



ORIGINAL PAPER

The Extinctive Prescription: the Solutions of the Romanian Civil Code and the UNIDROIT Principles Applicable to International Commercial Contracts

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Abstract

Bringing a civil action before a court is a means of achieving the legal protection of the rights of natural and legal persons. The security and stability of civil legal relations have imposed a legal time limit within which the holder of the right must act legally to defend his right. The failure to comply with such a legal time limit entails the mechanism of extinctive prescription. The institution of the extinctive prescription is regulated in all national legislations, as well as international conventions governing the relations of international trade law. The UNIDROIT Principles applicable to international commercial contracts establish numerous rules on limitation periods.

Keywords: *civil action, right of action, right, legal protection of rights, extinctive prescription*

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Preliminary issues

It is a truism that the material or substantive laws recognize the civil rights of natural and legal persons, and these rights correspond to correlative obligations (V.M. Ciobanu, 1996, p. 8). When individual rights are infringed or their correlative obligations are not performed, the holder of the right may commence legal proceedings for the protection of his rights and legitimate interests, as no law can restrict this right (art. 21 of the Romanian Constitution). A civil action is the most important legal means for the protection of civil rights and legitimate interests of a person. But the general interest and social stability require that the holder of the right should use the civil action within a certain time limit; if the right to bring an action before a court is not exercised within the time limit provided by law, it is extinguished by the extinctive prescription (Dogaru, Cercel, 2007: 235). The extinctive prescription is not a specific institution of modern law. In Roman law, the institution of prescription (in the two forms - extinctive and acquisitive) was one of the most effective legal means to protect individual rights. Medieval law and later modern law took over the prescription from Roman law, "being regulated, for the first time and in a unitary way, by the 1804 Code of Napoleon" (M. Nicolae, 2004: 15).

In Romanian law, the extinctive prescription was first regulated by the Calimach Code and the Caragea Code, then the Civil Code of 1864 and Decree no. 167/1958 on the extinctive prescription, and is currently regulated by the Civil Code of 2009. The extinctive prescription is regulated in all national legislations and international conventions on international trade law relations. The UNIDROIT Principles applicable to international commercial contracts establish numerous rules on limitation periods (The International Institute for the Unification of Private Law, commonly known as UNIDROIT is an intergovernmental independent organization whose aim is to harmonize the private law of the Member States, the adoption by its members of uniform rules of private law, the unification of law internationally. The activity of UNIDROIT mainly consists in developing model laws and international conventions. UNIDROIT has more than 60 members, all European Union member states having this quality).

The extinctive prescription in Romanian law. General considerations

The phrase "extinctive prescription" has two meanings: the former refers to the civil law institution bearing that name, i.e. the body of legal rules governing the extinction of the material right to action of the holder of the claim right who did not exercise it within the limitation period in order to make the passive subject perform the obligation corresponding to the civil right; the latter meaning refers to the extinction of the right to action which was not exercised within the time limit; this meaning is taken into account by the Romanian legislature when defining the extinctive prescription (Beleiu, 2007 : 236; Dogaru, Cercel, 2007 : 237). Considering the provisions of art. 2500 of the Civil Code (in its essence, identical to that contained in art. 1 of Decree no. 167/1958) establishing the object and effect of the extinctive prescription ["The material right to action (...) shall be extinguished by prescription if not exercised within the time limit established by law" (the phrase "the material right to action", used by the legislature in this context, refers to the right of the right holder to obtain, through the jurisdictional bodies, the protection of his right by the coercive bodies of the state; therefore, it has been argued that the material right to action represents a component of the right. Civil procedural law makes use of the phrase "right to action in the procedural sense", which involves the right of the right holder to bring an action before jurisdictional bodies when

his right is violated; for an analysis of the distinction between the material right to action and the right to action in the procedural sense, see Ciobanu, 1996: 251-259)], we can say that the extinctive prescription is a means of extinguishing the material right to action not exercised within the time limit (Beleiu, 2007: 236; Dogaru, Cercel, 2007: 236; Chelaru, 2003: 185-186).

On the legal nature of the extinctive prescription, it has been argued that, since the extinctive prescription is regulated in all branches of law, its legal nature should be established for each branch of law. As regards the legal nature of the extinctive prescription in civil law, there were several opinions expressed (Cantacuzino, 1998 : 492-494; Hamangiu, Rosetti-Bălănescu, Băicoianu, 1928: 717-719; Gh. Beleiu, 2007 : 240-241; Dogaru, Cercel, 2007: 241-242; Nicolae: 40-55; Boroi, Stănciulescu, 2012: 278-279): in one opinion, the extinctive prescription is a sanction of civil law that covers only the material right to action, not the civil right, which outlives the effect of the prescription; in another opinion, the extinctive prescription is a legal means of transforming the civil right and its correlative civil obligation, which change from perfect (provided by “action”), into imperfect (natural); finally, in a majority opinion, that we also assume, the extinctive prescription is a means of removing tort liability, as the passive subject of the legal relationship cannot be constrained by the court to perform the obligation correlative to the civil right.

The nature of the legal rules governing the extinctive prescription

The legal rules of the 1864 Civil Code that regulated the extinctive prescription were dispositive in nature (usually, the civil law rules are dispositive), thus the extinctive prescription exception could be raised by the party interested in supporting the discharge of the obligation. In this respect, the provisions of art. 1841 of the old Civil Code are clear (in accordance with which “In civil matters, judges cannot apply the prescription if the person concerned has not raised this defence”), art. 1842 (in accordance with which the debtor could oppose the prescription at any time of the judgment until a final decision has been delivered), art. 1843 (in accordance with which “The creditors and any other person concerned may oppose the prescription to their debtor or co-debtor, even if the debtor, co-debtor or owner waives it”) and art. 1838 (in accordance with which “No prescription may be waived until its expiration”). However, the doctrine considered the extinctive prescription an institution of public order in the system of the 1864 Civil Code (Hamangiu, Rosetti-Bălănescu, Băicoianu, 1997: 390).

Instead, the rules of Decree no. 167/1958 on the extinctive prescription are imperative, the extinctive prescription being qualified by the doctrine as an institution of public order, since the interest protected by these legal rules is general, it concerns the community. The imperative nature of these legal norms determined the inadmissibility of derogation, by the agreement of the parties to the legal relationship, from the rules governing the extinctive prescription (the parties could not establish limitation periods other than the legal ones, they could not remove the causes of suspension or interruption of the course of the extinctive prescription, they could not remove the effects of the extinctive prescription, declaring certain rights to action as not subject to prescription, etc.); the universal nature of the interest protected by the legal rules governing the extinctive prescription, so the imperative character of the legal rules governing the extinctive prescription, imposed the obligation of the courts to inform the parties on the extinctive prescription defence and to apply, ex officio, the rules on the extinctive prescription. In this respect, art. 1 of Decree no. 167/1958 provides that “Any provision

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that deviates from the legal regulation of prescription shall be void” (therefore, the clauses of the contracts concluded under the old regulation would have been affected by absolute nullity if they had established limitation periods other than those provided by law, if they had established another date on which the extinctive prescription started, causes of suspension or interruption of the extinctive prescription other than those provided by law), and in accordance with art. 18 of Decree. no. 167/1958 “The court and the arbitral body have the obligation, ex officio, to investigate whether the right to action or compulsory enforcement has expired”. The 2009 Civil Code regulates the legal regime of the extinctive prescription both by dispositive norms and imperative norms. However, the extinctive prescription is not regulated as an institution of public order (as happened in the previous Code), but as an institution of private order (G. Boroi, L. Stănciulescu, 2012, p. 277).

Dispositive norms on the extinctive prescription

Modification of limitation periods. The contracting parties may derogate from the legal regime of the extinctive prescription, within the limits allowed by law. So that such an agreement may be valid (contractual clause), there are two requirements to be met: first, the contracting parties should have full legal capacity to exercise rights; secondly, there must be an express agreement of the contracting parties [considering that the law provides the requirement for the existence of the mutual agreement of the contracting parties for regulating the legal regime of the extinctive prescription, legal scholars have expressed the justified opinion that, in case of a unilateral act, “it is impossible to lay down clauses derogating from the legal regime of the extinctive prescription, unless such clauses are agreed upon by the beneficiary of the unilateral act” (Terzea, in Baias, Chelaru, Constantinovici, Macovei, 2012: 2517)]. If these legal requirements are met, the contracting parties may modify the length of the limitation periods or the running of these periods by setting the beginning or by modifying the legal grounds for suspension or interruption [art. 2515(3) of the Civil Code]. The length of these periods may be reduced or extended, but the new duration cannot be less than one year or more than 10 years, except for the limitation periods of 10 years or longer, which can be extended up to 20 years [art. 2515(4) of the Civil Code.].

Imperative norms on the extinctive prescription

The 2009 Civil Code 2009 prohibits certain contractual clauses, the sanction for violating the legal interdiction being the absolute nullity of the agreement or unlawful contractual clause. Thus: a) art. 2515, paragraph (2) of the Civil Code prohibits any clause whereby, either directly or indirectly, an action would be declared not subject to prescription, though, by law, it is subject to prescription, or conversely, an action declared not subject to prescription, by law, would be considered subject to prescription; b) art. 2515, paragraph (5) of the Civil Code prohibits the clauses whereby the parties derogate from the legal regime of the extinctive prescription (in the sense that they modify the length of the prescription periods or the course of prescription by setting the beginning or by modifying the legal grounds for suspension or interruption) in the case of rights to action of which the parties cannot dispose and the actions derived from non-negotiated contracts, insurance contracts and contracts subject to consumer protection legislation; c) art. 2515, paragraph (4) of the Civil Code prohibits the clauses reducing the length of the prescription periods to less than a year, the clauses extending the length of the prescription periods to more than 10 years (in the case of prescription periods of less than 10 years),

the clause extending the prescription period to more than 20 years (in the case of prescription periods of 10 years or more than 10 years).

The persons that may raise the extinctive prescription

As for raising the extinctive prescription, art. 2512(1) of the Civil Code provides that “The prescription may be raised only by the one for the benefit of which it runs, either personally or by proxy, and without being bound to produce any contrary title or to have acted in good faith”; if the defence of prescription is waived by the representative of the one for the benefit of which the prescription runs, the latter must have a special power of attorney, as waiving prescription is considered a dispositive act. Exceptionally, the extinctive prescription may be raised by others; in this respect, art. 2514 C of the Civil Code provides that “The co-debtors of a joint and several obligation and the fidejussors may raise the prescription, even if one of the debtors has failed to do so by negligence or has waived it. So may do the creditors of the person concerned, as well as any other person concerned”. Legal literature has shown that the creditors of the debtor that neglects to raise the extinctive prescription may invoke it by way of an indirect action and the creditors of the debtor that has waived the extinctive prescription may require the abolition of the waiver by way of a revocatory action and then raise the extinctive prescription by way of an indirect action (Terzea, in Baias, Chelaru, Constantinovici, Macovei, 2012: 2516). Pursuant to art. 2512 C. civ., the competent court cannot apply the extinctive prescription ex officio, even if the defence of prescription was in the interest of the state or its administrative-territorial units. The court cannot inform the parties on the exception of extinctive prescription so that the parties may discuss it, based on the active role, since it is an exception which is personal in nature, and not an exception of public order, and on the other hand, at the procedural level, raising this exception is relevant as to the principle of availability, each party having the possibility of disposing, during the lawsuit, of his rights (Nicolae, 2010: 1158). The prescription may be raised either in the main proceedings, by filing a declaratory action, or as an exception, filed by the beneficiary of the prescription; as for the exception of prescription, it has been argued in the doctrine that it is an exception of material law, a substantive exception, not of procedural law, because it concerns an individual civil right (right to action) and not a procedural right, arising during the proceedings (Nicolae, 2004: 595). The prescription may be raised by the entitled party only before the first instance court, by a defence or, in its absence, at the latest at the first hearing to which the parties are legally summoned (art. 2513 of the Civil Code.).

Waiving the extinctive prescription

The one for the benefit of which the prescription runs may waive the prescription; the waiver may concern both the expired prescription, and the benefit of the time elapsed for the prescription which began, but did not expire (art. 2017 thesis II of the Civil Code). So that the act of waiver will be valid, the prescription period must have begun to run (art. 2017 thesis I of the Civil Code), since the anticipated waiver of the right to raise the extinctive prescription, lacking its object, is subject to absolute nullity. Another requirement for the validity of the act of waiving the prescription is that the one renouncing must have full legal capacity to exercise rights (art. 2509 of the Civil Code) as the legislature considers that the legal document waiving prescription is an act of disposal; therefore, the act of waiving the prescription carried out by a person without legal capacity to exercise rights or with limited legal capacity is subject to annulment, and

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relative nullity may be raised as an action only within the time limit provided by law, and raising the exception of prescription is not time barred (art. 1249 of the Civil Code).

The waiver may be express or implied (art. 2508 of the Civil Code). Express waiver may be in writing (by an act under private signature or deed) or orally. Implied waiver must be unquestionable, it can only result from unequivocal agreement; the following acts of the debtor have the value of implied waiver of the right to raise the extinctive prescription: voluntary performance of an obligation after the prescription period has expired (art. 2506, paragraph 4 of the Civil Code); guarantees for the benefit of the right holder whose claim has expired (art. 2506 paragraph 5 of the Civil Code). It has been noted in the doctrine and case law that the following acts of the debtor have the significance of implied waiver: payment of a deposit or part of the debt, a payment offer or request for a payment time limit, exercise of the withdrawal of disputed objects (Alexandresco, 1915: 62). Instead, the following do not have the value of a waiver: the act of the debtor to have raised the exception of nullity of the contract, the act of requesting the benefit of performance he is entitled to receive, resulting from a mutually binding agreement (Alexandresco, 1915: 62).

The waiver of prescription has the effect of losing any possibility for the debtor to raise the extinctive prescription he renounced; in this situation a new prescription period begins. If the debtor waives the benefit of the time elapsed before that date, such a waiver is the acknowledgement of the creditor's right (art. 2510 of the Civil Code), in which case, as provided by law, there is an interruption of the limitation period with the consequence of the beginning of a new period of limitation. The effects of waiving the extinctive prescription affect only the person that made use of it. In case of joint and several obligations, the waiver of one of the co-debtors shall have no effect with regard to the other co-debtors (art. 2511 of the Civil Code); the latter still have the right to raise the extinctive prescription, in accordance with art. 1441(1) of the Civil Code. Similarly, if the debtor's obligation was secured by a fidejussor, the latter is entitled to invoke the benefit of extinctive prescription, even if the debtor has waived this defence (art. 2511 of the Civil Code).

Principles of the effect of the extinctive prescription

The effect of the extinctive prescription (extinction of the right to action in the material sense) is governed by two principles, expressly provided by art. 2503 of the Civil Code: a) with the lapse of the right to action as to a principal right, there is another right that is extinguished, the one concerning accessory rights; therefore, if the action regarding the principal right has not been time barred, the accessory right concerning interest, personal or real security; excluding mortgages (Boroi, Stănciulescu, 2012, p. 281). Conversely, in the case of penalties agreed to by a criminal clause, considering the double legal nature of it (autonomous and accessory convention), the prescription of the right to action as to the principal right does not entail the prescription of the right to action for the payment of conventional penalties (M. Nicolae, 2010, p. 664). The regulation of the principle mentioned above (which is an application of the *accessorium sequitur principale* rule) has two consequences: the impossibility of prescribing the main right has the effect of the impossibility of prescribing the accessory right; the lapse of the right to action regarding an accessory right does not determine the lapse of the right to action regarding the main right (Dogaru, Cercel, 2007: 251); b) if a debtor has the obligation of performing obligations successively, the right to action with regard to each type of performance is extinguished by a special prescription, even if the debtor continues to perform what he

owes, except when successive performance refers, by its purpose, resulting from the law or convention, to a whole; in the application of this principle one must take into account the incidence of the first principle governing this matter, because the prescription of the main right entails the prescription of all successive performance making the object of the accessory claim right, and thus it becomes useless to verify whether the extinctive prescription operated or not for the performance (S.C.J., comm. section, Dec. no. 4881/2001, in Curierul Judiciar no. 4/2002: 33-34).

Interruption of the extinctive prescription

The interruption of the extinctive prescription is that change in the running of the prescription which consists in annulling the period elapsed before the occurrence of an interruption cause and the beginning of a new limitation period (Dogaru, Cercel, 2007: 279; Boroî, Stănciulescu, 2012: 314). The causes of interruption must intervene after the extinctive prescription began and before the expiration of the limitation period. Pursuant to art. 2537 of the Civil Code, the prescription is interrupted due to: a) the acknowledgment of the right whose action is time barred, by the one for the benefit of which the prescription runs or through a voluntary act of performance; b) the lodging of a claim form or arbitration application (even if the application has been filed with a court or an incompetent arbitral body), by registering as a bankruptcy creditor in insolvency proceedings, by filing an application to intervene in the recovery pursuit started by other creditors or by raising the exception of the right to action which is time barred; c) the commencement of civil legal proceedings by a party during the prosecution or before the court before the beginning of the judicial investigation; where compensation is granted, by law, ex officio, the prosecution interrupts the running of prescription, even if no civil proceedings have been commenced; d) any act whereby the one for the benefit of which the prescription runs is notified; e) as provided by law. The interruption of the prescription has the effect of extinguishing the prescription that had begun before the cause of interruption occurred; after the interruption a new limitation period begins to run.

Suspension of the extinctive prescription

The suspension of the extinctive prescription refers to the change in its running, which consists in automatically ceasing the running of the prescription throughout the situations restrictively provided by law, that make it impossible for the holder of the right to action to act (Dogaru, Cercel, 2007 : 275; Boroî, Stănciulescu, 2012: 310). Pursuant to art. 2532 of the Civil Code, which regulates the general causes for the suspension of the prescription, the prescription does not begin and, if it has begun, it is suspended in the following cases: 1. between spouses, during their marriage, and if they are not separated as matter of fact; 2. between parents, guardian or administrator and those lacking legal capacity to exercise rights or with limited legal capacity or between administrators and those they represent, as long as protection lasts and the accounts have not been provided and approved; 3. between any person which, by law, or on the basis of a judgment or a legal act, administers the property of others and those whose property is thus managed, as long as the management has not ceased and the accounts have not been provided and approved; 4. if someone lacks legal capacity to exercise rights or has limited legal capacity, as long as he has no representative or legal guardian, unless otherwise provided by law; 5. if the debtor deliberately conceals that the debt exists or is legally enforceable; 6. throughout the negotiations to settle disputes amicably, but only if the parties negotiated in the last six months before the expiration of the limitation period; 7. if the

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person entitled to action must or can, under the law or contract, use a certain preliminary procedure, such as administrative complaint, seeking reconciliation or the like, while not aware or entitled to know the result of that procedure, but no more than 3 months from the commencement of the proceedings, unless otherwise provided by law or contract; 8. if the holder of the right or the one that violated it is part of the Romanian armed forces, as long as they are in a state of mobilization or war. Civilians who are in the armed forces for operational reasons imposed by the necessities of war are also included; 9. if the one against which the limitation period runs or is about to run is prevented by an act of force majeure from interrupting the period, as long as this impediment still exists ; temporary force majeure is not a cause of suspension of the limitation period unless it occurred in the last 6 months before the expiration of the limitation period; 10. in other cases provided by law.

The effects of the suspension of the limitation period are: a) from the date on which the cause of suspension has ceased, the limitation period begins to run again, the time elapsed before the suspension also being calculated; b) the limitation shall expire 6 months after the suspension has ceased, except for the 6-month or shorter limitation periods which shall expire one month after the suspension has ceased.

The extinctive prescription in international trade relations

In legal relations with foreign elements, the extinctive prescription of the right to action is subject to the law applicable to the right itself (art. 2663 of the Civil Code.). Since the prescription is qualified in Romanian private international law, as a matter of substance of the contract, it is subject to the law governing the substance of the legal relation. So, depending on the reference that the conflict rule makes, the limitation may be subject either to Romanian law or to a foreign legal system, applicable in respect of *lex causae* (Sitaru, 2008: 629).

Even if, under the conflict rule, the Romanian law was applicable to a legal relation with foreign elements, on the basis of the principle of availability, the contracting parties may remove the Romanian law from application, with various possibilities in this respect (D.A. Sitaru, 2008, p.630): a) they may submit their contract to a foreign legal system, through a clause of selection of applicable law (*pactum de lege utenda*); b) they may choose arbitration in equity as a way of settling their dispute, situation in which the arbitrators have the option to remove the effects of the limitation period; c) they may waive the effects of the limitation period, either expressly or impliedly; in this regard it has been decided in the arbitral practice that the party which has voluntarily paid the requested amount, although by the counterclaim it was requested to reject the arbitral action against him as barred, is considered to have waived the defence of limitation impliedly (Award of the Arbitral Court of Bucharest, no. 30/1981, in *Repertoriul practicii arbitrale române de comerț exterior*, 1987, pp. 105-106). The party for the benefit of which the limitation runs may not invoke it, situation in which the competent jurisdictional body cannot apply the limitation period *ex officio* (art. 2512 of the Civil Code.); this solution of the Romanian law complies with that enshrined in the Convention of New York, which, in art. 24, entitled “Consequences of the expiration of the limitation period”, provides that “Expiration of the limitation period shall be taken into consideration in any legal proceedings only if invoked by a party to such proceedings”. If Romanian law is the law applicable to a particular legal relation with foreign elements, the provisions of the Civil Code referring to the extinctive prescription (contained

primarily in Book VI, entitled “On the extinctive prescription, loss and calculation of time limits”) are applicable as general law.

Limitation periods as provided by the UNIDROIT Principles

General considerations on the UNIDROIT Principles

The UNIDROIT Principles represent an international “codification” of the general principles of contract law. They aim to provide a set of rules adapted to the needs of international trade. The UNUDROIT Principles differ from international conventions, in that they are not binding, they do not require the approval of governments, as they addresses international legal and economic environments and are applicable as a consequence of the option of the parties to an international commercial contract. For example, under the principle of freedom of will, the parties to an international commercial contract may agree that the UNIDROIT Principles should be the applicable law to their contract.

The first version of the UNIDROIT Principles appeared in 1994 and was a success, which made the UNIDROIT Governing Council take steps for the development of a second edition which was to complete the first edition with new topics of interest to the international legal and economic community (the translation into Romanian of the 1994 UNIDROIT Principles was carried out by a group of lawyers within the civil-law society Șova & asociații, 2002); thus, the second version published in 2004 included new rules on the authority of agents, third party rights, set-off, assignment of rights, transfer of obligations and assignment of contracts, limitation periods (the translation into Romanian of the 2004 UNIDROIT Principles was carried out by Ene and Oprea, 2006). The year 2010 witnessed the publication of the third version of the UNIDROIT Principles, which did not aim to review previous editions, but to supplement them with new rules, such as those relating to reinstatement in case of non-performance, prohibitions, conditional obligations, the plurality of obligors and obliges (the translation into Romanian of the 2010 UNIDROIT Principles was carried out by Bobei, 2015). Limitation periods are regulated in Chapter 10 of the UNIDROIT Principles, a chapter added in 2010, with the publication of the second version of the “Principles”.

The complementary nature of limitation periods

The limitation periods provided by the UNIDROIT Principles are complementary in nature. The principle of autonomy of the contracting parties concerning the limitation periods enables them to modify the limitation periods applicable to rights arising from the contract concluded according to their needs. In this respect, art. 10.3 provides that “The parties may modify the limitation periods”. But one party should not take advantage of the other by reducing or increasing the length of limitation periods, therefore the UNIDROIT Principles limit the changes that the parties may make: a) the general limitation period cannot be shortened to less than one year; b) the maximum limitation period cannot be shortened to less than four years; c) the maximum limitation period cannot be extended to more than fifteen years. In the comment following art. 10.3 it is specified that the modification of limitation periods may be agreed upon by the parties either before or after the commencement of the limitation period. The UNIDROIT Principles establish a general limitation period of three years and a maximum limitation period of ten years, beginning at different moments (art. 10.2). Thus, the three-year period begins when the obligee knows the facts enabling him to exercise the right (subjective

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moment) or when he ought to know the facts (objective moment). The maximum limitation period of ten years starts on the day after the day the right can be exercised, i.e. it is legally enforceable; this is the objective moment, and that the obligee knew or not the fact enabling him to exercise its right has no significance (For illustrations on the beginning of the two limitation periods, see *Principiile UNIDROIT privind contractele comerciale internaționale 2010*, Bobei, 2015: 361-362).

Effects of the expiration of the limitation period

The UNIDROIT Principles start from the premise that the expiration of a period within which one must exercise a right does not extinguish the right, but it is a means of defence; thus, pursuant to art. 10.9 (1), “The expiration of the limitation period does not extinguish the right”. Therefore, the effect of the limitation is only the extinction of the right to action. But the expiration of the limitation period takes effect only if the obligor asserts it as a defence art. 10.9 (2); so the effects of the expiration of the limitation period do not occur automatically, but the obligor must raise it as a defence. No judicial body (judicial or arbitral court) has the obligation to invoke *ex officio* the limitation or allow the parties to discuss this defence. According to the comment following article 10.9 it is possible that the limitation of the right to may be the subject of a declaratory judgment.

The first effect of the fact that the right is not extinguished by the limitation is that a right may be invoked as a defence any time, even after the expiration of the limitation period referring to it (art. 10.9 (3)). After the expiration of the limitation period the right of the obligee still exists, but an action for the performance of this right is barred by the fact that the obligor invoked the expiration of the limitation period; instead, the obligee may assert a right of retention on the basis of a right extinguished by the limitation. The comment relating to art. 10.9 (3) contains the following illustration in this respect: A leases a printing press to B for a period of ten years. A has the obligation to maintain the press in working condition and to undertake repairs, except defects caused by B’s negligence in using the machine. The machine breaks down, but A refuses to pay the repairs done. A does not react and B does not insist. Five years later, when the lease expires, B requests again the restitution of the costs of the repairs. A refuses and raises the extinction of B’s right by the expiration of the limitation period, but he requests the return of the printing press. B is entitled to damages for A’s breach of contract and may refuse to return the printing press, having a right of retention until the award of damages. The second effect of the fact that the right is not extinguished by limitation is that the obligee may exercise the right of set-off until the obligor has asserted the expiration of the limitation period (art. 10.10). The comment relating to this article resumes the illustration discussed above (following art. 10.9), specifying that if A requests not only the return of the printing press, but also the payment of the unpaid rent, B is entitled to set-off its counterclaim for damages against this monetary claim, although the limitation period expired.

Instead, after the obligor has asserted the expiration of the limitation as a defence, the obligee can no longer exercise the right of set-off. In the second example contained in the comment relating to art. 10.10, it is shown that the facts are the same as in Illustration 1, but we presume that B requests the payment of damages and threatens to sue four years after it had had the repairs done, and as A invokes the time bar, B can no longer set off its claim for damages. A third effect of the fact that the right is not extinguished by limitation is that in case an obligation has been discharged, the mere expiration of the limitation period does not confer any right of restitution (art. 10.11).The

action for restitution of the obligor, which discharged its obligation after the lapse of the limitation period, lodged on the basis of unjust enrichment principles can be paralyzed by the obligee invoking its right, which still exists after the extinction of the right to action. In the comment of art.10.11, it is shown that even if the limitation period has expired, restitutionary claims can be based on grounds other than performance, for instance, when the payor claims to have paid a debt which does not exist due to a mistake. The second illustration following art. 10.11 advances the hypothesis that bank B lends a sum of money to A, and the latter repays the loan before the date provided by the loan agreement, but neither side is aware of it; four years later, B requests payment from A again, and A complies with the request and pays; A can recover the second payment because the obligation had been previously extinguished by performance.

Interruption of the limitation period

Most legal systems allow the parties or other circumstances to modify the running of the limitation period. The modification of the limitation period can take place either as a consequence of the interruption of the limitation period, or as a result of its suspension. As a consequence of the interruption of the limitation period, a new general limitation period begins to run. *The acknowledgement of the obligor is the only case of interruption of the limitation period regulated by the UNIDROIT Principles*; therefore art. 10.4, regulating the interruption of the limitation period, is called “New limitation period by acknowledgement”. In accordance with art. 10.4 (1), if the obligor acknowledges the right of the obligee before the expiration of the general limitation period (the general limitation period of three years), a new general limitation period begins to run on the first day after the day of the acknowledgment of the right. The illustration in the comment of the paragraph is the following: A defectively performs a construction contract concluded with B, and in October B informs A about the non-conformities, without receiving a reply from A. Two years later, B notifies A again, threatening with an action for damages. A acknowledges the non-conformities of the performance and promises to remedy them. The next day, a new general limitation period begins to run for B’s right to damages. The maximum limitation period (ten years) remains unchanged, it does not begin to run again, but it may be exceeded by the beginning of a new general limitation period (art. 10.4, paragraph 2). Thus, if the acknowledgement takes place during the maximum limitation period, it is not interrupted, but it may be extended by up to 3 years if the acknowledgement took place seven years after the beginning of the maximum period, but before the expiration of the maximum limitation period. The illustration in the comment of this paragraph is the following: A defectively performs a construction contract concluded with B, and B discovers the defects in the construction work of A nine years after the end of the work; the defects could not have been discovered earlier. A acknowledges the defects. A new general limitation period begins to run from the moment of the acknowledgement, so the length of the limitation period amounts to 12 years. If the parties altered the limitation periods by mutual agreement, in accordance with art. 10.3 of the UNIDROIT Principles, the acknowledgement has the effect of the beginning of a new limitation period equal to the interrupted one. If, for example, the parties reduced to one year the length of the general limitation period, the acknowledgement determines the beginning of a period of one year.

The interruption of the limitation may occur several times, if the obligor acknowledges successively the obligee’s claims (Sitaru, 2008: 640). According to the comment of art. 10.4, (comment entitled “Novation and other acts creating a new

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obligation”), the acknowledgment does not create a new obligation, and accessory rights are not extinguished. If the limitation period had already expired at the time of the acknowledgement, the acknowledgement does not retroactively invalidate this defence, i.e. it does not remove the effects of the expiration of the limitation period. But, at the time of the expiration of the limitation period, the parties may create a new obligation by “novation” or a unilateral act of the obligor or by the fact that the obligor waives this defence; the parties may also prolong the length of the obligee’s right beyond the end of the maximum limitation period, as provided by art. 10.2(2).

Suspension of the limitation period

During the running of the limitation period, a series of situations may occur and prevent the holder of the claim right from acting. Such situations have the effect of suspending the running of the limitation period, i.e. they stop the running of the limitation period throughout the situation preventing the holder of the right from acting. In other words, the suspension of the limitation period has the effect that the period running before the occurrence of the suspension cause will be deducted from the applicable limitation period, the remaining period beginning to run from the expiration of the suspension period. The running of the limitation period is suspended in judicial or arbitral proceedings or in an alternative dispute resolution procedure, and if the obligee is prevented from acting for reasons not depending on it (force majeure, death or incapacity).

Under art. 10.5, the running of the limitation period is suspended: a) when the obligee performs any act, by starting judicial proceedings or in judicial proceedings already instituted (for instance, a counterclaim), which is recognized by the law of the court as asserting its right against the obligor; b) when the obligee, in the case of the obligor’s insolvency, has asserted its own right in the insolvency proceedings; c) when the obligee, in the case of proceedings for dissolution of the entity which is the obligor, has asserted its rights in the dissolution proceedings. In such cases, the suspension of the running of the limitation period lasts until a final judgment has been issued or until the proceedings have been otherwise terminated (for instance, the withdrawal of the complaint by the obligee). On the suspension of the limitation period by judicial proceedings, in the comment relating to this article, it is specified that the procedural law of the court (*lex fori*) determines the requirements for the interruption of judicial proceedings, if a counterclaim is tantamount to the instituting of judicial proceedings in regard to those claims; likewise, the procedural law of the court before which the action has been brought establishes the requirements for the termination of proceedings by a final judgment or by any other means, and decides whether the litigation comes to an end without a final decision on the merits (for instance, the withdrawal of the complaint or a settlement of the parties). Insolvency and dissolution proceedings are considered judicial proceedings under art. 10.5, and the commencement and termination of these proceedings are established by the law governing those proceedings. On the suspension of the limitation period by arbitral proceedings, art. 10.6 provides that arbitration has the same effect as judicial proceedings, i.e. the suspension of the running of the limitation period, the explanations given in the comment relating to this article being similar to those relating to art. 10.5.

As for the suspension of the limitation by alternative dispute resolution proceedings, art. 10.7 states that the provisions on the suspension of the limitation by judicial and arbitral proceedings apply with appropriate modifications, to any other

proceedings in which the parties seek the assistance of a third party in order to reach an amicable settlement of their dispute. The comment relating to this article mentions that, prior to instituting legal or arbitral proceedings, the parties may agree on conciliation or other forms of alternative dispute resolution; but negotiations do not automatically suspend the running of the limitation period unless the parties mention this effect in the content of an express agreement.

The suspension of the limitation period in case of force majeure, death or incapacity is governed by art. 10.8 of the UNIDROIT Principles, which provides: if the obligee has been prevented from causing the limitation period to cease to run by an impediment that is beyond the control of the obligee and that it could neither avoid nor overcome, the general limitation period is suspended so as not to expire before one year after that impediment has ceased to exist.

If the impediment that prevents the obligee from causing the limitation period to cease to run consists of the incapacity or death of the obligee or the death of the obligor, the suspension of the limitation ceases with the appointment of a representative of the incapacitated person or the deceased or its estate or when a successor has inherited the respective party's position; in such cases, too, the general limitation period is suspended and it will not expire before the one-year period after the impediment has ceased to exist. The comment of this regulation contains the following illustration: A lends an amount of money to B, money which is due to be repaid on 1 January. A dies 35 months after the date for repayment, without requesting the restitution of the amount. Under the law of succession applicable to A's estate, the court must appoint an administrator that also has the obligation to collect outstanding debts. The court appoints the administrator after two years. He has one month left (of the three-year limitation period), plus an extra one-year period to pursue the restitution of the loan against B. The comment of art. 10.8 illustrates this with events that justify the suspension of the limitation period, such as war, natural disasters; instead, the imprisonment of a person does not suspend the running of the limitation period (since the event preventing the obligee from exercising its own right must not be subject to control by that obligee) unless the imprisonment could have been avoided, such as, for example, the case of a war prisoner.

Only the running of the general limitation period may be suspended. If the maximum limitation period expired before the obligee had exercised its right, this right can be paralyzed by raising the exception of the expiration of the maximum limitation period. The comment of this regulation provides the following example: A's lawyer plans to sue B, an engineering firm, for professional malpractice by B's employees. The limitation period expires on 1 December, and A's lawyer has completed the complaint on 25 November, intending to file it by mail with the competent court. On 24 November, a terrorist attack makes traffic cease, thus preventing A from filing the complaint in due time. The limitation period ceases to run and will not expire before one year after some public services have been restored in A's country. If the disruption of all means of communication in A's country lasts for ten years, A's right is barred by the expiration of the maximum limitation period.

Conclusions

The regulation of the extinctive prescription in the new Romanian Civil Code shares certain principles with the UNIDROIT Principles, both as an expression of legal liberalism. We will highlight below some of the arguments that can be presented in order to support this idea: if the legal provisions prior to 1 October 2011 (Decree 167/1958)

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regulated the extinctive prescription as an institution of public order, the provisions of the new Civil Code give the prescription the character of private order. This assertion has as a landmark the provisions in accordance with which the competent jurisdictional body cannot apply this limitation *ex officio*, even if the raising of the defence of limitation is in the interest of the state or of its administrative-territorial units. In all cases, the defence of limitation may be raised only by the one for the benefit of which it runs (art. 10.9 of the UNIDROIT Principles, art. 2512 of the Romanian Civil Code). As for the effects that the lapse of time has on rights, the Civil Code, like the UNIDROIT Principles, enshrines the idea that the expiration of the limitation period does not extinguish the right, but only the right to action. The joint effect of this principle is that in case of performance in order to discharge an obligation, the mere expiration of the limitation period does not confer any right of restitution (art. 10.11 of the UNIDROIT Principles, art. 2506 par. 3 of the Romanian Civil Code).

Another principle enshrined by both the Romanian law and the UNIDROIT Principles is the possibility for the parties to modify limitation periods with observance of the restrictions expressly and specifically provided. The complementary nature of most legal rules governing the extinctive prescription, deriving from the character of private order of the extinctive prescription institution, allows the parties that have full legal capacity to exercise rights, within the limits and conditions provided by law, to modify, by express agreement, the duration of limitation periods or to modify the running of the limitation period by establishing its beginning or by altering the legal grounds for suspending or interrupting it, if applicable (art. 10.3 of the UNIDROIT Principles, art. 2513 of the Romanian Civil Code). Likewise, both the Romanian Civil Code and the UNIDROIT Principles enshrine the idea that the acknowledgement of the creditor's right by the debtor is a cause of interruption of the limitation period and the idea that the effect of the interruption of the limitation period is the running of a new limitation period (art. 10.4 of Principles UNIDROIT, art. 2537, 2538 and 2541 of the Romanian Civil Code).

As for the suspension of the limitation period, both the Romanian Civil Code and the UNIDROIT Principles consider as suspension grounds the existence of judicial or arbitral proceedings or alternative dispute resolution proceedings and the fact that the creditor is prevented from acting for reasons not depending on him (e.g. force majeure). Another enshrined rule specifies that the effect of suspending the limitation period is that, after the cause of suspension has ceased, the limitation period begins to run again from that date, the time elapsed before the suspension also being calculated for the expiration of the limitation period (art. 10.5-10.8 of the UNIDROIT Principles, art. 2532 and 2534 of the Romanian Civil Code).

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