 months, which will only be fulfilled after the expiry of a 1-month period from the suspension.

The New Civil Code preserves the solution set forth in Ordinance no. 167/1958 with regard to the effects of the suspension of the extinctive prescription course, but supplements it with the provisions of article 2532 on the statute of the benefits of the prescription suspension. Therefore, *the suspension of the prescription may only be alleged by the party hindered to perform acts of interruption*, except where expressly provided otherwise by the law. Yet, article 2536 of the New Civil Code sets forth the extension of the suspensive effect, establishing that the suspension of the prescription with regard to the main debtor or the fidejussor causes effects for both parties.

Section III, „Interruption of the extinctive prescription” establishes that the interruption of the extinctive prescription constitutes that modification upon the course of the prescription which resides in the extinguishment of the prescription started before the occurrence of an interruptive cause and the beginning of a new extinctive prescription.

De lege lata, the interruption of the extinctive prescription is mainly regulated by articles 16-17 of Ordinance no. 167/1958.

The New Civil Code sets forth new cases of interruption (the debtor's notice of default), and the criminal claim referred to the criminal prosecution authorities, currently assimilated with the petition form, is regulated as a distinct cause for the interruption of the prescription. Moreover, it regulates the situation where, on formal grounds, the petition form, without being settled on the merits, is dismissed or annulled. With the latter case, if the referring party of the initial request files a new petition within six months from the date when the resolution of dismissal or annulment remained final, the petition is deemed interrupted by the initial petition, on condition that the new petition is admitted on the merits (article 2539, paragraph 2).

We also note that currently, art. 405² and the subsequent articles of the Civil Procedure Code, regulates the interruption of the prescription of the right to commence the foreclosure.

The interruption of the prescription is accounted for by circumstances related to the termination of the passivity or the holder of the right of legal action and the debtor's ceasing to oppose the foreclosure of its obligation. These two premises determine the extinctive prescription to generate no more effects.

Section IV „Fulfillment of the extinctive prescription”

The fulfillment of the extinctive prescription refers to the establishment, determination or knowledge of the date when the prescription expires. This operation entails a calculation, which is based on the knowledge of the following elements:

- the extinctive prescription term applicable in the actual case;
- the beginning of this term;
- whether there has or has not occurred a cause for suspending or interrupting the prescription;
- the rules based on which the prescription is calculated.

According to the regulations in force, prescription is calculated, in principle, by days, not by hours (article 1887 of the Civil Code). Therefore, the day when the prescription commences is not taken into account in this calculation.

Nevertheless, according to article 1889 of the Civil Code in force, the prescription shall not be deemed as fulfilled until the lapse of the last day of the limitation established by law. This means that the day when the prescription was fulfilled is considered in the calculation.

This calculation system is called intermediary, as it does not take into account the first day when the prescription begins to run, yet it considers the day when the prescription is to be fulfilled.

With regard to the calculation means of the extinctive prescription by years or months, the provisions of article 100, paragraphs 3 and 4 of the Civil Procedure Code shall be applied.

Therefore, the time limit established by years or months shall expire on the corresponding day (to the day when the time limit began to run) of the last year or month; in case the last month does not contain a corresponding day, the time limit shall be considered completed on the last day of that month.

Therefore Article 104, paragraph 4 of the Civil Procedure Code provides that the time limit which, beginning with the 29th, 30th or 31st of the month, ends in a month which does not contain such day, shall be deemed as completed on the last day of the respective month.

Finally, paragraph 5 of art. 101 of the Civil Procedure Code provides that the prescription which ends on a legal holiday, or when the service is suspended, shall be extended until the first subsequent working day. The provisions of art. 104 are also worth mentioning, setting forth that the procedure documents delivered by mail to the judicial authorities shall be considered timely sent if delivered by registered mail before expiry.

Section V, „Reinstatement of the prescription term”

The reinstatement of the prescription represents the benefit granted by law to the holder of the right of action who, on solid grounds, could not institute legal proceedings within the prescription period, so as the judicial body is entitled to resolve, on the merits, the petition form, albeit entered after the expiry of the prescription period.

Therefore, the reinstatement of the prescription is a benefit, as well as a barrier against the effects of the prescription. It renders the prescription a realistic nature, namely not to carry punitive effects whenever the holder of rights to legal action is not at fault.

The reinstatement of the extinctive prescription is established, in general, by article 19 of Ordinance no. 167/1958, according to which: “the law court or the arbitration body may, upon finding the causes that led to the incompliance with the prescription period solidly founded, rule the trial or settlement of the case ex officio. The reinstatement of the prescription request may only be filed within one month form the cessation of the causes which account for the incompliance with the prescription period”. The statute of reinstatement enforced by Ordinance no. 167/1958 proved useful, and was therefore preserved by the New Civil Code (article 2523), which only cancelled the right of the judicial body to rule the reinstatement of the prescription ex officio.

As opposed to the suspension and interruption causes of the extinctive prescription, set forth expressly and by limitation by the law, the causes for the

reinstatement of the prescription are not listed, but left to the free judgment of the judicial body who is requested or who rules the reinstatement ex officio. This freedom is yet restricted by the term “*solid*” inserted in the text of the law, in relation to the notion of “*justifying grounds*”, meant to limit the statute’s area of applicability and to draw the attention upon its exceptional nature.

Chapter VI, „Effects of the extinctive prescription” consists of 4 sections, as follows:

Section I, „General issues”

In principle, the prescription only cancels the right to take legal action in a material sense, not the subjective right in itself, the conclusion resulting from the construction of the provisions under article 20, paragraph 1 of Ordinance no. 167/1598 and under art. 1092, paragraph 2 of the Civil Code, so that the subjective right becomes a fallible right, deprived from the protection of action.

Section II, „The principles of the extinctive prescription effects”

The cancellation of the right of action in a material sense represents the effect of the extinctive prescription, which is directed by two principles:

- art. 1, paragraph 2 of Ordinance no. 167/1958 defines the first principle, establishing that once with the cancellation of the right of legal action regarding a main right, the right of action regarding accessories is also cancelled.
- the second principle worth mentioning derives from article 12 of Ordinance no. 167/1958, establishing that: “in case a debtor is compelled to subsequent performances, the right of action with regard to each performance shall be cancelled by means of a separate prescription”.

Section III, „The manner of operation with extinctive prescriptions”

The first text of law to be mentioned is art. Art. 1841 of the Civil Code in force, providing that: “in civil law, the judges cannot enforce the prescription if the concerned party has not invoked this manner of operation”.

The New Civil Code, art. 2512 in particular, on the effect of extinctive prescription, the cancellation of the material right of action may not be alleged ex officio by the judicial body, but only by the concerned party, in accordance with the current provisions of the Civil Code.

Section IV, „Legal means of valorization of the extinctive prescription”

As a rule, the extinctive prescription can be opposed as exception, motioned by the party to whose benefit the prescription runs. The exception is public, in rem, absolute and nullifying. We speak about an exception of material, substantial law, not proceedings law as its object is a subjective civil right, not a proceedings right arisen in the course of the trial.

Provided the plea is admitted, the law court (or the arbitration court) shall overrule the case as prescribed.

The statute of extinctive prescription, of all civil law statutes, is the most beneficial to the social order, as it is committed to ensuring the clearance of pendency from the civil circuit and enabling the so-called “adjustment of law to facts”, of indisputable consequence in all branches of law.