

**PROJECT NAME: “TECHNICAL ASSISTANCE FOR THE PREPARATION OF THE ENFORCEMENT
OF THE NEW CIVIL CODE, CRIMINAL CODE, CIVIL PROCEDURE CODE AND CRIMINAL
PROCEDURE CODE”**

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INTERIM REPORT I

VOLUME I

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VOLUME I

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I. INTRODUCTION

According to the Contract of consulting services for Technical Assistance for the “Preparation of the enforcement of the New Civil Code, Criminal Code, Civil Procedure Code and Criminal Procedure Code” (hereinafter referred to as the “**Contract**”), concluded on September 10, 2010 between the Ministry of Justice, through the Department for Implementation of Externally Financed Projects (hereinafter referred to as the “**Beneficiary**”) and the consortium formed of S.C.A. Țuca Zbârcea & Asociații, S.C. KPMG România S.A., The Gallup Organization-România S.R.L., and Hewitt Associates Sp. Z.o.o. (hereinafter referred to as the “**Consultant**”), the Consultant undertook to provide to the Beneficiary a number of reports containing conclusions of the activities of identification and analysis of the estimated impact the new codes (Civil Code, Criminal Code, Civil Procedure Code, and Criminal Procedure Code) (hereinafter referred to as the “**New Codes**”) would have on the Romanian judicial system, from a legal, economic, budgetary and human resources point of view.

In accordance with the provisions of Appendix B (Reporting Requirements) to the Contract, the Consultant undertook to submit to the Beneficiary a first such report (hereinafter referred to as “**Interim Report I**” or “**Report**”) containing the results of a first, preliminary analysis of the modifications brought by the New Codes to the current legislative framework.

The review comprised in Interim Report I is not aimed at providing an exhaustive theoretical study of the New Codes as regards the origin, suitability, or legal added-value of the modifications they bring, their accuracy of systematization or degree of consistency with European Union legislation; nor is this Report aimed at providing a substitute for extensive scholarly works analyzing legal concepts from a historical or epistemological point of view.

At this stage in Contract performance, Interim Report I comprises a preliminary theoretical analysis of the New Codes meant to provide the Beneficiary with:

- mainly, an outline of the regulations susceptible of influencing, or requiring adjustment of the financial-budgetary, or human resources policies applicable to the judicial system in Romania;
- secondarily, a preliminary outline of the normative inconsistencies and discrepancies found in the New Codes, in view of future legislative remedy; as well as
- a preparatory estimate of the legislative adjustments that integrating the New Codes in the existing legal framework requires, with a preliminary indication of necessary revisions and amendments to legislation currently in force;
- a brief review of the New Codes’ compliance with the constitutional norms in force;
- conclusions drawn from consulting with the practitioners; and also
- the preliminary conclusions of the simulations of judicial proceedings organized by the Consultant on the subjects, and following the method agreed with the Beneficiary.

In preparing and drafting the Report, we have employed the methodology described in the Inception Report approved by the Beneficiary, studying the new substantive and procedural norms in the New Codes with a view to identify new legal concepts and compare them against those existing in the current legal framework; in all cases, the purpose of this comparison was to evaluate the potential the

new norms have to generate, upon implementation, a financial, budgetary, or human resources-related impact on the judicial system.

Also, considering that Interim Report I is the result of a first stage of the analyses entailed by the subject matter of the Contract, the Report does not include final evaluations of the financial, budgetary, or human resources-related impact that the New Codes may have on the current judicial system. Such evaluations will be made in the following reports to be submitted under the Contract.

A list of domestic and international enactments referred to in the Report, as well as a glossary of abbreviations and acronyms used throughout the Report, are attached hereto as Annex 1 to Interim Report I.

II. LEGAL ANALYSIS OF THE NEW CODES

A. LEGAL ANALYSIS OF THE NEW CODES BY COMPARISON TO THE EXISTING LEGISLATION

1. The New Civil Code

1.1. Preliminary Title “On Civil Law”

[Art.1-24] NCC’s preliminary title is dedicated to the general principles and norms concerning the regulatory scope and application of civil law in time and space.

[Impact] Considering the general character of these norms, already contained in the existing legislation or commented upon by the legal doctrine and case law, the legal provisions included in the preliminary title will not have a significant legislative, institutional, finance or HR-related impact, except for the necessity to repeal those enactments which currently regulate the matters covered by the NCC. Starting from the idea of promoting a monistic approach as regards the regulation of private law relationships, the NCC has incorporated all regulations on persons, family and commercial relationships, as well as the relevant provisions on the conflict of laws, matters which are currently covered by a series of distinct laws. This means that, after the NCC comes into force, a set of enactments currently regulating the matters covered by the NCC, including the Family Code, the Commercial Code, Decree-Law No.31/1954, Law No.105/1992, will need to be repealed. This Interim Report I also indicates other enactments to be repealed or amended, as the case may be, as a consequence of the NCC’s entry into force; upon the Beneficiary’s express request, we have also considered the proposals for legislative amendments included in the Draft IL of NCC.

(i). Chapter I “General Provisions”

[Art.1-5] Art.1 NCC defines NCC’s regulatory object by codifying the definition of the object of civil law, as this was previously addressed by the doctrine.

[Art.2] Under the side heading “Content of the Civil Code”, Art.2 NCC states the doctrinal principle that civil law norms represent the general law for all regulation areas covered by the code. We note that reference is made now not only to the letter, but also to the spirit of the NCC’s provisions, a principle which has been often asserted by the legal doctrine as regards the interpretation of legal norms and which is now regulated by the NCC.

[Art.3] The provisions of Art.3 in NCC determine the code's scope of application, reflecting the new regulatory approach which aims to cover both the relationships among persons as subjects of personal social relations, and the social relationships with patrimonial content, irrespective of the area of law in which they are carried out (commercial law, employment law, finance law, land law, etc.).

As a novelty, the text promotes definitions for the notions of "professional" (with a wider scope than "merchant", which is currently used by the doctrine and legal practice) and "enterprise" (covering not only the persons or organizations with patrimonial purpose, but also those with non-patrimonial purpose). The newly regulated definitions are meant to cover the entire range of private law subjects which are foreseen by the current legislation (such as companies, family associations, free lancers, civil law partnerships, associations, foundations, etc.). The concepts of "merchant" and "commercial activity" used by the current legislation shall be construed from the perspective of these new definitions.

However, we note that the NCPC does not take on the exact meaning of these concepts, as defined by the NCC. First, the NCPC frequently uses the concept of "enterpriser", which is not defined as such by the NCC. Secondly, the concept of enterpriser is usually used by the NCPC along with the concept of "other professionals" (the most frequently met expression being "enterprisers or other professionals"),¹ which seems to suggest that the NCPC gives to the term of "enterpriser" the meaning of a species out of the broader class of "professionals", i.e. the persons operating an enterprise with the purpose of gaining profit², which contradicts the NCC's view (the definition of the concept of "professional" provided at Art.3 NCC, according to which "the persons operating an enterprise are deemed to be professionals", would suggest an overlap between the two concepts of "professional" and "enterpriser").

To avoid confusions, we deem that the NCPC must be amended so as to eliminate the use of two similar concepts ("enterpriser" and "professional"), which do not even comply with the terms used by the NCC to name the private law subjects. The NCPC should use only the concept of "professional"; according to the information provided by the Beneficiary, this proposal was considered when drafting the NCC Draft IL.

[Art.4-5] The NCC reiterates the principles provided for by Art.20 of the Constitution on the supremacy of the fundamental law and on the fact that this is construed, as regards personal rights and liberties, in accordance with the Universal Declaration of Human Rights and other pacts or treaties to which Romania is a party, as well as the principle of priority in the enforcement of EU law. As regards Art.5, we deem that the term "Community law" should be replaced by "European Union law", a change of wording required by Art.2 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community signed at Lisbon, December 13, 2007. This recommendation is general and applies to the entire regulation. In our opinion, the provision in Art.207 para.(7) of the NCC Draft IL, according to which the term "Community" is to be replaced by

¹ See, for instance, Art.111, para.(1) item(8), Art.118, Art.270 para.(1), Art.274 of the NCPC.

² The conclusion may only be inferred, as the NCPC does not include a definition of these concepts.

“European” does not fully comply with the terminological standard required by the Treaty, which indicates that the correct and complete expression is “(of) the (European) Union”.³

(ii). Chapter II “Application of Civil Law”

[Art.6-8] NCC states the rules for the application of civil law: the principle of non-retroactivity (Art.6), the territoriality principle (Art.7) and the recourse to the conflict of laws norms in case of legal relationships with a “foreign” element (Art.8). As regards the norms for the application of civil law in time, the NCC reiterates, in a different wording, the provisions of Art.15 para.(2) of the Constitution. Against the constitutional text, Art.6 of the NCC has the advantage that it covers both the principle that the law is applied as of its entry into force, and the principle that the law is not retroactive.

From a **legislative impact** perspective, these provisions impose the necessity to partially repeal Law No.105/1992, because, as of the coming into force of the NCC, the norms on the conflict of laws included in Book VII of the NCC are to be applicable. We note that the NCC Draft IL intends to repeal only Art.1-33 and 36-147 of Law No.105/1992, which means that Art.34–35 of this law, regulating the norms on the conflict of laws applicable to the “obligation of support”, remain in force, as the case is with Art.148–181, regulating “procedural norms on the conflict of laws”. In fact, as regards the norms on the conflict of laws applicable to the “obligation of support”, the NCC provides, under Art.2612, that “the law applicable to the obligation of support is determined in accordance with the regulations of EC law”. At EC level, the law applicable to the obligation of support is determined by the 2007 Hague Protocol and by Regulation (EC) No.4/2009, which have entered into force yet. Upon entry into force of these enactments, Art.34-35 of Law No.105/1992 shall also be repealed.

As regards the procedural norms on the conflict of laws, as regulated by Law No.105/1992 (Art.148-181), these are taken over, with certain amendments, by Art.1050-1095 of the NCPC. Therefore, the law for the implementation of NCPC should also repeal the relevant articles from Law No.105/1992.

(iii). Chapter III “Interpretation and Effects of Civil Law”

[Art.9-17] Art.9 of NCC regulates the approach of the legal doctrine on the official authentic interpretation and the official jurisdictional interpretation. The novelty is that, although, currently, the legal doctrine is quasi-unanimous in contending that the interpretative norm will have retroactive effects because it is not an amendment of the law, NCC expressly provides for the applicability for the future of the interpretative norm, thus ending the controversy on the infringement of the non-retroactivity principle. As regards the official jurisdictional interpretation, the NCC provides that the court may interpret the law only for the purpose of applying it to that particular case.

3 Article 2 of the Treaty of Lisbon provides that: “The Treaty establishing the European Community shall be amended in accordance with the provisions of this Article. 1) The title of the Treaty shall be replaced by ‘Treaty on the Functioning of the European Union’”.A. HORIZONTAL AMENDMENTS 2) Throughout the Treaty: (a) the words ‘Community’ and ‘European Community’ shall be replaced by ‘Union’ and any necessary grammatical changes shall be made, the words ‘European Communities’ shall be replaced by ‘European Union’, except in paragraph 6(c) of Article 299, renumbered paragraph 5(c) of Article 311a. In respect of Article 136, this amendment shall apply only to the mention of ‘The Community’ at the beginning of the first paragraph.”

[Art.10] As an absolute novelty, the NCC recognizes that, absent a special reference (the so-called *praeter legem* custom), usages⁴ are sources of law, but only in non-regulated matters, while in regulated matters, usages may have effects only if they are expressly admitted or recognized by the law. In matters of evidence, the party asserting the application of a certain usage must bring evidence on its existence, to facilitate the burden of proof – which may prove to be difficult, especially in non-regulated matters. The NCC establishes a relative presumption of the existence of usages which have been published in corpora by competent authorities or institutions. The NCC also provides for a definition of the notion of usage, which includes local customs and professional best practices.

According to the NCC, in non-regulated matters, if there are no usages, one shall apply the legal provisions concerning similar legal situations and, absent such situations, the general principles of law. This provision modifies the theory currently developed on the basis of the provisions of the CC, according to which, in non-regulated matters, one shall apply the general principles, and not the legal provisions applicable in similar situations⁵, thus confirming an interpretation trend initiated by the case law (for example, in the matter of warranties for defects, the legal provisions on the sale and purchase contract were applied by analogy).

[Art.11] Art.11 of the NCC regulates certain other principles, i.e. *specialia generalibus derogant* and *exceptio est strictissimae interpretationis*, as well as the doctrinal rule according to which incapacities and sanctions are not presumed, but must be expressly regulated. Para.(2) resumes the provisions of the current Art.5 of the CC on the impossibility to derogate, by an agreement or unilaterally, from the norms on public order or good morals.

[Art.12] The NCC resumes the provisions of Art.475 of the CC, reiterating the rule on the freedom to dispose of the right of private property. Such rule may be limited only by express legal provisions. Art.12 para.(2) of the NCC provides for another novelty, that the insolvent transferor cannot dispose for free of such right, under pain of relative nullity of the deed. This sanction is harsher than in the current regulation, where transferor's insolvency may entail at the most the applicability of the provisions on the revocatory action (in French, *action paulienne*) in case of the debtor's fraud and results in the inapplicability of the deed against the third party who filed the action.

[Art.13] The NCC provides that the waiver of a right is never presumed. This legal text is the codification of a doctrinal principle and promotes to the rank of general rules those provisions which currently exist only under the form of particular applications in certain areas (waiver of succession, waiver of the benefit of joint liability, etc.).

[Art.14] The principle of good faith, which so far has been stated in the CC only in relation to the obligations resulting from agreements, is expressly regulated within the preliminary title of the NCC, being promoted to the rank of general rule. Art.14 of the NCC resumes a principle developed

⁴ Currently, the custom does not represent a source of law by itself, and may be applicable only if there is an express reference to it in a legal text or in the interpretation of a legal text (Art.970, Art.980 CC).

⁵ A good example in this respect is the unnamed agreement, where the general principles on obligations from the CC is applied, and not the legal provisions governing the named agreement which it resembles most.

by the doctrine, i.e. that good faith is always presumed. The presumption of good faith remains relative, as it is now.

[Art.15] A corollary of good faith, the institution of the abuse of rights has not been expressly regulated so far and, until now, was only developed by the doctrine. The NCC only states that “no right may be exercised for the purpose of injuring or damaging another person or exercised excessively or unreasonably, contrary to good faith”. However, the NCC does not determine any sanctions against the abuse of rights. Basically, on the ground of contractual or tort liability, the person who is guilty of an abuse of rights may be ordered by the court to repair the damage in ways that the court will deem appropriate by reference to the respective case (to eliminate the effects of the abusively exercised right, to grant indemnification, etc.)

[Art.16] Starting from the necessity to have a unitary terminology and to codify the applicable principles on civil liability, the NCC defines the forms of guilt (intention, simple negligence, gross negligence) and sets the principle that the person is liable only for his negligence or intention, if the law does not otherwise provide, thus reiterating the principle taken from Art.1082 of the current CC. Intention is regulated in direct or indirect form, and negligence may be deliberate or simple, just as in criminal matters. NCC introduces and defines the concept of “gross negligence” to circumstantiate a form of negligence which has specific implications on its author’s liability. The article is supplemented by special provisions from the NCC. For instance, Art.1480, which is part of the chapter dedicated to obligations, provides for the principle of liability for *culpa levis in abstracto*, defining the criteria for the assessment thereof: “the diligence of a good owner in the management of his property”. In case of professionals, diligence shall be assessed by reference to the nature of the professional activity.

[Art.17] This article is the codification of two principles which are not expressly regulated by the current laws, but have been developed by the doctrine and case law, i.e.: “*Nemo plus iuris ad alium transferre potest quam ipse habet*” and “*Error communis facit jus*”. Currently, these principles are mostly used in the context of the sale of another person’s property. The institution of common and invincible error has been established by the doctrine in order to address problems such as those related to the apparent owner, the apparent heir and the apparent creditor. As an effect of the occurrence of a common and invincible error, the transaction concluded with the third party who is in error shall be validated in favor of that party in error, while the true owner shall file legal action against the apparent owner. The NCC also provides that this institution is limited to the matters in connection to which a mandatory publicity system exists.

(iv). Chapter IV “Publicity of Rights, Legal Deeds and Acts”

[Art.18-24] Under the title of “Publicity of rights, legal deeds and acts”, the NCC establishes a set of principles concerning the effects of the registration of legal rights, deeds and acts, the registration methods, the cases when there is a conflict between several forms of registration and the right of any person to have access to public registries, even if such person does not justify any interest. NCC provides that the land book, the electronic archive of security interests in personal property and the trade registry are, without limitation, public registries.

NCC implements provisions on the protection of persons who may demand the fulfillment of registration formalities, and provides also for the absolute nullity of the contractual clauses which seek to limit the right to perform certain registration formalities (Art.19). It is also provided that third parties cannot prove that they were not aware of a registered act or right if registration procedures with respect to such act or right were performed.

Art.20 NCC specifies and generalizes rules which are currently regulated only in certain matters, concerning the effect of enforceability against third parties, the rank of registration and, if expressly provided by the law, the constitutive effect⁶. The rights/deeds/acts are enforceable between the parties even if no such registration formalities have been performed. It is also provided that a performed registration formality does not substitute the conditions which are required for the validity existence of the deed. In certain cases expressly provided by the law, registration may have acquisitive effects (for example, in the case of real rights under the scope of NCC). In addition, registration does not interrupt the statute of limitation.

Art.21 of the NCC establishes two legal relative presumptions, i.e.: the presumption on the existence of the registered act or right if it was not amended or de-registered and the presumption of the inexistence of a de-registered deed or act.

1.2. Book I “About Persons”

1.2.(a). Title I “General Provisions”

[Art.25-33] Title I of Book I of NCC on persons reunites a set of general provisions on the persons subjected to civil law (Art.25), the recognition of fundamental rights and freedoms (Art.26), the assimilation of foreigners and stateless persons with the Romanian citizens as regards the civil rights and freedoms and respectively the assimilation of the foreign legal entities with Romanian legal entities (Art.27), the civil capacity and its limitations (Art.28-29), the principle of equality before the law (Art.30), as well as a few general principles on the concept of patrimony (Art.31-33).

A few comments must be made especially in relation to the new regulation on the concept of patrimony. Similarly to the current legal regime instituted by CC, Art.31 NCC does not provide for any definition on the concept of patrimony. Nevertheless, the NCC Draft IL supplements the initial wording of Art.31 NCC by including a definition of the concept of “patrimony”, according to which it includes “*all financially assessable rights and debts*” of a person. The definition given by the NCC Draft IL is in line with the one provided by the doctrine further to interpreting the current Art.1718 of CC, according to which the patrimony would represent all rights and debts with economic content belonging to a person. As a novelty, the NCC provides that, by exception from the rule of a sole patrimony, the patrimony may be divided where there groups of assets allocated to a certain purpose. In such case, it is possible to transfer rights and obligations from one patrimony to another, which is deemed to be an act of administration, rather than an act of transfer (Art.32 NCC). In addition, Art.33 of NCC introduces the concept of individual professional patrimony, consisting in that group of assets

⁶ Such rules are currently provided in connection with real estate publicity (Art.27-28 of Law No.7/1996) or movable security in personal property (Art.28, Art.38 of Law No.99/1999).

allocated to the individual exercise of an authorized profession. The NCC Draft IL introduces an additional stipulation concerning the liquidation of the individual patrimony affected to a purpose, i.e. that such liquidation must comply with the general rules provided at Art.1941-1948 of NCC on the company's liquidation, if not otherwise provided by the law.

The new regulation provided at Art.31-33 of NCC on the patrimony affected to a purpose must be read in the light of Art.2324 of NCC on the general security of the creditors. Thus, the extent of patrimonial liability in the case of the patrimonies of affection is only partially limited to each patrimony. In this respect, Art.324 para.(3) provides that: "the creditors whose receivables have been born in relation to a certain part of the patrimony, authorized by the law, must first enforce the assets which are included in such patrimony. If such assets are not enough to satisfy their receivables, the other assets of the debtor may be also enforced". However, by way of exception, NCC provides at Art.2324 para.(4) that "the assets which are included in a part of the patrimony affected to the exercise of a profession authorized by the law may be enforced only by the creditors whose receivables were born in relation to the respective profession. These creditors cannot enforce the other properties of the debtor".

[Impact] We deem that introducing the concept of patrimony affected to a purpose and the possibility to divide the patrimony (in the case of patrimonies affected to a purpose) shall have an impact on the application of the new relevant rules by the courts of law, especially as regards the extent of the patrimonial liability.

1.2.(a). Title II "The Individual"

[Art.34-103] Title II replaces the former regulation on the status of the individual, included in Decree No.31/1954⁷ and commences by a set of provisions on the individual's capacity, grouped in a first chapter (Chapter I – "The Civil Capacity of the Individual") that is divided into three sections: the legal capacity to hold rights and obligations (Section 1), the legal capacity to exercise rights and obligations (Section 2) and declaring death in absentia (Section 3). Chapter II of Title II ("Respect for Human Beings and their Inherent Rights") provides for principles concerning the main fundamental rights of the persons, taking over, to a great extent, as it will be outlined below, the similar provisions from the ECHR, the EU Charter and the Constitution. As preliminary remark, we would like to note that there are no incompatibilities or significant regulatory discrepancies between the fundamental principles provided by NCC and the texts from which NCC inspired. Chapter III of Title II regulates on identification of the individual.

[Impact] Considering, on the one hand, that a large part of the provisions under this title are general principles and, on the other hand, that the texts are to a large extent the same as already provided by the existing laws (Decree No.31/1954, constitutional norms), we estimate a minimum impact from the institutional, human resources and finance/budget point of view further to the

⁷ The NCC Draft IL provides that Decree No.31/1954 on individuals and legal entities shall be repealed as of the effective date of NCC.

implementation of this NCC title. This impact will be limited to trainings for professional improvement purposes, to ensure that the judicial staff becomes acquainted with these norms.

(i). Chapter I “Civil Capacity of Individuals”

(a) Section 1 “Legal Capacity to Hold Rights and Obligations”

[Art.34-36] Legal capacity to hold rights and obligations is defined in the NCC as a person’s aptitude to have civil rights and obligations. Legal capacity to hold rights and obligations is born at the same time with the person and ceases upon the death of such person. As regards child’s rights, the NCC takes on all the provisions of Art.7 para.(2) of Decree No.31/1954, stipulating that such rights are recognized ever since child’s conception, but only if the child is born alive. The text makes reference to Art.412 of NCC regarding the legal time of conception. Please note that NCC amends the current regulation from the Family Code, providing that child’s conception may be proved to have occurred within a certain period from the term provided by the law or even outside this term (Art.412 para.(2)), thus reflecting the current doctrine and case law. The provision shall also apply in relation to setting the time when the individual’s legal capacity to hold rights and obligations is born.

(b) Section 2 “Legal Capacity to Exercise Rights and Obligations”

[Art.37-48] As regards the capacity to exercise rights and obligations, NCC systematizes and supplements the current provisions of Decree No.31/1954 and the Family Code. Thus, NCC provides examples of the categories of persons deprived of the capacity to act. It also clarifies the situation of the married minor’s capacity to exercise rights and obligations, expressly stipulating that, if marriage is annulled, the minor who contracted the marriage in good faith keeps his full capacity to exercise rights and obligations.

As a novelty, the NCC introduces the concept of anticipated capacity to exercise rights and obligations, stipulating that the court of tutorship may recognize full capacity to exercise rights and obligations to a 16 year-minor. Another novelty is that the 15 year-minor may conclude legal acts concerning his job, craft, sport-related occupation or profession, with the consent of his parents or tutor. In such case, the minor is entitled to exercise the rights and perform the obligations arising from these acts, and he may dispose of the earned income. However, the NCC Draft IL eliminates the condition that the minor must turn 15 for his legal acts concerning his job, craft, sport-related occupation or profession to be valid.⁸

Last but not least, the NCC systematizes the provisions concerning the sanctions applicable to legal acts concluded with the infringement of the norms on the legal capacity to exercise rights and obligations (i.e. relative nullity), thus recognizing the right of the legal guardian of a minor with limited legal capacity to exercise rights and obligations to file action for the annulment of the acts entered into by the minor without his consent, a right which is currently acknowledged by the doctrine

⁸ Art.17 item 3 of the NCC Draft IL.

on the basis of the interpretation of Art.9 para.(2) of Decree No.167/1958. Last but not least, we note that the NCC Draft IL proposes that the expression “*relative nullity*” be replaced by “*annulability*” as regards Art.45 (Fraud Committed by an Incapable Person) and Art.46 (Regime of Nullity) from NCC. However, we deem that it is more appropriate from a legal perspective to keep the initial expression from NCC, i.e. relative nullity.

(c) Section 3 “Declaring Death in Absentia”

[Art.49-57] The procedure whereby the court declares death in absentia is simplified by reduction of legal deadlines. Thus, according to Art.49 of the NCC, a person may be declared dead after the lapse of at least 2 years since the last information or indicia showing that he was still alive⁹ Moreover, the NCC provides that the apparent heir who finds out that the person declared dead in absentia by court judgment is alive shall continue to keep possession over the goods and acquire the fruits thereof as long as the reappearing person does not claim their restitution.

(ii). Chapter II “Respect for Human Beings and their Inherent Rights”

[Art.58-81] Inspiring from the FCC and QCC, Chapter II (Art.58-81), called “Respect for Human Beings and their Inherent Rights”, introduces in the Romanian civil code system a charter of the main fundamental human rights, containing legal principles on the right to life, health, physical and psychic integrity, the right to private life and personal dignity, as well as provisions regarding acts or deeds which may represent infringements of these rights (Art.74-75). A section is dedicated to the respect for the memory of deceased persons (Art.78-81). Principles on personal data processing have also been introduced (Art.77). We note that, unlike the FCC (and even the QCC) system, which establish a Charta of fundamental civil rights that are not provided in the constitution, the NCC resumes the constitutional norms on human rights and freedoms provided by the Constitution. In this context, it is our opinion that inserting a Charta of rights and freedoms in the NCC lacks necessity, since a part of the rights and freedoms regulated by the NCC are already provided, under identical or similar wording, in the Constitution (see especially Art.22, Art.26, Art.29, Art.30, Art.34 of the Constitution).

In addition, we note that the aim of Art.58 NCC is rather to itemize the main fundamental rights and freedoms, which are further developed by NCC in other articles (see, for instance, Art.252 NCC). Without minimizing the importance of these fundamental values, we deem that repeating them in several articles from NCC may seem without a practical utility and may generate confusions in the interpretation. In addition, we note that the NCC Draft IL replaces the expression “honor and reputation” in Art.58 of NCC with “dignity”, and provides that any other recognized rights, similar with the ones already listed within the text of law, are rights of the personality, in an attempt to harmonize the terms used throughout the NCC (see, for instance, Art.252). Nevertheless, Art.72 NCC, having as the side heading “The Right to Dignity”, keeps the expression “honor and reputation” at

⁹ According to the former regulation, i.e. Art.16 of Decree No.31/1954, the term was 4 years as of the date when the person was declared missing by court judgment.

para.(2). We recommend that the terminology be rendered uniform by amendments through the NCC Draft IL.

(a) Section 1 “Common Provisions”

[Art.58-60] From the perspective of the regulatory substance, Art.58 NCC resumes the provisions of Art.22 and 26 of the Constitution and Art.2, Art.3 and Art.8 of the ECHR.

Art.59 NCC on the right to a name, domicile, residence and civil status establish rights that have been recognized by the ECHR Court as falling in the scope of Art.8 of ECHR’s Convention on the right to respect for private and family life.

Art.60 NCC reproduces, in an identical form, the provisions of Art.26 para.(2) of the Constitution.

(b) Section 2 “Rights of Individuals to Life, Health and Integrity”

[Art.61-69] Moreover, the NCC pays a particular attention to the issue of medical interventions on the human body and respectively the transfer of tissues and organs from live and dead persons. The regulation of such issues in the civil code, although not an absolute legislative novelty¹⁰, sets the general frame by systemizing a set of principles that are to be then developed by special laws. Mention should be made that these principles are also provided, in a general form, by Art.3 para.(2) of the EU Charter. Moreover, we consider that this section from NCC must also be applied in correlation with Art.77 NCC on the protection of personal data. Thus, according to the ECHR Court’s case law, the fingerprints, the DNA profiles and the cell samples are deemed to be personal data, and so they must be treated in accordance with the principle of the fair balance between private and public interests.

(c) Section 3 “Respect for Private Life and Personal Dignity”

[Art.70-77] Art.70 NCC on the right to the freedom of expression must be read in the light of Art.74 and 75 NCC regarding the limitations to exercising the freedom of expression, the latter making an implied reference to the provisions of Art.10 of ECHR ECHR. It is noted that the right to the freedom of speech is also provided at Art.30 of the Constitution. In this context, the provisions of Art.76 NCC must also be taken into account, as they state for an assumption that consent has been given if the person to whom an information or a material refers is the one who makes available to an individual or a legal entity the respective information or material, being aware that the respective person deals with public information. This assumption appears to be a transposition of ECHR Court’s case law, according to which the person who makes his private life known by his acts loses the protection provided in the ECHR.

¹⁰ The issue of the transfer of tissues and bodies is currently regulated both by the Oviedo Convention of April 4, 1997, ratified by Romania through Law No.17/2001, and by Law No.95/2006 on health reform (see particularly Title VI on the retrieval and transplant of human organs, tissues and cells for therapeutic purposes), Law No.104/2003 on the handling of human corpses and retrieval of organs and tissues from corpses for transplantation purposes and Government Ordinance No.79/2004 on the establishment of the National Transplant Agency. Please note that the NCC Draft IL proposes a set of amendments to Law No.95/2006 in order to harmonize it with NCC’s provisions (NCC Draft IL, Art.20).

In its turn, Art.71 NCC resumes the provisions of Art.26 (Intimate, Family and Private Life) and Art.28 (Secrecy of Correspondence) of the Constitution and the principles provided at Art.8 of ECHR. Art.72 NCC on the right to dignity and Art.73 NCC on the right to one's image are also an application of Art.8 of ECHR, these being acknowledged in ECHR Court's case law as falling in the scope of the right to private and family life.

(d) Section 4 "Respect due to the Individual even after his Demise"

[Art.78-81] The section on respecting the individual even after his demise (Art.78-81 NCC), including as regards the transfer of tissues and organs that we discussed above (Art.81 NCC), is also an application of Art.8 of ECHR. In this respect, ECHR Court acknowledged that this sector is "intimate and sensitive [...] where (the States) must pay a particular attention and prudence."

[Impact] Although, as we mentioned above, the fundamental rights and freedoms outlined in the NCC are already expressed or implicitly provided in the Constitution or in other international conventions, their express regulation in the civil code could prompt the increase in the number of disputes in the domestic court on the ground of alleged infringements of these rights.

(iii). Chapter III "Identification of the individual"

[Art.82-103] As regards the identification of the individual, the NCC contains a set of provisions on the right to a name, domicile and residence, stating on the fact that there may be only one domicile and residence (Art.86 para.2), as well as a series of provisions on civil status, (defined by the NCC as the right of any person to identify himself within family and society), as well as on the evidentiary means in these matters.

(a) Section 1 "Name"

[Art.82-85] Art.82 NCC reiterates the principles already provided by Art.59 NCC and resumes in terminis the provisions of Art.12 para.(1) of Decree No.31/1954. In its turn, Art.83 NCC, resumes the provisions of Art.12 para.(2) of Decree No.31/1954 and respectively Art.1 of GO No.41/2003.

Art.84 para.(1) NCC on acquiring a name partially resumes the provisions of Art.2 of GO No.41/2003, but no longer provides for the mandatory change of the family name when the marital status is changed, but only for the possibility to change the name. Art.84 para.(2) NCC partially amends Art.18 para.(2) of Law No.119/1996, in the sense that the civil officer cannot, under the new regulation, register first names that consist of indecent words. As regards the change of the family name or the first name by administrative procedures, Art.85 NCC only makes reference to the special law in this matter (currently GO No.41/2003).

(b) Section 2 "Domicile and residence"

[Art.86-97] As regards the domicile, Art.86 NCC partially resumes the provisions of Art.25 para.(2) of GEO No.97/2005, also expressly adding that Romanian citizens may also establish their domicile abroad. Art.86 para.(2) NCC establishes the principle that there must be only one domicile, by resuming the provisions of Art.25 para.(3) of GEO No. 97/2005. Similarly to the current regulation (Art.26 para.(1) of GEO No. 97/2005) NCC provides that the domicile is the main address (Art.87

NCC). We note that, under the current regulation, Art.26 para.(1) of GEO No. 97/2005 uses the concept of “*main dwelling*” instead of “*main address*”. To harmonize these semantic differences, the NCC Draft IL proposes the amendment of Art.26 of GEO No. 97/2005 in the sense of using the expression “*main address*” (NCC Draft IL Art.19). As regards the concept of residence, Art.88 NCC reflects the substance of the provisions of Art.29 of GEO No. 97/2005 and discards the provision that the address of residence is different from the address of domicile. Concerning the change of domicile, Art.89 NCC makes reference to the rules provided by the special law, *i.e.* GEO No.97/2005, also adding that the domicile is not deemed established or changed unless the person occupying or moving to a certain place did so with the intention to have a main address; the proof of such intention follows from the statements made by such person with the administrative bodies which are competent to determine the establishment or change of domicile or, absent such statements, from any *de facto* circumstances. As a novelty, NCC establishes, at Art.90, an assumption regarding the domicile: the residence shall be deemed to be the domicile when no domicile is known and, when lacking a residence, the individual is deemed to be domiciled at his last known domicile or, if such is not known, at the place where such person is actually located. As regards the evidentiary means of domicile, Art.91 NCC resumes and develops the provisions of GEO No. 97/2005. Art.92-96 NCC regulate special cases concerning the establishment of domicile for the minor, the legally incapable, the person under curatorship, the domicile at the trustee or curator and respectively the professional domicile, by resuming and supplementing the current regulation, mainly contained in Decree No.31/1954 and GEO No.97/2005.

As a novelty, NCC defines the concept of “professional domicile”, according to which the person operating an enterprise is deemed domiciled at the place of such enterprise as regards the patrimonial obligations born or to be performed in such place (Art.96 NCC). In addition, we note that the NCC (Art.97 NCC) has expressly provide for the possibility of choosing the domicile by a legal deed in order to perform the obligations arising from such deed, which was already recognized by the doctrine.

(c) Section 3 “Civil Status Deeds”

[Art.98-103] Concerning the civil status deeds, as mentioned above, Art.98 NCC defines, in line with the opinions already expressed by the doctrine, the concept of “civil status” as the right of the person to identify oneself within the family and society by his strictly personal qualities arising from civil status acts and deeds. As regards the evidentiary means on the civil status, Art.99 NCC resumes most of the current regulation, contained especially in Art.13 and 14 of Law No.119/1996 and respectively Art.23 of Decree No.31/1954. However, unlike the solution provided at Art.23 of Decree No.31/1954 (according to which “the drafting or rectification of the civil status deeds made through a judgment is also enforceable against third parties. However, the latter are entitled to prove the contrary”), Art.99 para.(3) NCC provides that the proof to the contrary must be acknowledged by another judgment.

As regards the annulment, supplementation, amendment or rectification of civil status deeds, NCC does not bring any significant amendments (except for those provided under the paragraph above), resuming and supplementing the existing provisions, *i.e.* Law No.119/1996. Also, Art.101-103 NCC resume the current provisions of Law No.119/1996 on the registration of mentions in the civil status deed, the regime of the civil status deeds drafted by an civil officer lacking competence and,

respectively, other means to prove the civil status. Nevertheless, as regards the civil status deeds drafted by a civil officer lacking competence, Art.102 NCC adds a new exception to those provided by Art.7 of Law No.119/1996, namely in the case the beneficiary was aware of the lack of competence of the respective civil officer. This exception is currently justified, considering that Art.7 of Law No.119/1996 is an application of the rule of *error communis facit jus* which, according to the doctrine, relies on the idea of good faith.

1.2.(b). Title III “Protection of the individual”

[Art.104-186] Title III of Book I in the NCC puts together in a better systematized manner the legal provisions on the protection of minors and other persons requiring special forms of protection that were so far included in Title III of the Family Code and in specific laws on child protection, mainly Law No.272/2004. This title refers especially to the protection measures which may be taken in relation to individuals who are in special situations (the minor, the persons who, because of old age, disease or other causes, cannot manage their property or interests); cases when a tutorship is established, the person who may be appointed as tutor; procedure for the appointment of the tutor; tutor’s obligations, conditions in which donations and legacies may be accepted by the tutor on behalf of the minor, relative nullity of the legal acts concluded by the tutor or spouse or a relative thereof, on the one hand, and the minor, on the other hand – in line with the current regulation and the theory of nullity, status of the amounts of money required for supporting a minor and tutor’s obligations in this respect, regulation of dative tutorship and institution of dative curatorship for legally capable people.

[Impact] The main regulations from Title III of the NCC which will have a legal, institutional, financial/budgetary or HR impact are those concerning the newly created court of tutorship and family, called the “**court of tutorship**”. The organization and substantive competence of this court requires a more detailed analysis, which we will make below, after we comment on a few other aspects.

As a shortcoming of the new regulations, we note the absence of the *celerity* principle in ruling on children-related matters (currently provided for by Art.6 let.j) of Law No.272/2004, as being a fundamental principle of proceedings involving the minor), which is substituted with the principle according to which proceedings should be held “in a reasonable timeframe, so that the child’s best interest and family relations would not be affected” (Art.263 para.(4) of the NCC). However, we consider that the duties entrusted to the court of tutorship, especially those concerning the exercise of tutorship (and curatorship) are of a type which often calls for “celerity” rather than merely a “reasonable timeframe” in settling claims, an aspect which should be taken into account in assessing the staffing needs for the courts of tutorship.

Another aspect with a **legislative impact** concerns the role of the tutorship authority, since its duties relating to the protection of individuals through tutorship and curatorship (currently regulated by the

Family Code and Law No.272/2004) have passed to the court of tutorship¹¹ or to the family council¹², as applicable. Therefore, some provisions of Law No.272/2004 and the special norms issued for the implementation thereof should be amended.¹³

Moreover, the duties entrusted to the court of tutorship sometimes require the appointment of proxies – for example, to inventory the minor’s assets immediately after tutorship has been placed – which triggers the need for special regulations to clarify whether these ancillary activities are to be carried out by judges, by the auxiliary staff within such specialized courts or by other authorities to which the court of tutorship would delegate such power (for example, the general departments of social assistance and child protection established under Law No.272/2004). The assessment of the human resources impact, respectively the financial/budgetary impact on the courts highly depends on this clarification as well.

- Organization of the Court of Tutorship

The institutional, human resources and financial/budgetary impact of the implementation of NCC’s provisions on the court of tutorship depends, to a great extent, on how these courts will be organized. The new regulation must be analyzed by reference to the current organizational framework of the judicial power, as provided by Law No.304/2004.

Law No.304/2004 expressly allows the establishment of specialized tribunals, which may be created, *inter alia*, to handle the files involving minors and family, as courts without legal personality organized at the level of counties and Bucharest municipality, specialized divisions for minors and family within tribunals and courts of appeal, as well as specialized panels at all jurisdictional levels.

On the other hand, it follows, from the analysis of the legal texts, that NCC creates an entire set of specialized courts which must comply with the substantive and territorial competence rules provided by the law for district courts, tribunals and courts of appeal in family related cases and in cases concerning the protection of individuals by tutorship and curatorship.¹⁴

In our opinion, the expression “court of tutorship” seems to indicate the lawmaker’s intention to create a specialized court, and not specialized divisions or panels within the courts. As a possible argument to support this interpretation, we may argue that the NCC Draft IL provides that, until the legal regulation of the organization and operation of the court of tutorship, its duties are to be exercised by the courts, the divisions or, as the case may be, the specialized court panels for minors and family. It

¹¹ For instance, the appointment of a tutor as an alternative protective measure for minors is currently made by the court based on an assessment of the prospective tutor by the general division for social assistance and child protection in what regards the moral guarantees and material requirements to be met in order to be entrusted with the child. The New Civil Code no longer provides for the involvement of the tutorship authority, which leads to the conclusion that the assessment is conducted directly by the court.

¹² For example, the tutorship authority’s duty to fix the annual amount necessary to support the minor and manage his assets now devolves upon the family council (Art.148 para. 1 of the NCC).

¹³ We note, in this respect, that the NCC Draft IL intends to repeal Art.40 para.(1), Art.41 and Art.42 of Law No.272/2004.

¹⁴ As regards the HCCJ it would be then recommendable to create a special division within such court rather than a completely separate court, the homologue of the High Court of Cassation and Justice, as it is preferable for the supreme court to remain unique.

may follow that, after the necessary legal framework is set in place, the court of tutorship will not be organized and operate as a specialized division or panel within the existing courts, but as a specialized court. According to such interpretation, the courts of tutorship would be established at each jurisdictional level, with their own organizational structure and assets, separated from the general law courts in the territorial jurisdiction of which they would be organized (i.e., district courts, tribunals and courts of appeal from which they would take over the cases on family matters and on the protection of the individual by tutorship and curatorship), according to the model of the specialized tribunals provided by Law No.304/2004, more precisely, according to the Braşov Tribunal for Minors and Family (“**TMFB**”), the only specialized tribunal in this respect which has been created so far.¹⁵

Alternatively, in the absence of express provisions in the NCC, the court of tutorship could be, in principle, organized under the form of specialized divisions or panels within the courts, at each jurisdictional level. In this case the expression “court of tutorship” would be interpreted as a reference to the special substantive competence of these structures, and not to their form of organization. Mention should be made that the NCC Draft IL provides that the organization, operation and duties of the court of tutorship shall be established by the law on the judicial organization, however without indicating whether the NCC lawmaker’s intention has been to organize this court under the form of specialized panels or divisions, as per Art.39, Art.40, Art.41 of Law No.304/2004 or as a specialized court, organized according to the model of specialized tribunals at all jurisdictional levels.

In our opinion, the institutional, human resources and financial/budgetary impact shall differ by reference to the selected organization method of the court of tutorship. As the current version of the NCC Draft IL provides that, at the outset, the duties of the courts of tutorship are to be exercised by the courts, divisions, respectively the court panels for minors and family, a first impact analysis should ponder the implications of this organization method in terms of the changes to occur in the competence of these courts, divisions and panels when they take over all duties of the court of tutorship. In support of this impact analysis, we include below a brief comparative analysis between the competences of the court of tutorship and the competences of the existing courts, divisions and panels for minors and family.

A distinct analysis must be made on the impact of the organization, at a subsequent stage, of specialized courts or, as the case may be, specialized panels and divisions having the competences provided by the NCC for the court of tutorship. Again, to support this impact analysis, we deem that it would be useful to compare the current competences of the courts, divisions and panels for minors and family with the competences of the court of tutorship. This presentation is included in the section below.

¹⁵ TMFB was established by Order of the Ministry of Justice No.3142/C/232.11.2004, issued under Art.130 para.(2) of Law No.304/2004, as well as GD No.652/2009. TMFB actually started to operate on November 22, 2004.

- Substantive competence of the court of tutorship

Another aspect influencing on the assessment of the impact triggered by the NCC's implementation as regards the newly created court of tutorship is its scope of substantive competence. The NCC contains two norms of principle concerning the competences of this court: Art.107 and Art.265. Art.107 NCC provides that "the procedures herein provided on the protection of the individual by tutorship and curatorship fall under the competence of the court of tutorship and family established in accordance with the law, hereinafter called the court of tutorship". Art.265, which is included in Book II of NCC ("The Family"), provides that "all measures assigned by this book to the competence of the court of law, as well as all provisions of this book fall under the competence of the court of tutorship", thus setting a general competence of the court of tutorship on family cases.

In addition to these general provisions, the NCC contains provisions which expressly assign certain cases to the court of tutorship. Thus, Art.40 NCC provides that the court of tutorship may acknowledge the minor's emancipation. Art.41 para.(2) provides that the minor with limited capacity to exercise rights and obligations may conclude legal deeds with the authorization of the court of tutorship. Art.44 NCC provides that the court of tutorship is competent to authorize the acts made by the tutor on behalf of the person who does not have the capacity to exercise rights and obligations and, absent such authorization, the court of tutorship is to notify the prosecutor in view of initiating an annulment action (as per Art.46 para.(4)). The court of tutorship is also competent to establish the minor's domicile in accordance with the conditions provided at Art.92.

As a first comment, there are differences in the substantive competence of the specialized tribunals, panels and division for minors and family currently provided by Law No.304/2004, on the one hand, and the court of tutorship implemented by NCC, on the other hand. Thus, under the current regulation, the specialized panels and divisions, as well as the specialized tribunals for minors and family related matters (in this case, the sole tribunal of this kind was established at Braşov), judge all family and minor related cases, both of civil and criminal nature (the latter concerning offenses committed by or against minors; also the cases with several offenders that include minors, if division of the case is not possible (Art.40 of Law No.304/2004)). The cases on the promotion and protection of the rights of the child, provided at Law No.272/2004, since they are cases concerning minors, also fall under the competence of the specialized tribunals, divisions and panels provided by Law No.304/2004.

On the other hand, the court of tutorship regulated by NCC is competent, as expressly provided at Art.107 and Art.265, only in relation to civil cases, i.e.: family related cases and cases concerning tutorship and curatorship. Unlike the specialized tribunals, divisions and panels currently provided by Law No.304/2004, the court of tutorship does not held competence as regards criminal cases, whether or not concerning minors. From this perspective, according to NCC, the newly created court of tutorship has a more limited competence than the one provided by Art.40 of Law No.304/2004 for the tribunals, divisions and panels specialized in minors and family related matters.

The scope of civil cases on which the court of tutorship is competent raises certain questions. First, we note that the new regulation does not clearly states which court is competent to settle cases on the protection and promotion of child's rights under Law No.272/2004. On the one hand, NCC included –

in Book I and mostly in Book II on family, the general principles concerning the protection and promotion of minor's rights and other provisions from this special law, and allocated the cases in these matters under the scope of the court of tutorship. However, there are measures which are regulated only by the special law and have not been taken on in NCC, such as the fostering (child's placement). Art.106 para.(1) NCC provides that the minor's protection is ensured through his parents, tutorship, fostering or, as the case may be, by other special protection measures expressly provided for by the law; Art.107 expressly provides that "the procedures herein provided on the protection of the person by tutorship [...]" fall under the competence of the court of tutorship, apparently excluding the competence of this court as regards the measure of fostering or other protection measures provided by the special law (according to Law No.272/2004, such measures are urgent fostering and specialized supervision). To the same extent, NCC does not contain provisions regarding alternative care, which are provided by Law No.272/2004; such cases may be closely connected to family law but, absent express provisions, they will not be settled by the court of tutorship, but by another court. Please note that currently the fostering of minors falls under the competence of the tribunals, divisions or panels specialized for minors and family related matters, established under Law No.304/2004.

Secondly, and in close connection to the first discussed issue, we consider that the lawmaker must expressly clarify if, after the implementation of the NCC, a special competence must be maintained or not for cases involving minors and if, within such competence, a distinction must be made by reference to the nature of the case (civil/criminal). The lawmaker may opt for granting the competence to settle all minor-related cases, irrespective of their nature, to the court of tutorship, by amending the NCC, Law No.304/2004, Law No.272/2004 and other relevant enactments, including those on criminal law. Alternatively, it may be an option to maintain the specialized tribunals, divisions and panels already provided for by Law No.304/2004, but limit their competence only to the cases concerning minors, while the family law matters be allocated under the competence of the court of tutorship; although, in this case, there seems to be no reason to create two different courts for family related cases, depending on whether the case concerns a minor or not.

Finally, the lawmaker may decide to grant to the general law courts the competence to settle the cases concerning minors, except for those concerning family law, tutorship and curatorship, which fall under the competence of the specialized court of tutorship. In our opinion, this would be a step back as compared to the current level of the legislation. For reasons pertaining to institutional coherence, harmonization of the Romanian laws with the legislation of EU Member States and compliance with the fundamental principles provided by the UN Convention on the Rights of the Child to which Romania is a party as per Law No.18/1990, and due to the need that Romania continues the efforts of the last years to establish a judicial system specializing in minors related matters, efforts which include the issuance of Law No.272/2004, the amendment of Law No.304/2004 to allow for the creation of specialized tribunals, divisions and panels for minors, as well as the actual organization thereof, the

professional improvement of the staff in this respect,¹⁶ etc., it would be more justified to maintain and develop a sole court specializing in the settlement of all cases involving minors, irrespective of their nature. Such sole court specializing in making justice for minors could be, in principle, the newly created court of tutorship. In this case, it would have the same competence as the tribunals, divisions and panels specialized in minors and family related matter set forth by Law No.304/2004, and in addition the competence to settle the cases concerning the protection by tutorship and curatorship provided for in Book I of the NCC. In this case, depending on the organization of the court of tutorship which will be selected when implementing the NCC, such court would take over the cases falling under its competence, for each jurisdictional level, from the divisions and panels for minors and family operating in the respective territorial jurisdiction, respectively from TMFB, as well as, for each jurisdictional level, from the general law courts in the territorial jurisdiction of which the cases concerning the protection of the individual by tutorship and curatorship are filed.

In consideration of the above, we anticipate the need of amending the source law, i.e. Law No.304/2004, so as to expressly provide how the newly created courts of tutorship are to be organized and to determine how they will be correlated, from an organizational, institutional and competence perspective, with the specialized tribunals, divisions and panels currently provided for by Law No.304/2004.

- The impact of creating courts of tutorship on the Braşov Tribunal for Minors and Family

TMFB is the only specialized tribunal of this type set up under Law No.304/2004. According to the data available on TMFB's website, it operates on the premises of Braşov Tribunal, but in a separate unit, consisting of two offices for judges, two offices for court clerks, a meeting hall with recording equipment, a computer and sound system, a council chamber, an archive and a registration office. TMFB's organizational chart provides for 1 position of chairman, 6 positions of judge, 1 position of head court clerk and 6 positions of court clerks, 1 position of archive operator, 1 position of procedural agent and 1 position of driver. As regards the type of cases submitted to TMFB, the published list of the last 100 cases pending before this court indicate a prevalence of civil cases over criminal cases (as well as a large number of declinations of competence in criminal matters) and, among the civil cases, a relative balance between the cases under Law No.272/2004 and those under the Family Code.

The aforementioned considerations on the organization and substantive competence of the newly created court of tutorship remain relevant in the particular case of TMFB. Depending on the organization and the competence of the court of tutorship – which will be ultimately determined by law – TMFB may be maintained, under a new name and possibly with an amended competence, as a court of tutorship at the jurisdictional level of Braşov Tribunal, by maintaining TMFB's specialized staff and assets in the new structure. Please note that, according to the NCC Draft IL, during the period following the coming into force of the NCC, until the norms for the organization and operation

¹⁶ According to the Presentation made at the end of the project in the PHARE Programme RO 2003/IB/JH-09 "Support for the improvement of justice for minors in Romania", 490 magistrates, 56 court clerks, 50 probation advisors, 75 ANP officers have been professionally trained in the field of justice for minors.

of the courts of tutorship are adopted, TMFB will exercise at its jurisdictional level – along with other courts’ existent divisions and panels for family and minors – the competences of a court of tutorship.

(i). Chapter I “General Provisions”

[Art.104-109] Chapter I of Title III, containing general provisions, institutes the principle of protecting the individual in consideration of his best interest, currently regulated as such only with respect to the protection of minors.¹⁷ The forms of protection with respect to minors and individuals of full legal age, respectively, are outlined in the same chapter.

As mentioned above in our brief review of the impact of NCC’s implementation as regards the newly created court of tutorship, only part of the causes concerning the protection of the individual provided by NCC fall under the competence of the court of tutorship. As regards the minor, Art.107 expressly provides that the minor’s tutorship falls under the competence of the court of tutorship, while Art.265 provides that the minor’s protection through his parents, detailed in Book II on family, is also under the competence of such court. However, it does not follow from the text whether the fostering and other measures concerning the minors established by the special law would fall under the competence of such specialized court or of the general law court. For instance, although fostering is mentioned among minor’s protection forms at Art.106 para.(1) of the NCC, along with tutorship, Art.107 provides that the court of tutorship is competent to try only the procedures on the protection of persons by tutorship and curatorship, and not all procedures concerning the protection of persons. As regards the major persons, it follows from the interpretation of Art.107 and Art.164-177 NCC that only tutorship and curatorship falls under the competence of the court of tutorship, while the settlement of the request for declaring an individual legally incapable would fall under the competence of the general law court; thus, in Chapter III (“Protection of Legally Incapable Person”), the NCC uses the concept of “court of law” in the legal texts concerning the declaration of legal incapacity, which is distinct from the concept of “court of tutorship”, used in the legal texts concerning the protection measures, while Art.170 para.(1) of NCC provides that the judgment on declaring legal incapacity is served to the court of tutorship. Pursuant to the information provided by the Beneficiary, this aspect was settled on the occasion of the Parliament debates on the NCC Draft IL.

As regards the exercise of the minor’s tutorship, a new element worth noting is the introduction of the concept of “family council” (Art.108), a consultative body which may be set up by the court of tutorship at the request of interested parties¹⁸. The role, manner of establishment and members, the powers and functioning of the family council are regulated in a separate section (Section 3 “The Family Council”, Art.124-132), while references to this council are also spread out through the entire

¹⁷ See in this respect Art.114 of the Family Code according to which “Tutorship is exercised solely in the best interest of the minor” or Art.2 para. (2) of Law No.272/2004 providing that “The principle of the child’s best interest is mandatory including with respect to the rights and obligations incumbent on the child’s parents, his other legal representatives as well as on any persons duly entrusted with the child’s care”.

¹⁸ Although the institution of the “family council” is regulated in the matter of minor’s tutorship, we deem that the legal provisions concerning the family council also apply to the tutorship of the person declared legally incapable, in consideration of Art.171 NCC.

Title III. If no family council is established, the powers provided by the law for such council shall be exercised by the court of tutorship (Art.108 para.(3)).

(ii). Chapter II “Tutorship of the Minor”

(a) Section 1 “Instituting the tutorship”

[Art.110-111] The cases when tutorship is to be instituted and the persons under the obligation to notify the court of tutorship when such cases arise are similar to those provided by the current regulation, the only change as to the provisions of Law No.272/2004 (Art.40 para.(1)) and the Family Code (Art.113 and Art.115, respectively) consisting in the lack of providing a legal term for making the notification. The absence of a time limit is actually justified as long as the legal obligation is not accompanied by any specific sanction. We note that the NCC Draft IL proposes the repeal of Art.40 para.(1), Art.41 and Art.42 of Law No.272/2004.

(b) Section 2 “Tutor”

[Art.112-123] In what concerns the persons that may be appointed as tutor and the cases of incompatibility, the NCC repeats the existing regulations (Art.41 para.(1) of Law No.272/2004 and Art.117 of the Family Code), with two notable amendments (Art.112-113). Thus, it is no longer a condition under the NCC that the appointed tutor should be domiciled in Romania. However, when assessing the relevant person’s capacity to fulfill the task incumbent as tutor, the criterion of “having close domicile” shall be considered (Art.118 of the NCC), and thus the appointed tutor’s domicile is still a relevant aspect. Secondly, a new case of incompatibility with the capacity of tutor was added, namely when a person is excluded by means of an authentic instrument or will by the parent who, at the time of his death, was exercising parental authority alone (Art.113 para.(1) let.g) of the NCC).

In close connection to the provision under Art.113 para.(1) let.g), Art.114 of the NCC allows, by contrast to the current regulations, for the parent to designate the person to be appointed as tutor, under a unilateral act or a mandate agreement, both concluded in authentic form, or under a will. However, a parent having lost parental rights or having been declared legally incapable cannot make such designation of the tutor. The designation may be revoked at any time even by a deed under private signature.

The court may deny tutorship to a designated person if he is subject to any of the incompatibility cases provided by Art.113 of the NCC or if his appointment threatens the minor’s interests.

As a new element, the NCC provides the possibility for the court of tutorship to request the tutor to provide personal or *in rem* guarantees (Art.117).

The order of priority in appointing the tutor is the same as the currently regulated one: relatives, in-laws or friends of the minor’s family (Art.118). The tutor is appointed by the court of tutorship, in council chambers, by means of a “final interim award” (Romanian, *încheiere definitivă*) (Art.119).

Art.119 para.(2) guarantees the right of the minor who is of at least 10 years old to be heard in relation to the appointment or replacement of his tutor, a right which is provided by Law No.272/2004 and taken on by NCC in Book II as a general principle, applicable in all procedures concerning the minor (Art.264 NCC). The provisions of Art.119 shall be supplemented by Art.264, in the sense that any

child, even if he is not at least 10 years old, may be heard if the court of tutorship deems that this hearing is useful for the case.

Unlike the current Family Code, according to which the tutor may not decline tutorship, except for certain circumstances, the NCC provides that the appointment of the tutor shall be made subject to his consent. As an exception, the tutor cannot decline tutorship if designated under a mandate agreement, unless such tutor is in one of the cases provided at Art.120 para.(2) (he/she is at least 60 years old, she is pregnant or the mother of a child under 8 years of age, or deals with the upbringing of two or more children or, because of illness, infirmity, the type of activity such tutor develops, the distance from the tutor's domicile to the place where the minor's goods are located or for other grounded reasons, the tutor cannot comply with the duties of tutor). The principle of having the tutor's consent upon his appointment is doubled by the one providing for the obligation to continue tutorship, the tutor having the possibility to discontinue exercising tutorship only in the situations restrictively laid down by Art.122 para.(2) of the NCC, which are identical to those provided under Art.118 of the Family Code for declining tutorship.

Another novelty is that if a family council has been established, this must be consulted on appointing the tutor.

The NCC states for the personal nature of tutorship, with the possibility that, exceptionally, the court of tutorship, with the consent of the family council, if there is one, may appoint specialized individuals or legal entities to manage the minor's patrimony or part thereof, depending on its size and composition (Art.122).

As with the current regulation, Art.123 NCC institutes the rule that tutorship is exercised for no consideration. However, the court of tutorship has the possibility to establish remuneration not higher than 10% of the revenues generated by the minor's property. It is worth noting that the NCC does not provide the possibility for the remuneration to be established directly under the mandate agreement whereby the parent designates the tutor; absent an express provision in this respect, we deem that the rule of free-of-charge work shall also be applicable to the appointment by mandate agreement, but in exceptional cases the court of tutorship may set a remuneration in this case as well.

(c) Section 3 "Family Council"

[Art.124-132] The family council, a new concept in our legislation, is established as an advisory body, which has the purpose of supervising how the tutor exercises his rights and fulfills the obligations of tutorship in relation to the minor and his property. In principle, the family council is formed of relatives or in-laws, or, in the absence thereof, persons who had friendship relations with the minor's parents or who take a particular interest in the latter's situation. The new provisions regulate the manner of appointment and the maximum number of members, the replacement thereof, the operating manner and the decision-making process, as well as the duties of the family council. The family council expresses its opinion through advisory notices, except for the cases when the law grants it a decision-making role. For instance, the family council issues advisory notices with regard to the appointment or replacement of the tutor by the court of tutorship, as per Art.119 para.(3), when establishing tutor's remuneration (Art.123 para.(2)), when the tutor takes measures with regard to the

minor, except for those on ordinary matters (Art.136). The family council has a decision-making role in the setting the annual amount necessary in order to support the minor (Art.148).

As regards the potential **impact** of NCC’s implementation, we note that the following aspects related to the institution of the family council must be clarified: who has the power to summon the meeting of the family council,¹⁹ whether the court of tutorship should participate to the family council meetings,²⁰ who is in charge of establishing and keeping the registry of family council decisions (as such is provided under Art.130 para.(3) of the NCC). Pursuant to the information provided by the Beneficiary, this aspect was settled on the occasion of the Parliament debates on the NCC Draft IL.

(d) Section 4 “Exercise of Tutorship”

1. General Provisions

[Art.133-135] As regards the general rules for exercising tutorship, the lawmaker opted to reiterate in the NCC the current provisions of the Family Code. We note that the concept of “interest of the minor” has been circumstantiated, as the NCC makes an express reference both to the person and to the property of the minor. As regards the content of tutorship, the current relevant provisions have been resumed, except for the provisions on the upbringing of children in accordance with the purposes of the State, so that they may serve the community. As also held by the doctrine, these provisions became obsolete after 1990 when the political regime and the constitutional principles changed, but, although inapplicable, they have not been expressly repealed so far. As a novelty, the NCC regulates the status of the tutorship exercised by both spouses, in which case they are both liable for the exercise thereof, the NCC making express reference to the applicable norms in the field of parental authority. In case of divorce, the court of tutorship will determine which of the two spouses is to exercise tutorship.

2. Exercise of Tutorship in relation to the Minor

[Art.136-139] The exercise of tutorship on the person of the minor is made with the endorsement of the Family Council, except for day-to-day measures. The minor’s domicile is at the tutor, and the court of tutorship must authorize the setting of an address for the minor. We note that, unlike the current regulation,²¹ the NCC considers only the possibility of setting a residence as secondary address, the minor not being able to have another domicile than the tutor’s. Another novelty is that the tutor may approve a residence of the minor by reference to his education and professional training,

¹⁹ According to Art.129 para.(1), the family council should be convened at least 10 days before the meeting date, at the request of either member, the minor of at least 14 years of age, the tutor or the court of tutorship, but NCC does not stipulate expressly who is in charge with summoning the council at the request of the entitled persons. Read in the light of Art.128, it may also be interpreted that any of the persons provided at Art.129 para.(1) may convene the family council. This is why we recommend that this aspect be clarified by the implementation law.

²⁰ Art.129 para.(3) provides the possibility that the family council’s meetings be held at the minor’s domicile or, “as the case may be”, at the court headquarters, which seems to suggest that the court of tutorship should attend the said meetings, at least in the latter situation.

²¹ According to Art.122, the minor can have another address only if the court of tutorship so agrees.

informing the court of tutorship in this respect.²² The type of education or professional training received by the minor is subject to the same legal regime as it is now. The NCC establishes the general obligation for the court of tutorship to hear the minor past the age of 10, an obligation which currently is not general, but may be found only in particular applications of this principle.

3. *Exercise of Tutorship on the Minor's Assets*

[Art.140-150] As regards rules of exercising tutorship with respect to the child's assets, the NCC resumes and develops the current Family Code provisions.

As we also mentioned above under the section dedicated to the institutional impact, we deem that the duties of the court of tutorship to supervise how the tutor manages the minor's assets, duties which usually lay with the tutorship authority, may raise an issue concerning the auxiliary staff available to the court of tutorship, and that is dependent to the clarifications to be brought to these general provisions by the implementation law or by the special secondary legislation. For instance, the inventory of the minors' assets, upon the appointment of the tutor, is now a duty of the court of tutorship, which shall exercise it "by proxy"; the legal provisions does not mention however who are the persons or institutions to which the court may delegate this duty. When carrying out the inventory, the tutor and the family council members must declare their own receivables or claims against the minor, otherwise a relative legal assumption that they waived such rights would apply.

The duty to authorize (i) the payment of receivables to the tutor, their spouse, direct relatives, brothers or sisters, and (ii) the transfer, partition, mortgaging, encumbrance of the minor's assets, waiver to patrimonial rights or other acts exceeding the scope of management acts, currently established by the Family Code to fall under the scope of jurisdiction of the tutorship authority, were transferred to the competence of the court of tutorship. The authorization condition is required for both the deeds concluded by the tutor on behalf of the minor who is under 14 years old and for the deeds concluded by the minor who is at least 14 years old. In all cases, the lack of authorization shall entail the relative nullity of the deed, at the request of the tutor, the family council or any of the members thereof, or at the prosecutor's request, *ex officio* or when so instructed by the court of tutorship.

The annual amount necessary to support the minor shall be however established by the family council, who must inform the court of tutorship on its decision.

The NCC establishes a special regime for the amounts of money exceeding the minor's needs of support and for the management of his assets. They are to be deposited with a bank nominated by the family council, they may be used only with the authorization of the court of tutorship and cannot be used in transactions on the capital market.

²² Currently, Art.102 provides that the tutorship authority may grant, at the request of the minor past the age of 14, the possibility for such minor to set his address by reference to his education and training.

(e) Section 5 “Control of Tutorship”

[Art.151-155] The control of tutorship is exercised by the court of tutorship and must be “effective and permanent”. To this end, such court may call for the involvement of the “public administrative authorities, child care public institutions and divisions or child protection institutions. The enactments on the operation of such authorities and institutions should be amended or supplemented with provisions on how the cooperation with the court of tutorship will take place in matters related to the supervision and control of tutorship.

As under the current legislation, the tutor has the obligation to make an annual report on the manner he took care of the minor and the management of the latter’s property. The report is to be filed with the court of tutorship within 30 calendar days as of the end of the calendar year. As a new element, the NCC provides that in case the minor’s property is of small value, the court of tutorship may approve that the report be filed at lengthier terms, however not exceeding 3 years.

The duty of verifying the accounts regarding the minor’s revenues and the expenses incurred for his care and the management of his assets, as well as the tutor’s discharge of liability, which so far have laid with the tutorship authority, is now transferred to the court of tutorship.

To facilitate the control of tutorship by the court of tutorship, the NCC provides that the following persons may file complaints against the tutor before the court of tutorship: the minor who reached the age of 14, the family council, any member thereof, as well as the persons mentioned under Art.111 (the persons who, according to the NCC, are in charge of notifying the court of tutorship on the occurrence of one of the cases requiring the establishment of tutorship). The complaints shall be settled as a matter of urgency, in chambers, by summoning the parties and the members of the family council, and, according to Art.155 para.(2), by hearing the minor at least 10 years old, when the court deems necessary. We deem that this last provision contradicts the rule provided at Art.264 para.(1) NCC, according to which it is mandatory to hear the child of at least 10 years of age any judicial or administrative procedures concerning him.

(f) Section 6 “Termination of Tutorship”

[Art.156-163] The NCC provides for more detailed regulations as compared to the current legal provisions in relation to the termination of tutorship: cases of termination, obligations of the tutor’s heirs in case of his death, cases of tutor revocation, tutor’s discharge of obligations, civil fines which may be charged to the tutor. Thus, as a novelty, the tutor may be sanctioned by the court of tutorship with a civil fine for the following: refusal to continue with the duty of tutorship (in other situations than those when the refusal is allowed by the law) or the inappropriate fulfillment of the duty of tutorship, due to his fault. The civil fine is applied by enforceable interim resolution (Ro: *incheiere executorie*).

(iii). Chapter III “Protection of Legally Incapable Person”

[Art.164-177] Chapter III under Title III of Book I regulates the protection of legally incapable persons. The NCC mainly reflects the current legal provisions in force regarding the protection of the legally incapable persons, included under Art.142–151 of the Family Code, regulating the following: the substantive conditions required for establishing legal incapacity, the persons who may request that

legal incapacity be established, the appointment of the tutor, the appointment of a special curator until the tutor is designated, the opposability of the court-established legal incapacity, the service of the decision establishing legal incapacity, the regime of the acts executed by the legally incapable person, the replacement of the tutor, the situation of the legally incapable minor, and the withdrawal of the legal incapacity decision.

Note should be made that two courts are to be involved in relation to protecting legally incapable persons: the competent general law court competent with the proceeding for establishing the legal incapacity and issue a court decision to this effect, and the court of tutorship that exercises the duties established under the legislation currently in force for the tutorship authority *i.e.* appointing, replacing and discharging the tutor (Art.166,171,173 of the NCC), appointing a temporary special curator until the tutor is designated (Art.167 of the NCC) and all other duties related to the duty of tutorship, provided in the chapter on minors' tutorship, which shall apply accordingly.

The procedure for establishing legal incapacity and withdrawing it are regulated by Arts 924–930 of the NCPC. However, mention should be made that the NCC includes a series of procedural aspects which are already regulated by the procedural norms of the NCPC. Thus, Art.170 of the NCC provides that the court judgment establishing legal incapacity be served to the court of tutorship and the regional public health authority, although the rules on service of such court judgment are already provided for under Art.929 para.(1) of the NCPC.

As compared to the current regulation on the protection of the legally incapable person, the new elements under the NCC are as follows: possibility to appoint the tutor under a mandate agreement, by the person with full capacity to exercise rights and obligations, for the case when he would be declared as legally incapable (Art.166); the express sanction by relative nullity of the legal acts executed by the legally incapable person, even if he had discernment on the execution date thereof (Art.172); tutor's possibility to request to be replaced not only after three years as of his appointment (that is also provided for by the current regulation), but also before the expiry of the three-year term, when for solid grounds; the requirement of the family council's endorsement with regard to the location where the legally incapable person shall be cared for, upon such is decided by the court of tutorship (Art.174 para.(2)); obtaining the authorization of the court of tutorship and the endorsement of the family council when the tutor makes liberalities to the legally incapable person's descendants (Art.175).

(iv). Chapter IV “Curatorship”

[Art.178-186] The NCC resumes and develops the provisions of the Family Code in relation to curatorship, adding a series of new elements, among which the fact that the protected person may appoint his curator by authenticated unilateral act or agreement.

1.2.(c). Title IV “Legal Entity”

[Art.187-251] Title IV of Book I in the NCC regulates the legal entity's status by establishing rules on the incorporation of public law or private law entities, the nullity cases pertaining to the legal entity and ways to correct nullity (on the basis of the principle to ensure the safety of civil circuit), the civil capacity of the legal entity, the identification data of the legal entity, ways to reorganize the legal entity, termination, dissolution and winding up of the legal entity.

The new provisions partially reiterate the principles established under Decree No.31/1954, which they either develop or supplement by new norms, inspired particularly from corporate law. Such norms are promoted by the NCC to the rank of principles generally applicable to the legal entity. For instance, we noticed that the applicability of certain norms, so far provided by Law No.31/1990 only, is extended to any type of legal entity: nullity of the legal entity and ways to correct nullity (Art.196-199), characterization of the liability of the legal entity's management bodies as a liability relying on the "good owner" principle (*bonus pater familias*), norms on conflict of interests (Art.213-215), development on the effects of legal entity's spin-off and merger (Art.235-240) and implementation of the special right of creditors or any other interested person to oppose to spin-off or merger (Art.243).

[Impact] From the standpoint of **legislative impact**, a review must be made on the compatibility of the NCC, which once entered into force becomes the general norm as regards the regime of the legal entity, with the enactments currently in force regulating the regime of incorporation, operation and termination of certain types of legal entities and which are special norms as compared to the general norm included in the NCC, among which: Law No.31/1990, GEO No.99/2006, Law No.566/2004, GO No.26/2000, Law No.54/2003, Law No.489/2006, and Law No.14/2003. According to the information provided by the Beneficiary, the analysis of the compatibility between the NCC provisions and the provisions of various special laws was performed when drafting the NCC Draft IL.

Generally speaking, such special norms are compatible with the general norms established by the NCC, in the sense that the general norms are much more detailed than the regime applicable to the legal entity, thus supplementing the aforementioned special norms.

The exception to the above is represented by the special norms applicable to companies, where a series of discrepancies arises in relation to certain subject matters; such discrepancies shall have to be eliminated or clarified. For example, the provisions of Law No.31/1990 on spin-off and merger of companies are, to a certain extent, in contradiction with the provisions of the NCC as regards the spin-offs and mergers of legal entities.

Thus, Art.238 of the NCC (Liability in case of Spin-off) provides that, in case of spin-off, each of the acquiring legal entities shall be liable for the obligations related to the assets which form the object of the fully acquired or kept rights; for the other obligations of the legal entity subject to spin-off, the acquiring legal entities shall be liable *pro rata* to the value of the acquired or kept rights, calculated after having deducted the obligations for the fully acquired or kept assets.

This provision differs from Art.241¹ para.(3) of Law No.31/1990²³ in terms of the following two issues: (i) Art.241¹ para.(3) of Law No.31/1990 provides for the liability of the company participating in the spin-off for obligations which were not allotted to it under the spin-off within the limits of the net assets allotted to such company, without deducting the value of the obligations related to assets fully acquired or kept; in other words, the scope of liability is broader under Law No.31/1990, than the scope established under the general norm provided by the NCC; and (ii) under the regime

²³ Art.241¹ was inserted in Law No.31/1990 by way of GEO No.90/2010, thus subsequent to the approval of the NCC.

established by Law No.31/1990, the liability provided at item (i) above has a subsidiary nature, as it shall occur only if the creditor fails to obtain satisfaction of its receivable from the company to whom such receivable is allotted further to the spin-off, while the NCC does not provide for the subsidiary nature of such liability.

[Art.243] Also in the matter of spin-offs and mergers, another significant difference between the general norm and the special norm concerns the opposition to merger or spin-off, regulated under Art.243 of the NCC (the general norm) and respectively under Art.243 of Law No.31/1990, as amended by GEO No.90/2010 (the special norm). The two regulations differ in terms of the following: (i) persons entitled to file opposition: the general norm provides that the creditors of the legal entity and any other interested person shall have the right to oppose; on the other hand, Art.243 of Law No.31/1990 gives the right to oppose only to creditors having receivables of a certain and liquid nature, which were born before the publication of the merger or spin-off project, and not matured as at the date of publication, creditors seeking to prevent a damage that would otherwise occur further to the merger or spin-off; and (ii) the suspensive effect of the opposition: the general norm provided under Art.243 of the NCC provides that the opposition stays the performance of reorganization with respect to the opposing parties until the court judgment remains final, while Art.243 of Law No.31/1990 no longer provides for such suspensive effect²⁴; nevertheless, one may request the stay on the grounds of the general provisions on opposition disposed under Art.62 para.(2) of Law No.31/1990.

Consequently, the lawmaker must provide in the implementation law whether the derogating rules provided under the special norm, *i.e.* Law No.31/1990, are to be kept in full force and effect as special rules after the entry into force of the NCC, or are to be repealed. At least as corporate law is concerned, we recommend the lawmaker to maintain the provision according to which creditors' opposition does not stay the spin-off or merger, because, in practice, such *de jure* suspensive effect led to extremely long delays in the completion of the spin-off and merger operations, likely to render inefficient the restructuring of legal entities by such mechanism. In addition, Law No.31/1990 currently provides for efficient ways to protect the creditors entitled to opposition.

[Art.212] Another legal provision of the NCC which will have a **legislative and human resources impact** is the rule taken over from corporate law that the resolutions and decisions of the legal entity's bodies are enforceable against third parties starting from the publication thereof only, except for the case when evidence is produced attesting to the fact that the third parties had knowledge of such resolutions and decisions by other means (Art.212 para.(2) of the NCC).

In the case of companies and agricultural cooperatives, the publication and opposability of statutory bodies' decisions is ensured by way of submission and registration with the trade registry and publication in the Official Gazette of Romania, Part IV. The rules for registration of amendments with the trade registry and publication are regulated under Law No.26/1990.

²⁴ The suspensive effect of the opposition against merger or spin-off was removed by way of the amendments to Law No.31/1990 approved by GEO No.90/2010.

In the case of other types of legal entities (associations and foundations, trade unions, religious cults, political parties), the current legislation regulates the formalities for the registration thereof and the publicity of their establishment as follows:

- associations, foundations and trade unions shall be registered by way of notation in the special register (register of associations and foundations and respectively register of trade union organizations) kept by the court clerk's office having territorial jurisdiction over them; same rule shall apply to religious cults that are to be established as associations;
- political parties shall be registered with the register of political parties kept by the Bucharest Tribunal.

In each of the above cases, the current legislation requires the registration of the establishment of such legal entities,²⁵ respectively the registration of amendments to their articles of incorporation or winding up thereof, but does not require the publication of the acts adopted by their statutory bodies.

Thus, as a **legislative impact**, the special legislation applicable to each of such types of legal entities should be amended so as to regulate how the publicity of their statutory bodies' decisions is to be ensured. Such publicity could be ensured either by submitting the respective decisions with the court clerk's office which keeps and operates the records of such legal entities and/or directly by publishing them in the Official Gazette of Romania, Part IV.

In order to secure the effect of opposability towards third parties by notations made with the records of the legal entities falling under the above categories, the special legislation shall have to provide for the free public access to such records. Absent a free and easy public access to the records kept by the courts, alike with the records kept by the trade registry, the effect of publicity of such records towards third parties cannot be achieved.

The provision of Art.212 para.(2) of the NCC may also involve an **impact on human resources**, as the processing of the applications for submission and notation with the special registry of all decisions of the statutory bodies of the legal entities for which publicity is performed by way of submission with the relevant court clerk's office may require an increase in the auxiliary staff of the district courts keeping such records and of the Bucharest Tribunal (which keeps the records of political parties).

1.2.(d). Title V "Defense of non-patrimonial rights"

[**Art.252-257**] A welcomed regulatory innovation is Title V of Book I in NCC, which reunites the principles on the defense of non-patrimonial rights in a much more elaborate manner than the current regulation (Art.54–56 of Decree-Law No. 31/1954). It may be seen, from the regulation of the entire title, that certain judicial defenses have been introduced for a better protection of these non-patrimonial rights. Thus, the preventive and protective measures available through the injunction procedure on matters of this sort are detailed therein.

²⁵ The registration of such legal entities shall be made on the basis of the resolution or decision of the relevant court.

[Impact] Since this title comprises a codification of theories already developed in doctrine and case law on the basis of the current, albeit scarce, provisions of Art.54-56 of Decree-Law No. 31/1954, the provisions under this title shall be of no significant impact, save for the procedural norms contained under Art.255, which allow for provisional measures to be obtained under the injunction procedure, including prior to bringing an action on the merits of the case. The express regulation of these preventive mechanisms in non-patrimonial matters may boost the number of claims filed through the injunction procedure.

[Art.252] This article is a general rephrasing of the principle according to which persons are entitled to protection of their non-patrimonial rights which are recognised by and protected under the law. The rights indicated under this article correspond to those protected under the ECHR, as well as to those of constitutional import, rights that have made for a rich case law before the ECHR Court owing to their insufficient protection under the national legislation. With respect to the principle of protecting the human personality, we note that NCC only provides for the protection of “non-patrimonial rights”. However, legal scholars have consistently emphasized the existence of moral values or interests which, although not legally transposed into actual rights, require the same protection as non-patrimonial rights. The NCC’s provisions seem to be ensuring the protection of such moral values and interests solely to the extent that they correspond to a specific subjective right.

It is worth noting that notions that are similar, but with a different content are used within the NCC: “personality rights” (Art.58 NCC) and “non-patrimonial rights” are closely related to the “protection of human personality” (Art.252). The scopes of the two concepts, as described in each of the two aforementioned articles, do not perfectly overlap, given that Art.252 also covers rights pertaining to scientific, literary, artistic or technical work. Consequently, Art.252 of NCC should be rephrased by including a reference to the concept of “personality rights” employed in Art.58 of the NCC and to other “non-patrimonial rights”, as well as to those resulting from scientific, literary, artistic or technical work.

The NCC lays down the regime of moral damage compensation, by resuming the distinction developed by legal scholars between moral damages resulting from the injury to the personality rights, also referred to as actual moral damages, and the extra-patrimonial damages that are the result of physical injury, referred to as bodily injuries, which may be expressed as both financial and moral damages. From this perspective, the texts are supplemented by the provisions of Art.1391 of the NCC which is dealing with the repair of non-patrimonial damage resulting from injury to body or health.

We note however that NCC is confining the possibility to repair moral damages emerging from physical harm only to those damages which consist in the “limitation of the possibilities to pursue a family and social life” (the so-called “loss of amenity”), without including however other damages such as aesthetic harm or physical pain. Art.1391 para.(2) of NCC contemplates the possibility of repairing the so-called bereavement (suffering caused by the death of someone close). The provisions of Art.1391 seem to have a specific nature as compared to those under Art.252–253 NCC and are to be interpreted restrictively. Insofar as the entire existing legal doctrine and case law alike accept the award of monetary indemnification as remedy for any moral damage whatsoever (not only for those that consist in loss of amenity or bereavement), our opinion is that Art.1391 para. (1) should be amended so as to be freed from restrictions.

[Art.253] The NCC's available measures for infringement of non-patrimonial rights are as follows: to prohibit the perpetration of the unlawful act, if it is impending, to stop future infringements, to declare the act unlawful. The NCC adds a series of measures intended to "restore the impaired right": ordering the perpetrator to publish the sentencing judgment and any other necessary measures (Art.253). In our view, the concept of "restoration of the claimed right" may prove problematic in practice, since the harm to human dignity can very rarely be "restored". "Repair" or "compensation" of moral damage would be more appropriate, as these measures most often have the effect of consolation or satisfaction rather than that of restoration or repair.

Para.(4) of Art.253 NCC deals with the repair of the damages caused by the infringement of non-patrimonial rights, drawing a distinction between "compensation" and "patrimonial repair of damages, even if non-patrimonial". The terminology employed is questionable, since compensation is always intended to repair patrimonial damages. To the extent that the lawmaker intended to draw a distinction between "compensation" as repair for patrimonial damage and "moral damages" as repair for non-patrimonial damage, our opinion is that, for the sake of terminological clarity and accuracy, the text should be rephrased in the implementation law. Moreover, it has been repeatedly upheld in doctrine that, when dealing with matters of moral damages, it is inappropriate to use the term "compensation", as the harm caused to human values cannot be remedied with money, and that is why "financial reward" would be a more suitable choice.

[Art.254] Art.254 lays down the rules for protecting the right to a name and pseudonym, although the protective method is the same with the one generally foreseen for the protection of non-patrimonial rights: stopping the harm caused to such right. We therefore consider that, for a coherent legislative approach, the "right to a name" should have been regulated under Title II, Chapter II of the NCC (entitled "Respect for the human being and its inherent rights"), while, with respect to the protective means, reference should have been made to Title V Book I of the NCC.

[Art.255] The novelty introduced by the NCC with regard to the protection of non-patrimonial rights consist not only in a set of express regulations on a matter which is currently only scarcely dealt with under Decree No.31/1954, even though amply treated in doctrine and case law, but also in specific procedural norms, meant to ensure a swift and efficient protection. Thus, the NCC allows the adoption of measures aimed at preventing or stopping the harmful action through an injunction procedure, not only when the unlawful act is present, but also even when it is imminent. The court's measures may seek either to prohibit or to stop the infringement, or to preserve evidence.

By deviating from the general legal regime of the injunction, Art.255 NCC allows for such measures to be sought even before the action on the merits is brought. Still, to prevent any abusive conduct, the NCC establishes that the injunction is also to indicate the time limit for filing the action on the merits – which cannot exceed 30 days, otherwise the provisional measure foreseen by the respective injunction shall be stopped. The deposit of a court bond may also be requested.

A separate paragraph is dedicated to the provisional measures sought in connection with damages caused by the written and audiovisual media. In light of the case law of the ECHR Court which has instituted special protective measures for the written and audiovisual media (considered by the ECHR Court as a true watchdog of democracy and which, for that reason, is allowed to resort to a certain

degree of exaggeration in reporting) NCC establishes that the cessation of the harmful actions may be ordered through such means only if: (i) the harm caused to the plaintiff is serious, (ii) there is no evident justification for the action, and (iii) the measure ordered by the court does not appear as disproportionate to the harm caused. Still, no preventive measures are available for the written and audiovisual media solely on grounds of the imminence of the harmful action.

In terms of the **institutional impact**, our view is that the instituted right to such provisional measures by means of injunction shall lead to an increased number of court cases to be dealt with as matters of urgency. For a more efficient protection of non-patrimonial rights, the expeditious resolution of such requests for provisional measures may prove to be of the essence, which is why the urgent nature of the procedure requires the existence of a sufficient number of magistrates to cover such functional necessities.

[Art.256] This text reiterates the principle of protecting non-patrimonial rights including after the death of their holder, currently regulated under Art.56 of Decree-Law No.31/1954. It also outlines the scope of the persons who may bring such action in court. With regard to the right to restore the damage, the question arises whether an indemnification action (which, according to Art.253 para.(3) NCC is another form of “restoration of the harmed right”) may be filed by any of the persons mentioned at Art.256 or only by the successors in right of a deceased individual. In our opinion, the NCC’s implementation law should contain an express provision clarifying this issue.

[Art.257] The text reiterates the principle according to which legal entities also benefit from the protection of their non-patrimonial rights.

1.3. Book II “About Family”

As announced in the Statement of Reasons, Book II of NCC reconsiders the manner of regulating family law, which is brought back to the corpus of the civil code, thus the old tradition inaugurated with the 1804 FCC and interrupted in Romania in 1954 being reestablished. According to its Art.1, NCC regulates patrimonial and non-patrimonial relations between persons, as civil subjects, including spouse relations, kinship relations, etc., which can also be patrimonial or non-patrimonial.

According to Art.2, providing that NCC constitutes the set of norms that make the general law for all matters to which it refers, Book II of NCC constitutes the general law in family matters. As we will show in our review, Book II of NCC reiterates a significant number of general provisions or principles currently provided in the Constitution, in special laws or in international treaties to which Romania is a party.

In the sections below we shall analyze the main new elements brought by NCC and their impact, following the structure of Book II according to its titles, chapters and, if necessary, sections and articles.²⁶

²⁶ Book II has 5 titles, reflecting a different structure as compared to the current Family Code which contains only 3 titles (“Marriage”, “Kinship” and “Protection of persons without legal capacity, with limited legal capacity and other persons”). Thus, after Title I containing general provisions and principles applicable to the entire matter, NCC proposes the following

1.3.(a). Title I “General provisions”

[Art. 258–265] Title I of Book II contains principles and general rules governing family, which may be classified into provisions generally referring to family (Art.258), general provisions on marriage and spouses (Art.259), principles of the fundamental rights of the child and the measures which may be taken in relation to the child (Art.260-264) and provisions on the competence of the courts in taking measures and ruling on disputes arising from the application of the provisions in Book II of NCC (Art.265).

[Impact] Since the texts of Title I in Book II of NCC regulate principles that already exist elsewhere in the Romanian legislation, either in the Constitution or in special enactments, we deem that the entry into force of this Title in particular will not produce any significant legal, institutional, finance/budget or human resources impact. The only notable exception is the creation of a new specialized court, *i.e.* the **court of tutorship**.

[Art.258,259] As regards the general principles governing the family and marriage institutions, the new regulation does not bring any remarkable novelties, but it introduces a few definitions which are missing from the Family Code, such as the definition of the “spouses”, which expressly provides that only opposite-sex marriages are allowed in Romania (Art.258 para.(4)), the definition (Art.259 para.(1))²⁷ and the purpose (Art.259 para.(2)) of the marriage²⁸.

Although, similarly to the Family Code, it does not define the concept of “family”,²⁹ NCC provides a few constitutional principles governing this institution: the woman’s and the man’s right to a freely consented marriage as of the marriageable age established by the law, the equality of spouses and the parents’ duty to ensure proper care and education for their children, the family’s right to be protected by the State and the society and the State’s obligation to encourage marriage, its development and consolidation, by economic and social measures (correlatively to the family’s right to such protection).

division of the matter: Title II “Marriage” (also including the new concepts of engagement, family residence, possibility to opt for a marital regime, administrative divorce), Title III “Kinship” (which, among other novelties, regulates for the first time medically assisted human reproduction with third party donor), Title IV “Parental Authority” (containing the general regulatory framework on parents’ rights and obligations towards the persons and goods of their minor children; the concept of parental authority as defined by the New Code is new) and Title V “Obligation of Support”.

²⁷ Para.(4) of Art.258 defines the concept of spouses as the man and woman who are married to each other. We deem that this principle refers to one of the substantive conditions of marriage, and therefore it should be more at home in Art.259, entitled “The Marriage”; in fact, Art.259 already contains, at para.(1), a newly introduced definition of marriage as the freely consented union between a man and a woman, which makes the provision at Art.258 para.(4) redundant.

²⁸ Art.259 para.(2) expressly provides for the purpose of marriage, that is, to start a family. Absent this purpose, the marriage is deemed fictitious and therefore null and void, according to Art.295 para.(1) (with the exception provided at Art. 295 para.(2)).

²⁹ Please note that the concept of “family” is defined by Law No.272/2004 as consisting of parents and their children; also, Law No.272/2004 defines the “extended family” as including the child, his parents and his relatives up to the 4th degree inclusively, as well as the “substitute family” consisting of other persons than the members of an extended family, who ensure the care and education of the child in accordance with the law.

Also, Art.259 resumes, at para.(3), the provisions of Art.48 para.(2) thesis II of the Constitution on the religious marriage, which may only take place after the conclusion of the civil marriage.³⁰

[Art.260,262,263,264] On the rights of the child, Title I of Book II of NCC resumes constitutional provisions and/or provisions from international treaties to which Romania is a party. Some of these provisions are already reflected in the special laws on the protection of the child's rights (Law No.272/2004), but, since they constitute principles governing this matter, they seem to be more at home in the corpus of the civil code.

Art.260 provides for the principle of equality before the law for the child born inside marriage, the child born outside marriage and the adopted child, a principle which does not exist as such in the Family Code, but is provided at Art.48 para.(3) of the Constitution. The welcome addition brought by NCC is that adopted children enjoy the same legal status with the natural children, a rule which already exists in the special law on adoption (Law No.273/2004).

Art.262 regulates the child's right to personal contacts with the parent(s) with whom he does not live, a right already provided by Law No.272/2004 and which may only be limited for serious reasons and in compliance with the best interest of the child.³¹ The Family Code currently provides for the right to personal contacts only for the parent, not for the child, more precisely, only for the divorced parent who was not entrusted with the child (Art.43 para.(3) of the Family Code). Therefore, NCC ensures, by this new provision, the observance of one of the fundamental rights of the child (the court of tutorship being allowed to prohibit the exercise of such right if this is in the best interest of the child).

Art.263 regulates, without defining it, the principle of the best interest of the child, which is also consecrated in Art.3 para.(1) of Law No.18/1990, as well as in Art.6 let.a) of Law No.272/2004. Also, the definition of the "child" included at para.(5) resumes Art. 4 let.a) of Law No.272/2004.

³⁰ In our opinion, while a text guaranteeing the right to religious marriage may be at home in the Constitution, a civil code must confine itself to regulations on civil law institutions. We welcome the rephrasing, at Art.259 para.(3), of the constitutional provision at Art.48 para.(2), according to which "The religious marriage may be celebrated only after the civil marriage", because it brings a much needed terminological distinction between marriage, which may be validly concluded only in accordance with the civil law, and the so-called religious marriage, which is only a form of celebration of the marriage. Nevertheless, the new text could be reworded as to more accurately express its intended meaning. Art.259 para.(3) of NCC (which reads: "The religious celebration of marriage may only take place after the civil marriage have been contracted.") seeks to consecrate the principle that only a marriage contracted in compliance with the substantive and formal conditions provided by the NCC has legal effects, creating the spousal rights and obligations provided by the civil law (this principle is stated at Art.3 of the current Family Code), and, conversely, that a valid civil marriage may not be concluded by the religious procedures traditionally linked with marriage. This principle should be regulated as such, for the sake of accuracy of the legislative technique. In its current wording, Art.259 para.(3) may be construed as a text concerned with the conditions for a religious celebration of the marriage, which exceeds the regulatory scope of the civil code.

³¹ Law No. 272/2004 contains, on the one hand, a somewhat broader regulation on child's right to personal relations, which are guaranteed not only as regards his parents (Art.16), but also other persons to whom the child developed an emotional attachment (Art.14) and, on the other hand, it contains provisions on the limits (Art.16) and methods of fulfilling the right to personal relations (Art.15). Considering these provisions, Art.262 para.2 of NCC seems to be a principle which strictly concerns child-parent relations and the limits to the exercise of the right to personal relations, to be supplemented with the provisions of Law No. 272/2004.

In our opinion, Art.263 para.(4), which requires that child-related procedures be settled “within a reasonable term” is a mere reiteration of the optimum and foreseeable duration of the civil trial newly introduced by the NCPC. However, the text fails in our view to ensure the required celerity in taking decisions concerning the child, although celerity is one of the principles guaranteeing the observance and protection of the child’s rights as per Law No. 272/2004.

Art.264 of NCC regulates the child’s right to be heard, in that resuming the text of Art.24 of Law No.272/2004. Unlike the brief and limited provision existent in the Family Code (Art.42), which requires the judge to hear the children of at least 10 years of age in the procedures concerning the divorce of their parents, the new regulation requires all judicial or administrative authorities to hear children past the age of 10 in any and all procedures concerning them, to provide them with information appropriate for their age, including in relation to the consequences the decisions to be taken will be having on them, to take into account the children’s opinions, depending on their maturity and age. Hearing a child under the age of 10 is optional but, if the child requests to be heard (a right any child is guaranteed irrespective of his age), such request may only be denied by a motivated decision; whenever such request is granted, the hearing of a child under 10 years of age entails his right to be informed as per para. (2) of this legal text.

[Art.265] Finally, as shown above, NCC brings an important institutional change by the creation of a specialized court competent to settle all disputes arising from the relations regulated in Book II, as well as the disputes concerning the protection of persons by tutorship and curatorship (Art.107 of NCC). The **impact** of the creation of such court shall be detailed in section II.A.1.2.(b) of this Interim Report I, within an analysis on NCPC, as well as in the sections on the financial/budgetary and HR impact.

1.3.(b). Title II “On Marriage”

[Art.266-404] Title II of Book II in NCC regulates the following: the engagement (Art.266-270); the substantive and formal conditions for contracting a marriage (Art.271-289) as well as the post-marriage formalities (Art.290-292); the cases for the absolute nullity of the marriage (Art.293-296); the cases for the relative nullity of the marriage (Art.297-303); the effects of marriage nullity (Art.304-306); the spouses’ personal rights and obligations (Art.307-311); the spouses’ patrimonial rights and obligations (Art.312-372); the dissolution of marriage (Art.373-404).

[Impact] As a general comment, the new regulation contributes to the modernization of the current regime of marriage by diversifying marital regimes, ensuring a special legal regime to the family residence, and by introducing consensual divorce by administrative or notarial procedures in addition to the judiciary divorce.

As regards the **institutional impact** on the courts of law, in addition to creating the aforementioned court of tutorship as a court specializing in family law, some of the novelties brought by NCC may generate an increase in the caseload of courts further to the implementation of new institutions (for example, the engagement) or following the transfer of certain competences from other authorities to the courts (for example, the competence to grant permission to marry to a person under the age of 18 is transferred from the general departments for social assistance and child protection to the courts).

It may also be estimated that introducing two new marital regimes shall increase the number and diversity of cases concerning the exercise of the spouses' patrimonial rights during marriage. For instance, the courts of tutorship have, according to the law, exclusive competence to order certain measures (for example, granting a mandate of representation to one of the spouses if the other cannot express his or her will, or requiring the express consent of both spouses for the conclusion of deeds concerned with the transfer of certain property). The courts of tutorship also have exclusive competence to solve the disputes which may arise between the spouses with regard to the performance of their marital convention, to rule on the separation of property at the request of one spouse when the other concludes deeds which endanger the patrimonial interests of the family, etc. The newly introduced concept of "family residence", with a special legal regime, will also be the legal ground for legal actions that are new for the Romanian practice.

As regards the judicial divorce, it is also for the courts of tutorship to rule, in the divorce decision, on the newly introduced claims for indemnification or compensation, and to subsequently overturn such measures, upon request, further to a change in the circumstances considered when such measures were taken.

NCC introduces for the first time in the Romanian legislation the consensual divorce by administrative or notarial procedure. These procedures seek to relieve the court from those cases where the spouses have agreed on the termination of the marriage and have no minor children. The role of the court in these administrative procedures is limited to the settlement of accessory claims to the divorce on which the parties have not agreed. The refusal of the notary public or of the public officer to issue the divorce certificate is not subject to judicial control. These two new divorce procedures have been recently implemented by Law No.202/2010, which resumed the relevant NCC provisions.

The institutional impact of the new regulations shall be accompanied by a **finance/budget and HR impact**, as the courts of tutorship must be sufficiently staffed with magistrates and auxiliary personnel so as to ensure the completion of cases within the optimum and foreseeable term required by the NCPC, and in establishing that number one must take into account not only the type of cases existing under the current regulation, but also the new types of cases relying on the new regulations on marriage. Also, the introduction of new types of cases and of new procedures requires professional training.

The implementation of the new legal provisions on marriage shall also have an impact on the notaries public, called to authenticate marital conventions and ensure their registration with the National Notary Registry of Marital Regimes, to be established at the level of the National Union of Romanian Notaries Public. The notaries public are also assigned the competence to release a divorce certificates in the case of consensual divorce by notarial procedure. To accommodate all these new procedures, the existing legal framework on the activity of the notaries public must be amended and supplemented. We note that, further to the coming into force of Law No.202/2010 and by virtue of Art.XXIII (3) thereof, such amendment has already been operated by the enactment of Order No.81/2011 of the Minister of Justice on the supplementation of the Regulation for the application of Law No.36/1995 on notaries public and notarial activity, as enacted by Order No.710/C/1995 of the Minister of Justice. Such amendment concerns, *inter alia*, the establishment of the National Notary Registry for divorce petitions and the implementation of norms concerning the notarial divorce.

We note that the NCC Draft IL contains the supplementation of Law No.36/1995 with provisions on the establishment of the National Notary Registry of marital regimes. The organization and operation thereof, as well as the registration and access procedure, are to be established by order of the Minister of Justice.

We also note that, in the absence of an express provision to the contrary, the provisions of Art.5 of Law No.36/1995 remain applicable. Therefore, Romanian diplomatic missions and consular offices, as well as other institutions, may as a matter of law, perform notarial acts concerning marriage, in accordance with the legal provisions on territorial competence and with the satisfaction of all publicity formalities required.

Finally, we note a few amendments that may bear an impact on the local authorities (including a possible impact on HR and finance/budget resources), generated by the implementation of new publicity formalities which require the statement of marriage to be published on the website of the local authority by the implementation of the formalities for the registration of the marriage act, *ex officio*, with the National Notary Registry of Marital Regimes and with the notary public who authenticated the marital convention, as well as, in particular, by the implementation of the consensual divorce by administrative procedure. The legal norms governing local public administrative authorities must be supplemented with methodological norms for the implementation of these procedures. A provision in this respect is included in Art.XXIII of Law No.202/2010.

(i). Chapter I “On Engagement”

[Art.266-270] NCC introduces the institution of engagement, on the ground - provided in the Statement of Reasons - that this is a traditional social reality in Romania.

Reiterating the definition given to the engagement in the CC1940, where the engagement was mentioned for the first time as a civil law institution, Art.266 NCC defines the engagement as a “mutual promise to contract the marriage”. However, it is difficult to determine the legal value of such promise from the legal texts. In our opinion, the engagement cannot have the features of the promise as a civil deed, because such assimilation would lead to an unacceptable infringement of the person’s freedom to marry (because, *inter alia*: the civil promise cannot be revoked; the infringement of a civil promise entails civil liability, irrespective of the fault; the civil promise may be transferred by *inter vivos* and *mortis causa* deeds, etc.). In fact, the existing doctrine deems that a promise to marry has no legal value, and that no promissory agreement is applicable to the institution of marriage.

According to Art.266 para.(2), the engagement is subject to the same substantive conditions as the marriage.³² Art.266 para.(3) provides that the engagement is not subject to any formality and may be proved by any means of evidence. This is a debatable provision, because it may lead to abusive interpretations in determining the true will of the parties. Introducing a formality (the written form) as a condition for validly contracting the engagement would have eliminated this risk.

³² Considering this provision, it is redundant to stipulate at para.(5) of the same article that engagement can only be contracted between opposite-sex persons.

In applying the principle that the individual is free to marry, Art.267 para.(2) deems null and void any penalty clauses provided in case of engagement break-off. Art.267 para.(1) (which reads: “The fiancé breaking off the engagement cannot be forced to marry”) intends to be another application of this principle, but its wording is deficient, and thus may give rise to abusive interpretations, because limiting an individual’s liberty to marry or to refuse to marry is prohibited regardless of whether such individual broke off or not the engagement.³³ The recommended wording would be: “The engagement does not create an obligation to marry”.

Although it does not regulate the effects of contracting an engagement, *i.e.* the parties’ rights and obligations flowing from engagement, NCC provides for the effects of breaking off an engagement, which leads, in all cases, to the restitution, in kind or pro rata with the enrichment, of the gifts received in consideration of the engagement or, during the engagement, received in view of the marriage, except for ordinary gifts (Art.268 para.(1) and (3)). The text may seem to be an application of the principle of restitution of unjust enrichment, although, at least in the case of the gifts made in consideration of the engagement itself during its term, it may be deemed that just cause existed when the gift was made.

Art.269 of NCC provides for two cases of civil liability (presumably tortious) when breaking off the engagement: both the party abusively breaking off the engagement, and the party who is guilty of determining the other party to break off the engagement, may be hold liable to indemnify the other for the expenses made in view of the marriage, to the extent such expenses were appropriate for the circumstances, as well as for any other damage incurred. In our view, absent other clarifications, the concepts of “abusively breaking off the engagement”, “guilty of determining the other party to break off the engagement”, “expenses appropriate for the circumstances”, as well the fact that the party is allowed to claim indemnifications for the moral damage caused by the break-off of the engagement (the legal text does not draw any distinctions between types of damages that one may ask indemnification for) may increase the workload of the court of tutorship with claims relying on abusive interpretations of the texts and may generate a non-uniform practice.

Finally, Art.270 limits the prescription term of the right to file legal action under Art.268 and 269 to 1 year since the date the engagement was broken off. We presume that, since it is a factual circumstance, the engagement break-off may be proven by any means of evidence.

³³ Please note that the corresponding provisions in SCC and CC1940, from which the text claims to originate, are entirely different and closer to the principle of the individuals’ liberty to marry than the regulation proposed by Art.267 para. (1), *i.e.* that a fiancé’s refusal to contract the marriage cannot be sanctioned by the other fiancé through a legal action whereby to claim that such fiancé be ordered to contract the marriage.

(ii). Chapter II “Contracting a marriage”

(a) Section 1 “Substantive Conditions for Contracting a Marriage”

[Art.271-277] NCC’s substantive conditions for contracting a marriage are similar to those provided by the current regulation.

Art.271 reiterates that the spouses must be of opposite sex, a provision which has already been included in Art.258 para.(4), Art.259 para.(1) and (2) and, by reference, in Art.266 para.(5). The condition that the spouses must freely and personally consent to contract the marriage is expressly stipulated.

The new regulation maintains the legal provisions in force on the marriageable age (18 years after the amendment of the Family Code by Law No.288/2007) and on the permission to marry granted, for justified reasons, to minors aged 16, subject to providing a certificate of health and to obtaining the necessary approvals. A practical **impact** may follow from the fact that, according to the new regulation, it is the court of tutorship which is now competent to grant such permission (“authorize” the marriage of a minor), and not the general department for social assistance and child protection having territorial jurisdiction over the minor’s domicile (Art.272 para.(2)). Considering the importance of the measure and the necessity to protect the minor’s best interest, we deem that it is appropriate that this competence belongs to a court of law, more so since the general departments of social assistance and child protection generally have only monitoring, analysis, evaluation and endorsement powers.

A welcome clarification is included in Art.272 para.(2), which provides that, should those called on by the law to give their consent to the minor’s marriage disagree, it is for the court of tutorship to decide, taking into account the child’s best interest. Nevertheless, NCC does not expressly provide for the competence of the court of tutorship to also remedy the abusive refusal to give the consent, or the abusive revocation of such consent, an issue debated by the current legal practice and doctrine and which should have been solved by NCC.

NCC maintains most of the current regulation on the impediments to marriage: if a person is already married (Art.273); there is consanguinity between the future spouses (Art.274 para. (1)); there are adoption relations between the future spouses (Art.274 para.(3)), there are tutorship relations between the future spouses (Art.275). However, as a novelty, although mental alienation or intellectual disability continue to constitute causes for the annulment of the marriage in NCC as well (Art. 276), the temporary loss of the mental faculties which leads to loss of discernment is deemed by NCC to be a cause for relative nullity only (Art.299). NCC maintains the exception that the court may authorize the marriage despite the impediment of having a 4th degree of collateral kinship by blood or adoption, and adds the condition that a favorable certificate of health must be submitted (Art.274 para.(2) and (3)).

In addition to the impediments against marriage provided by the current regulation, which are maintained, NCC introduces (Art.277) the express interdiction of same-sex marriage. This interdiction is also easily apparent from other texts in NCC, such as the express definition of the spouses as the man and woman joined in matrimony (Art. 258 para.(4)), the definition of the marriage

as a freely consented union between a man and a woman (Art.259 para.(1)), as well as from the substantive condition to marriage provided at Art.271, according to which the marriage is contracted between a man and a woman. Also, NCC provides in texts previous to Art.277 that Romania does not recognize same-sex marriages contracted abroad between foreign or Romanian citizens, or civil partnerships contracted abroad by Romanian or foreign citizens, irrespective of the partners' sex. According to Art.277 para.(4), the rules on the right of free circulation in Romania of the citizens from EU Member States and the European Economic Area remain valid, implicit reference being made to the provisions of GEO No.102/2005 regulating, *inter alia*, the rights related to the free circulation of the family members of Member State citizens, including, according to the law, their spouse or partner, as defined by the law of the country where the marriage or, as the case may be, the civil partnership was contracted.

(b) Section 2 “Formal Conditions for Contracting a Marriage”

[Art.278-289] As regards the formal conditions for contracting a marriage, NCC contains more detailed regulations than the Family Code, at the same time bringing a few modifications to the existing regime.

Most formal prerequisites for contracting a marriage as provided by the Family Code are also maintained in NCC: the obligation of the future spouses to mutually inform each other on their state of health (Art.278), the statement of marriage (Art.280-282), the publication of the statement of marriage (Art.283), the opposition to marriage (Art.285), as well as that the public officer may refuse to solemnize the marriage (Art.286).

However, NCC brings certain amendments to the current rules. For instance, the statement of consent to the minor's marriage given, at the time the statement of marriage is made, by the parents or, if applicable, the tutor or, in his absence, the person or authority authorized to exercise the parental rights, must be given personally at the town hall (Art.280 para.(3)). This new condition may seem redundant, doubling a condition which must have already been met on the date the future spouses submit their statement of marriage, considering that the competent authority (the court of tutorship, according to NCC) may not grant permission to the minor's marriage in the absence of the required consent to such marriage by the parents or the other persons provided by the law: further, absent the permission granted by the court, the public officer has the obligation to refuse to solemnize the marriage. Also, according to Art.281 para.(2), the future spouses have the obligation to submit, along with their statement of marriage, all the documents required by the law for contracting a marriage; if the court's permission is not among these documents, obtaining the consent of the persons provided by the law in the way of the statement of consent provided at Art.280 para.(3) shall not be sufficient.

Another amendment brought by NCC to pre-marriage formalities is that the future spouses may decide for one of them to keep the surname they had prior to the marriage, while the other takes the combined surnames of the two spouses (Art.282). It is also expressly required that the future spouses must stipulate in their statement of marriage the name each will assume after marriage (Art.281 para.(1)), a solution which has been adopted in practice under the Family Code but which is not expressly provided therein.

In our view, using the concept of “town hall” in Art.280 para.(1) and (4) is incorrect, considering that, as per Art.77 of Law No.215/2001, the town hall is a functional structure with permanent activity, consisting of a mayor, a deputy mayor, the secretary of the administrative territorial unit and the specialized employees of the mayor. Another terminological inadvertence which would require correction is the use, at Art.287 para.(2), of the expression “outside the headquarters of the civil records department”. The correct wording is already found in Art.279 para.(1), Art.280 para.(2) and Art.283 para.(1), *i.e.* “the headquarters of the town hall”. Besides the need for an exact and uniform wording, it would be recommendable for the texts to refer, except if the provision concerns precisely the place where a formality is fulfilled, to the authority or department authorized to fulfill the respective formalities.

A few amendments are also brought to the publicity formalities regarding the statement of marriage, an excerpt from which shall be published not only at the headquarters of the town hall, but also on the webpage of the local public authority by care of the civil registrar (Art.283 para.(1)). The new text also regulates the minimum information that must be found in the published excerpt in order to ensure correct and sufficient information of the persons who may oppose to the marriage (Art.283 para.(3)).

As regards the refusal of the civil registrar to solemnize the marriage, most of the current regulation is kept. The only welcome amendment is that the refusal may not rely on information held by the civil registrar from sources other than the verifications he has made or from the oppositions received, unless such information is publicly well-known (Art.286). The legal text does not provide whether the civil registrar’s refusal to solemnize the marriage may be challenged in court, but this is expressly provided by Art.10 of Law No.119/1996, which disposes that the district court having jurisdiction over the plaintiff’s domicile is competent to solve such challenge.

NCC maintains the terms provided by the Family Code for filing oppositions and for contracting the marriage (10 days as per Art.283 para.(2) and (3)) as well as the mayor’s power to reduce the term for justified reasons (Art.283 para.(4)), but it adds a time-limit by which the marriage may be concluded based on the same statement of marriage (30 days as of the publication of the statement as per Art.284). We note that this 30-day validity term of the statement of marriage thus provided by NCC is very short (as compared to Art. 65 of FCC, which provides for a 1 year-term as of publication, and to Art.371 of QCC, which provides for a term of three months and 20 days as of publication); in our view, a longer term would lead to a reduction of the expenses incurred by both the parties and the authorities in relation to the submission, verification and publication of the statement of marriage. NCC permits the future spouses to amend their initial statement of marriage (Art.284).

As regards the formal conditions for contracting a marriage (date, time, place, person competent to solemnize the marriage, marriage procedure), NCC does not bring any significant changes to the Family Code, but provides for a more precise and detailed regulation, improving the text systematization by giving titles to the articles. Unlike the Family Code, according to which marriage is concluded by the consent of the future spouses, Art.289 of NCC expressly provides that the marriage is contracted when, after having taken the consent of each of the future spouses, the civil registrar declares them to be married. A few clarifications are also brought on the role of witnesses to the conclusion of the marriage, and the cases of incapacity to bear witness to marriage cases are expressly provided (Art.288). Another welcome addition, meant to ensure the compliance with the

national minority rights, is included in Art.287 para.(3), according to which the members of national minorities may request that they be married in their native language, provided that the civil registrar speaks it.

Nevertheless, we deem that the supplementation of Art.287 para.(3) (“provided that the civil registrar or the person celebrating the marriage...”) should be eliminated, because it induces the idea that there are authorities other than the civil registrar having the competence to solemnize marriages, while, according to the law, only the civil registrar has this competence, even if several authorities or persons may act under the capacity of civil registrar under the law.³⁴

(iii). Chapter III “Post-marriage Formalities”

[Art.290-292] NCC groups post-marriage formalities into a separate chapter. The provisions from the current regulation on the marriage certificate (Art.290) are maintained, but a correct clarification is made that the marriage certificate is drafted after the marriage is concluded, which does not result from Art.17 of the Family Code. As regards the proof of marriage, NCC brings the clarification, which does not exist in the current regulation, that, in the cases provided by the law (for example, subsequent restoration or drafting of civil records in accordance with Law No.119/1996), the marriage may be proven by any means of evidence (Art.292 para.(2)).

The introduction of alternative marital regimes, one of the major innovations brought by NCC, also has an **impact** on post-marriage formalities. Art.291 provides for a new formality, *i.e.*, that the civil registrar must make mention of the marital regime chosen by the spouses in the certificate of marriage, and must *ex officio* communicate a copy of such certificate to the National Notary Registry of Marital Regimes and to the public notary who authenticated the marital convention. Considering that this new formality is fulfilled *ex officio*, the service expenses are incumbent to the local authorities, producing thus a financial impact on these institutions.

(iv). Chapter IV “Nullity of Marriage”

(a) Section 1 “Absolute Nullity of the Marriage”

[Art.293-296] As regards the nullity of marriage, the novelty brought by NCC consists, first of all, in a superior legislative technique, *i.e.* the distinct regulation and express definition of absolute and relative nullity cases and of the conditions for remedying such nullities.

The cases of absolute nullity of the marriage provided by NCC, as well as the exceptions from nullity allowed by the law follow to a great extent the current regulations, but there are certain amendments, such as the decrease in the number of cases of absolute nullity in favor of the cases of relative nullity. According to Art.293 para.(1), the following marriages are null and void: marriages contracted in breach of the formal conditions and interdictions provided at Art.271, 273, 274, 276 of the new regulation (existence of a free consent of the future spouses, interdiction of bigamy, interdiction of

³⁴ According to the law, the following officers have the capacity of civil registrars: mayors, heads of diplomatic missions, shipmasters, the persons appointed by order of the National Defense Minister or, as the case may be, Minister of Administration and Internal Affairs in special cases.

consanguinity up to the 4th degree inclusively, interdiction to marry for the persons with mental alienation and intellectual disabilities), as well as marriages contracted with the infringement of the formal conditions that must be met upon concluding the marriage provided at Art.287 (the doctrine written under the current legal regime includes in this category: the lack of solemnity, the lack of publicity, the lack of competence of the civil registrar). Art.293 para.(2) reunites the provisions of Art.22 and 23 of the Family Code, regulating the status of the person whose spouse is declared dead by a court decision which is annulled after the person remarried.

We note that this list of cases of absolute nullity fails to make any reference to Art.277 para.(1) which prohibits same-sex marriages. The logic of the regulation imposes the conclusion that the infringement of this interdiction must constitute a case of absolute nullity of the marriage: same-sex marriage is not provided as a case of relative nullity either, as are the interdictions on the tutor-minor relation or the lack of permission to marry. We deem therefore that the lack of reference to Art.277 para.(1) as a case of absolute nullity of the marriage is a material error in the text and should be remedied.

One notable amendment brought by NCC is that the temporary lack of discernment and the existence of tutorship relations between the spouses no longer constitute cases of absolute nullity, but of relative nullity of the marriage (Art.299).

Besides the cases of absolute nullity listed at Art.293 para.(1), NCC provides that the marriage contracted by a minor under the age of 16 is null and void (Art.294 para.(1)). The reformulation of the texts in the Family Code on this matter is welcome, as NCC makes an express distinction between the minors who may be granted permission to marry (the minor of at least 16 years of age) and the minors who cannot receive such permission. According to NCC, the marriage contracted by the minor between the ages of 16 to 18 without meeting the legal requirements is relatively null (Art.297). Both types of nullity may be remedied, but the conditions for remedying absolute nullity (Art.294 para.(2)) are different from those provided for relative nullity (Art.303 para.(1)). Also, the text regulating the remedy for this case of absolute nullity (Art.294 para.(2)) benefits from a more accurate wording that the current Art.20 of the Family Code: the text expressly provides a deadline by which the nullity may be remedied (the date when the court decision finding the marriage null becomes final), while such clarification does not exist in the current text. Also, the text eliminates the ambiguities existing in Art.20 of the Family Code,³⁵ by a clear stipulation that, in order to remedy such nullity, both spouses must have turned 18, or the wife must have given birth to a baby or be pregnant.

Art. 295 para.(1) of NCC provides for the absolute nullity of a fictive marriage (defined as the marriage contracted for purposes other than starting a family), a notion that has been accepted by the

³⁵ According to the current text, nullity is remedied if the “spouse” who was under “the age required for marriage” comes of age. The wording may create confusion, considering that the law provides for more than one threshold of marriageable age (18 years and, subject to permission, 16 years) and that also there may be cases when both spouses were under the age threshold accepted by the law when marriage was contracted.

doctrine³⁶ but is not expressly provided in the Family Code. According to Art.295 para.(2), this absolute nullity is deemed remedied if, before the court decision finding the marriage null becomes final, the spouses lived together, the wife gave birth to a child or is pregnant, or two years from the date the marriage has been concluded have passed.

Following the legal rules governing absolute nullity, and the practice and doctrine developed in the absence of an express provision in the Family Code, Art.296 of NCC provides that the legal action to obtain acknowledgment by the court of the absolute nullity of the marriage may be filed by any person concerned. In the absence of an express derogation from the legal regime of absolute nullity, such action may be filed without time limitations. It follows, by way of interpretation, from the 2nd thesis of Art.296, that the legal action to obtain acknowledgment of the absolute nullity of the marriage may also be filed after the termination or dissolution of the marriage (the text thus codifies the existing doctrine and practice). It is also provided that the legal action to obtain acknowledgment of the absolute nullity of a marriage which has been terminated or dissolved cannot be initiated by the prosecutor, except for the case when the prosecutor acts in defense of minors' or incapacitated persons' rights.

(b) Section 2 “Relative Nullity of the Marriage”

[Art.297-303] As mentioned above, NCC decreases the number of cases of absolute nullity of the marriage provided by the Family Code, re-qualifying them as relative nullity cases. Considering the special legal status of nullities in family law, which also allows for the remedy not only of the relative, but also of the absolute nullity, the practical difference of this re-qualification of certain cases of nullity consists in the different conditions that must be met to allow nullity to be remedied, the person who has the right to file legal action, and the time-bar for the right to file action. The new regulation provides, for each case of relative nullity, special means of remedy (Art.303 para.(1) and (2)), as well as general means of remedy similar to those provided for absolute nullity, and which are deemed based on an *a fortiori* argument to cure relative nullities as well; these remedies are: turning 18, giving birth to a child, or the wife’s pregnancy (Art.303 para.(3)).

Thus, the marriage contracted without the permission and consents required by the law (Art.297 para.(1)) by a minor who meanwhile turns 16, is no longer a case for absolute nullity, (which may be remedied, according to Family Code, when both spouses reach the legal marriageable age), but for relative nullity. However, the legal text does not seem to be complete when it refers only to the lack of the permission or consent provided at Art.272 para.(2) and (4) without also including para.(5), which provides that, in the absence of the parent and tutor, the consent of the person or authority exercising parental rights is required.

³⁶ Doctrine does not define fictive marriage in a unitary manner. Some opinions include in this category (e.g. the category provided by GEO No.194/2002) the marriage of convenience or the illegal marriage. It is admitted, in principle, that the fictive character of the marriage is given by the lack of intent to start a family (as regards one or both spouses) and that the purpose sought by one or both spouses is to obtain some secondary effects of the marriage or to circumvent mandatory provisions of the law.

The relative nullity provided at Art.297 para.(1) of the new regulation is deemed remedied, in accordance with Art.303 para.(1), if, before the court decision annulling the marriage remains final, the permission and consents required by the law have been obtained. We note that Art.303 should make reference not to Art.272 para.(2) and (4) but, for the sake of accuracy, to Art.297 para.(1) regulating the case of relative nullity which is remedied. As a special condition to filing legal action for the annulment of the marriage under Art.297 para.(1), NCC provides, at para.(2) of the same text, that this action can be filed only by the person whose permission or consent required by the law lacked upon the conclusion of the marriage. According to Art.272 para.(2), the permission is granted by the court of tutorship only. From interpreting the two texts, it follows that the court of tutorship is granted the right to act for the annulment of a marriage which was contracted without its permission. The regulation shall raise controversies and needs clarifications. According to Art.301 para.(1), the 6-month term for filing the annulment action runs from the date when the person entitled to file action became aware of the existence of the marriage.

The existence of a tutorship relation between the spouses is also re-qualified from a case of absolute nullity into a case of relative nullity (Art.300). This relative nullity is deemed remedied if, before the court decision annulling the marriage is issued, the tutored minor turned 18, or the wife gave birth to a child or is pregnant (Art.303). In this case, the 6-month term for filing the annulment action is calculated as of the date the marriage was concluded.

Temporary lack of discernment, which is deemed a case of absolute nullity in the Family Code, is also re-qualified as a case of relative nullity in the NCC (Art.299). The relative nullity of marriage resulting from the temporary lack of discernment is remedied if the spouses lived together for 6 months as of the date when such lack of discernment has ceased (Art.303 para.(2)).

NCC maintains the cases of relative nullity concerning vitiated consent (by error with regard to the physical identity of the future spouse, by *dolus malus* or by violence), stipulating that in these cases the nullity is deemed remedied if the spouses cohabit for 6 months after the causes vitiating the consent have ceased (Art.298 and Art.303 para.(2)). The annulment action may be filed within 6 months as of the date when the error or violence ceased or when the party concerned became aware of the *dolus malus* (Art.302 para.(3)).

In all cases, the right to file action for the annulment of the marriage is personal (not transferrable to the heirs), but the action initiated by the spouse may be continued by any of his/her heirs (Art.302).³⁷

(c) Section 3 “Effects of the Annulment of the Marriage”

[Art.304-306] NCC introduces a special section on the effects of the annulment of the marriage, regulating the two exceptions from the general legal regime of nullities which are also provided in the Family Code, as well as the ostensibility of the court decision acknowledging the nullity, or annulling the marriage is enforceable against third parties.

³⁷ The expression “action for annullability” used at Art.302 must be replaced by “action for annulment”.

Art.304 regulates the status of the putative marriage, resuming the provisions of Art.23 para.(1) and Art.24 para.(1) of the Family Code. The new regulation holds that, as an exception, patrimonial relations between putative spouses are subject to the provisions applicable in case of divorce.

Art.305 resumes the provisions of Art.23 para.(2) and Art.24 para.(2) of the Family Code, stipulating that the nullity of marriage has no effect on the legal status of the children born therein, who maintain their legal status of children born inside a marriage, while the parent-child rights and obligations are governed *mutatis mutandis* by the provisions applicable in case of divorce.

According to Art.306 para.(1), the court decision acknowledging the nullity of the marriage or annulling the marriage is opposable to third parties in accordance with the law and is subject to the publicity conditions provided at Art.291, 334 and 335. According to Art.306 para.(2), the nullity of the marriage may be opposed to any third party in relation to deeds they concluded with one of the spouses only if the publicity formalities provided by the law for the legal action seeking nullity or annulment have been fulfilled, or if the third party became aware of the nullity in some other manner before the conclusion of the deed.³⁸ Considering that there are no legal provisions imposing publicity formalities for the legal action seeking nullity or annulment, while there are norms which require such formalities for the court decision finding the nullity or annulling the marriage, we deem that the text contains a material error that must be remedied.

(v). Chapter V “Spouses’ Personal Rights and Duties”

[Art.307-311] NCC resumes a large part of the existing provisions on the spouses’ personal (non-patrimonial) rights and duties (*i.e.*, to jointly agree on all matters concerning the marriage, to use the name declared upon contracting the marriage and not to change it by administrative procedure without the consent of the other spouse).³⁹ According to Art.307, spouses have the personal rights and duties provided by the law, irrespective of the marital regime they choose for their marriage.

NCC introduces non-patrimonial rights and duties for the spouses that are not provided by the Family Code, but have been agreed upon by the scholars. Thus, it is provided that the spouses owe each other respect, fidelity and moral support (Art.309 para.(1)),⁴⁰ and that the spouses have the duty to live together, but may decide, for justified reasons, to live separately (Art.309 para.(2)). None of the spouses is entitled to control the other spouse’s correspondence, social relations or choice of profession (Art.310).

³⁸ The expressions “action for nullity” and “action for annulability” used at Art.306 para.(2) must be replaced by “action to obtain acknowledgment of the nullity” and respectively “action for annulment”.

³⁹ We note that the new regulation no longer expressly provides that the spouses have equal rights and duties. This principle is mentioned only in Art.258, according to which family relies, *inter alia*, on the spouses’ equality (the Family Code provides for equality as a general principle governing the marriage both at Art.1 and at Art.25 in relation to spouses’ mutual rights and duties).

⁴⁰ According to Art.212 of the FCC.

(vi). Chapter VI “Spouses’ Patrimonial Rights and Obligations”

[Art.312-372] The NCC chapter concerning the spouses’ patrimonial rights and obligations brings one of the most significant changes in family regulations: the introduction of two new marital regimes in addition to legal community: the conventional community and the separation of property, the spouses being entitled to choose their marital regime when contracting the marriage.

The Family Code only permits one marital regime, the legal community regime, accompanied by a limited separation of property (in relation to a few categories of goods deemed by the law as personal). This regime is exclusive, legal, unique, mandatory and immutable, having, as regards the common property of the spouses, the legal nature of indivisible co-ownership. According to Art.30 of the Family Code, any covenant contrary to the legal community is deemed null and void, no matter if concluded before or after the marriage, and no matter if it tends to aggravate or alleviate the legal community regime to the benefit or detriment of the spouses’ personal property.

The newly introduced conventional marital regimes of separation of property and conventional community allow the future spouses to choose the patrimonial regime that shall govern the marital community. The legal novelty thus grants the future spouses the freedom to choose the legal status of the property to be obtained subsequent to contracting the marriage, and releases them of the current legal obligation to submit such property to indivisible co-ownership. According to NCC, the future spouses may decide that the property obtained during the marriage be subject to indivisible co-ownership, or to co-ownership by quotas (divisible), or the exclusive property of one of the spouses, in compliance with the provisions of their marital convention.

(a) Section 1 “Common Provisions”

[Art.312-338] The first section of the chapter, entitled “Common Provisions” (Art.312-338), includes the components of the so-called mandatory primary regime, consisting, as expressly provided at Art.312 para.(2), of such mandatory legal provisions which apply regardless of the marital regime chosen by the spouses. Taking into account the sequence of the legal texts and the structure of the section, it is understood that the “family residence”, another novelty introduced by NCC (Art.321-324), is one of the components of the mandatory primary regime, together with the provisions regarding marital expenses (Art.325-328) and those regarding the choice of the marital regime (Art.329-338).

1. About Marital Regime

[Art.312] Art.312 para.(1) lists the marital regimes legally available to the future spouses (legal community, separation of property and conventional community) and it provides the spouses’ right to choose one of them.

[Art.313,329] In the new regulation, the legal community regime continues to act as general law with respect to patrimonial rights and obligations of the spouses, the spouses being required to conclude a marital convention only if they choose another regime (separation of property or conventional community). By consequence, in the absence of the registration formalities required by the law for the marital convention, in their relations to *bona fide* third parties, the spouses shall be deemed married under the marital regime of legal community (Art.313 para.(3)).

[Art.281,283,284] As regards the moment when the marital regime must be chosen, since it is not expressly provided in this section, the interpreter should turn to the norms governing the conclusion of the marriage. According to Art.281 para.(1), the future spouses must choose their marital regime on the date of the statement of marriage at the latest, and such statement shall specify the chosen marital regime. Art.281 para.(2) provides that the future spouses must supply, together with the statement of marriage, the evidence required by the law for contracting the marriage. The texts do not lead to a clear conclusion on whether the future spouses, in case they choose another marital regime than legal community, are required to file a copy of the marital convention together with the statement of marriage, or whether it is sufficient that they merely indicate the chosen regime; however, note must be made that the indication of the chosen marital regime is not included among the minimum of mandatory data that must be included in the published excerpt of the statement of marriage (Art.283 para.(2)), the reason being, in our opinion, that third parties may not ground their opposition to marriage on objections to the choice of marital regime made by the future spouses.⁴¹ Furthermore, we also deem from the interpretation of Art.284, that the future spouses may change their choice of marital regime after the marriage statement is submitted and before the marriage is concluded, but they will have to issue a new statement to this effect, resuming the registration and publicity formalities.

[Art.313] Pursuant to Art.313 para.(1), the marital regime produces its effects between the spouses as of the date when the marriage is contracted, but in relation to third parties it becomes enforceable only after the fulfillment of the registration formalities required by the law (with implicit reference to the registration of the marital regime required by Art.291, and to the specific formalities provided for the marital convention at Art.334).

[Art.314,315] According to Art.314 and 315, regardless which the selected marital regime, either spouse can be represented by the other in exercising his rights under the marital regime, either on the basis of a conventional mandate or, if he cannot express his will, under a judicial mandate of representation issued by the court of tutorship upon the other spouse's request.⁴²

The judicial mandate of representation shall be exercised only throughout the period during which the represented spouse is incapable of expressing his will, or until a tutor or a curator is appointed, and only within the limits and conditions established by the issuing court. Even in the absence of an express provision to this effect, we deem that the spouse represented by such judicial mandate is entitled to address the court of tutorship requesting the mandate to be revoked if his incapacity to express his will ceases before the term of the issued mandate expired. It seems advisable that NCC adopts the solution given by Art.219 of FCC with regard to the relations between the represented

⁴¹ According to the doctrine, the opposition to marriage is an instrument provided to third parties, for the general benefit of society, to prevent the contracting of the marriage if there are legal obstacles or marriage-related legal requirements are breached. One of the formal requirements related to marriage is that the future spouses should choose a marital regime, but their option is free according to the law, and cannot be censored by third parties through opposition.

⁴² Art. 398 of QCC allows either spouse to grant a mandate to the other, in order to represent him in matters regarding the material as well as moral life of the family; if one of the spouses cannot provide his expression of will, a mandate to this effect may be obtained by the other spouse in court. The Romanian lawmaker limited the conventional mandate and mandate of representation regulated under Art. 314 and 315 to the spouses' patrimonial rights, according to the chosen marital regime.

spouse and the spouse representing the other by mandate of representation, which, in the French text, shall be governed by the rules governing *negotiorum gestio* (Romanian, *gestiunea de afaceri*).⁴³ QCC provides (Art.446) that the spouse who managed the other spouse's property based on a mandate of representation shall account as well for the fruits of the property he used during the term of his spouse's incapacity to express his will.

Pursuant to Art.317 para.(3) NCC, in applying the provisions regarding the mandate of representation, there shall be considered, as the case may be, the conditions required for the valid conclusion of deeds of transfer or encumbrance of joint property at Art.346 and 347, which have been expressly provided for the legal community, but continue to apply to the other two marital regimes, only to the assets that are placed under indivisible co-ownership according to the marital convention. From the interpretation of these texts, it results that the transfer and encumbrance of joint property (immovable and movable assets for the transfer of which, against good and valuable consideration, the law does not require registration formalities) can only be made with both spouses' express consent (which is no longer presumed granted by one spouse to the other) subject to the sanction of the relative nullity of the deed. If one of the spouses cannot express his will, the other spouse can request the court of tutorship to issue a mandate of representation, so as to be able to represent the other spouse until such incapacity is overcome, however for no more than 2 years. Either spouse can grant a (conventional) mandate to the other, according to the chosen marital regime – both in regard to his joint property rights, and in regard to his private property rights. Nothing prevents the spouses from granting mandates to each other.

[Art.316] Art.316 introduces a case of judicial limitation of the freedom to dispose of certain assets for a spouse who is seriously jeopardizing the family interests by the legal deeds that he executes. The prejudiced spouse may request the court of tutorship to limit the latter's right to dispose of certain assets, a right that he shall be able to exercise only with the express consent of the claimant spouse. This measure may be extended but its term cannot exceed 2 years. The court decision limiting the right of disposal is communicated so that the publicity formalities required for movable or immovable assets be made, and the deeds executed in breach of the mandate are subject to relative nullity, while the right to file action for annulment of the deed is time-barred after 1 year from the date when the prejudiced spouse became aware of such deed.

The text does not make a distinction between limiting the spouse's right to dispose of his private or the spouses' joint property (that either spouse benefits from, within the limits provided under Art.346 and 347, which remain applicable, according to Art. 316 para.(3)). Therefore, Art.316 provides an exceptional case of limitation of the owner's exclusive right to freely dispose of his own property, to

⁴³ The two texts regarding the mandate are similar to those provided under Art. 218 and 219 of FCC, except for the express mentions that the conventional mandate can be revoked at any moment, which was already presumed according to the general rules, and, as regards the mandate of representation, that the actions carried out by the spouse mandated by the court are enforceable against the represented spouse, according to *negotiorum gestio* rules. QCC (Art.446) provides that the spouse who managed the property of the other spouse under mandate of representation shall account for the fruits thereof, used during the latter's period of incapacity to express his will.

the extent where, by the legal deeds that he performs, he seriously jeopardizes its family's interests.⁴⁴ We have noted the conservative and moderate solution chosen by the NCC lawmaker, limiting the application of Art.316 to the situations where the spouse is seriously jeopardizing his family's interests by legal deeds that he is executing, while according to FCC the sanction is applied to the spouse jeopardizing the family interests by serious breach of his duties, without distinguishing between patrimonial or non-patrimonial duties, and without imposing the condition that such breach should be consist in legal deeds. In the same line NCC lawmaker did not transpose the FCC Art.217 allowing the spouse to request the court that he be authorized to individually execute a legal deed in regard to which the express consent of the other spouse would be necessary, if the latter loses his capacity to express his will or refuses to execute such legal act, and his refusal is not justified by the family interest.⁴⁵

[Art.317] Art.317 para.(1) states the principle of spouses' patrimonial independence, which, whenever the law does not provide otherwise, may execute any legal deeds among themselves or with third parties, this principle being applicable notwithstanding the marital regime chosen by the spouses. In reaction to a need for clarification noted in practice, Art.317 para. (2) and (3) expressly provide the legal regime of bank deposits made during the marriage, resuming the provisions of Art.221 of FCC. Notwithstanding the chosen marital regime, either spouse is free to make bank deposits and any other operations in this respect, without the other spouse's consent, the account holder maintaining, in relation to the bank, the right to dispose of the deposited funds even after the dissolution or termination of marriage, if an enforceable court order does not provide otherwise.

[Art.318] Notwithstanding the chosen marital regime, any of the spouses is entitled to be informed by the other spouse with regard to his property, income and debts (Art.318 para.(1)). In case of unjustified refusal, the spouse whose right to information is breached may request the court of tutorship to order the other spouse to supply such information, that the court may request from the latter or from any third party. Third parties may refuse to supply the information requested by the court of tutorship on grounds of professional secret protection (Art.318 para.(3)). Art.318 para.(4) establishes a relative legal presumption that the plaintiff spouse's allegations are true if the defendant refuses to supply information that only he may obtain according to the law.

⁴⁴ Note should be made that the text does not distinguish between the types of family interests that the spouse jeopardizes through his deeds – patrimonial or other interests. Considering that Art.316 is part of the chapter regulating the spouses' patrimonial rights and obligations, a systematic interpretation leads to the conclusion that the text may only refer to the family's patrimonial interests. However, in an article belonging to the same chapter (Art.370 para. (1) regarding the legal division of property), the lawmaker expressly stipulates the type of interests protected under the regulation (the measure can be taken by the court of tutorship upon the request of either spouse, when the other spouse executes acts jeopardizing the "patrimonial" interests of the family). The absence of such clear specification in Art.316 might cause inconsistent interpretations.

⁴⁵ Pursuant to Art.217 of the FCC, the deed executed pursuant to an authorization issued by the court under such circumstances is enforceable against the spouse whose consent was substituted, however it cannot cause personal obligations to the latter.

[Art.319,320] The marital regime is terminated upon the acknowledgment by the court of the nullity, or the annulment, dissolution or termination of marriage, but it may be changed by the parties during the course of the marriage. If the patrimonial regime is terminated or changed, it shall be liquidated under the law, by the mutual agreement of the parties, or if they fail to agree, by settlement in court, and the notarized instrument or the final court order, as the case may be, shall represent the act of liquidation of the marital regime.

2. Family Residence

[Art.321-324] NCC introduces the notion of “family residence”, with a special legal regime, meant to ensure the protection and stability of family and marital community, including against possible abuse of the spouses in exercising the rights they are entitled to under the marital convention. The regulations on family residence are part of the so-called mandatory primary regime, and they are applicable notwithstanding the marital regime chosen by the spouses.

“Family residence”, defined as the common dwelling of the spouses, or, if they do not cohabit, the dwelling of the spouse where the children are residing (Art.321 para.(1)), is a new concept, absent from the current legislation. Pursuant to Art.321 para.(2), a real estate can be registered in the land book as family residence, but such registration requirement only tends to ensure enforceability against third parties, according to the law. Thus, in absence of formal mandatory conditions that a dwelling must fulfill in order to be considered the family residence, we understand that the special legal regime is applicable to the dwelling where spouses usually cohabit, or as the case may be, the dwelling of the spouse where the children reside, notwithstanding whether such dwelling is registered or not as such in the land book. In order to encourage the formalization of the dwelling status as family residence, the lawmaker also grants the right to make such registration to the spouse who is not the owner of the real estate.

The special legal regime of the family residence includes a series of derogations from the general provisions regarding the exercise of the private ownership right, justified by the legal imperative of protecting and promoting family. Pursuant to Art.322 para.(1), neither spouse, not even if he is the sole owner of the real estate, can dispose of the rights in relation to the family residence without the written consent of the other spouse. We deem that, by its wording, the text prohibits the sole owner spouse to dispose of his real estate (by transfer, by encumbrance or by establishing real rights in favor of third parties) but also the transfer of the right to use the estate by way of lease. In our opinion, the text shall apply notwithstanding the title under which the real estate serving as family residence is held, except if the title consists of a lease agreement, which is regulated separately under Art.323.

Furthermore, it is prohibited for the spouse to remove or dispose of the furniture or decorations from the family residence without the other spouse’s consent (Art.322 para.(2)).⁴⁶ The text does not provide explicit specifications, but it is to be presumed that this interdiction is applicable to the spouse even if he is the sole owner of the such movable assets and of the real estate in which they are situated.

⁴⁶ Pursuant to Art. 401(2) of QCC, assets which may not be removed from the family residence are the furniture, the interior decorations, including art items and paintings, but excluding art collections.

Since this is a limitation to exercising ownership rights, the NCC lawmaker provides the condition that the other spouse's refusal to consent should be legitimate, otherwise the owner spouse shall be entitled to request the court of tutorship the issuance of the authorization to perform the act (Art.322 para.(3)). Furthermore, the right to action for annulment against the deed executed without the consent required under the law, is time-barred within 1 year as of the date when the spouse who did not provide his consent found out about the existence of the deed, however no later than one year from the termination of the marital regime (Art.322 para.(4)).

Pursuant to Art.322 para.(5), as a protection measure for *bona fide* third parties, the spouse who did not consent to the execution of the legal deed under which the other spouse disposed of rights related to the family residence, may request the annulment thereof only if the real estate is registered as family residence in the land book. If no such registration was made, he may only claim damages, except if the third party acquirer knew by other means that the real estate was registered as family residence.

Pursuant to para.(6) of the same article, the provisions of para.(5) shall apply accordingly to legal acts regarding movable assets situated in the family residence that para. (2) of Art.322 refers to. We deem that, in case of deeds of disposal regarding movable assets, the condition of the registration in the land book of the real estate they originate from cannot provide the proof of the third party acquirer's good faith, which shall be established based on whether the third party acquirer was aware or not of the origin of the moveable assets.

In addition to the aforementioned limitations to the exclusive ownership right, the special regime of family residence also includes derogations from the principle of relativity of contractual effects, since if the family residence is held under a lease agreement, each of the spouses shall have his own leasehold interest, notwithstanding whether only one of them is a party to the agreement, and even if the lease agreement was executed before the marriage (Art.323 para.(1)). In such case, neither of the spouses is entitled to dispose of its right of use with regard to real estate without the other spouse's consent, and the act of disposal may be annulled upon the request of the spouse who did not express his consent, in case the lease agreement was registered in the land book with the specification that the real estate serves as family residence.⁴⁷ Otherwise, the plaintiff spouse may only claim damages, except for the case where the third party acquiring the right of use was aware by other means of the real estate legal status.

Art.324 regulates the award of the lease agreement benefit regarding the family residence, upon the dissolution of marriage, in case it cannot be used by both spouses and they fail to reach an agreement. The court of tutorship shall consider, in this order, the best interest of underage children, the fault in the dissolution of marriage, and the housing possibilities of the former spouses. The lease agreement benefit is awarded with summons to the lessor and it becomes effective against the latter as of the date when the ruling becomes final (Art.324 para.(3)). The spouse who is awarded the benefit of the lease

⁴⁷ Note should be made that in the source of inspiration (QCC) it is expressly provided, under Art. 403, that neither of the lessee spouses is entitled to sub-lease, assign the benefit of the lease agreement or terminate the lease agreement of family residence, without the other's consent, where the lessor was notified, by any of the spouses, that the dwelling is used as family residence. A spouse having neither consented nor ratified the act may apply to have it annulled.

agreement must pay to the other spouse an allowance covering the expenses for relocation to another dwelling, except if the divorce was ruled due to the exclusive fault of the latter. The allowance may be imputed during the partition with regard to the assets due to the spouse who was awarded the benefit of the lease agreement (Art.324 para.(2)). We deem that it would be recommendable to add in the legal text the condition that such relocation expenses should be reasonable, so as to avoid unfair situations in practice.

Pursuant to Art.324 para.(4), the same rules are applied to the temporary award of the benefit of the family residence which is the joint property of the spouses, until the partition ruling remains irrevocable; we suggest the amendment of the term “irrevocable” by “final”, for the purpose of harmonization with the NCPC provisions. In the absence of such distinction, the provision is applicable both for the dwellings held under common indivisible ownership title within the legal or conventional community regime and in case that the former spouses are co-owners of real estate quotas, under the conventional community or separation of property regimes.

3. Marital Expenses

[Art.325-328] Rules governing marital expenses represent another component of the so-called mandatory primary regime, which is applicable notwithstanding the marital regime chosen by the parties. Pursuant to Art.325 para.(1) of NCC, the spouses have the obligation to provide material support to each other; this obligation is provided as well in the current regulation, and it includes, as specified by the doctrine, the obligation to bear the marriage expenses (expressly regulated in NCC under Art.325 para.(2)) and the obligation of alimony (regulated under Title V of Book II).

The doctrine developed under the Family Code regime has determined that the scope of marriage expenses includes the expenses necessary for joint household support, and, in a wider interpretation, expenses for child upbringing and education and those for supporting the spouse affected by incapacity of work.

Art.325 para.(2) provides that the spouses are bound to contribute to the marriage expenses according to their own means, except if otherwise provided in the marital convention. However, Art.325 para.(3) provides the nullity of the convention establishing that the marriage expenses be incurred by one of the spouses only. Codifying the doctrine solutions, Art.326 provides that the spouses’ work in the household and work meant to ensure child care represents a contribution to marriage expenses.

The spouses are entitled to dispose at will, under the law, of the revenues they gain further to carrying out their profession (considered to be joint property under the legal community regime), but only upon first meeting the obligations incumbent upon them with respect to marriage expenses (Art.327). The spouse who actually participated to the professional activity of the other spouse may obtain indemnity, to the extent that the latter’s financial condition improves significantly, if his participation exceeded the limits of the obligation to provide material support and to contribute to marriage expenses.

4. Choice of Marital Regime

[Art.329-338] The last part of the section regarding general rules applicable to all marital regimes provides the conditions of validity, publicity, enforceability and amendment of marital conventions. Although, due to their object, such rules relate directly only to the conventional community and separation of property regimes, which are the only ones to require the execution of the marital conventions, they are also applicable to the legal community regime, which is the general rule; thus in case of failure to fulfill the legal requirements for the validity and enforceability against third parties of the marital conventions, the marriage shall be considered subject of the legal community regime, between the spouses as well as in relation to third parties.

[Art.336,369] As regards the time when the marital convention is executed, it follows from interpreting the NCC texts that the future spouses choosing a conventional marital regime must execute the marital convention on the date the marriage is concluded at the latest, and the civil registrar shall have the obligation to serve *ex officio* a copy of the marriage certificate to the notary public who has authenticated the convention (Art.291). The future spouses may amend the marital convention before the marriage has been concluded, with the observance of all validity conditions provided by the law (Art.336). If the amendments brought to the marital convention cause a change of the marital regime initially chosen, the future spouses shall also have to amend the statement of marriage according to Art.284. Furthermore, spouses may execute a marital convention during the marriage, choosing to pass from the legal community regime to a conventional marital regime, or to execute a new marital convention, and the provisions of Art.369 shall apply in the latter case.

[Art.330,332,338] As regards the validity conditions, pursuant to Art.330 para.(1), the marital arrangement is a formal act, executed in authenticated form before the notary public, in the presence of two witnesses, with the express consent of the parties, provided in person or by attorney-in-fact, based on an authenticated special power of attorney, with predetermined wording. The breach of any of the aforementioned conditions entails the absolute nullity of the marital convention (the spouses being considered, both in relation to each other and in relation to third parties, as subject to the regime of legal community).

Pending absolute nullity, marital conventions may not derogate from the substantive legal provisions applicable to the chosen marital regime, except for the cases expressly provided by the law, nor may marital conventions prejudice the equality between spouses, the rules on parental authority or legal succession (Art.332).

[Art.337,338] In the case of minors who reach the marriageable age (16 years), the validity conditions required for the permission (the consent of the legal guardian and the permission of the court of tutorship) are also required for the execution or amendment of the marital convention. As per Art.337 para.(2), failure to fulfill these conditions entails the relative nullity of the convention under Art.46 of NCC, the effect of marital convention termination being that the marriage shall be deemed submitted to the legal community regime, without prejudice to the rights of *bona fide* third parties pursuant to Art.338. The right to action for annulment is time-barred to 1 year from the contracting of the marriage (Art.337 para.(3)). The text is ambiguous as regards the annulment of the amendments brought by the minor to the marital convention without fulfilling the authorization conditions required

by the law, which seems not to fall under the scope of para.(2) and para.(3), although there seems to be identity of reason.

[Art.334] The marital convention is subject to registration formalities so as to be enforceable against third parties. Art.334 para.(1) provides the registration of marital arrangements in the newly created National Notary Registry of Marital Regimes, kept in electronic form (Art.334 para.(1)), which may be queried by any person, without the obligation to justify their interest, and of which excerpts may be issued upon request (Art.334 para.(5)). Furthermore, according to the nature of the property that it refers to, marital conventions shall be registered as well in the trade registry and in other registries imposed under the law, since their entry in the National Notary Registry of Marital Regimes cannot cover all required registration formalities (Art.334 para.(4)). The convention shall be recorded in the related registries by the notary public who authenticated the marital convention (Art.333 para.(2)).

The National Notary Registry of Marital Regimes is supposed to create an institutional, financial/budgetary and personal impact at the level of the National Union of Notaries Public of Romania. Mention should be made that, pursuant to the provisions of Art.56¹ under Order No.710/1995, the four national registries provided under the law (of successions, authenticated wills, succession options and revocation of powers of attorney) are kept both in electronic form and in hardcopy. To ensure regulation uniformity and for identity of reason, the new national registry of marital arrangements should be kept in both forms as well (Art.334 para.(1) of NCC only provides the electronic form). The introduction of this registry requires that the existing legal framework be also supplemented at the level of the methodological norms which must be enforced by the National Union of Notaries Public of Romania. We note that the NCC Draft IL amends, on the one hand, Art.334 para.(1) of NCC, eliminating the clarification that the National Notary Registry of matrimonial regimes is kept in electronic form and, on the other hand, it proposes the introduction of a new article (Art.29²) of Law No.36/1995, providing for the establishment of the National Notary Registry of matrimonial regimes, whose organization and operation are to be established by order of the Minister of Justice.

[Art.330,331,335] Between spouses, the marital convention executed prior to the marriage becomes effective as of the date when the marriage is contracted, while the convention executed during the marriage (by changing the marital regime) is effective as of the date stipulated by the parties, or in absence of such specification, as of the execution date thereof. (Art.330 para.(2) and (3)).

The marital convention is effective before third parties only after the registration formalities required by the law are fulfilled, or if such third parties have become aware of the convention by other means (Art.335 para.(1)), and is effective only as regards deeds made after the marriage was concluded. (Art.335 para.(2)).

Art.331 sanctions the simulation of the marriage convention, providing that the secret act by which another marital regime is chosen, or which modifies the marital regime for which the registration formalities are made, is effective only between the parties, and cannot be enforced against *bona fide* third parties.

[Art.333] NCC resumed, at least in part, the provisions of Art.1516 of FCC, regarding *praecipium jus*, defined in our regulation as such clause included in the marital convention stating that the surviving spouse should take over, without consideration, before the partition of the inheritance, one or several joint assets held under indivisible co-ownership or divisible co-ownership (Art.333 para.(1)). It follows from the text that *praecipium jus* can relate to assets held by the spouses under the marital regime of legal community and, in the absence of such distinction, the assets held by the spouses under the conventional community regime or even under the separation of property regime, as long as the spouses are co-owners of the asset. Pursuant to Art.367 let.d), the marital convention may only consist of such *praecipium jus* clause.

Unlike the French lawmaker, who gives *praecipium jus* its own legal individuality, naming it “marital convention and convention between associates”, the Romanian lawmaker does not define the legal nature of the *praecipium jus*; the Romanian doctrine and practice are to provide solutions to this effect. In any case, according to Art.333 para.(2) of NCC, *praecipium jus* is not subject to the obligation to restore donations, but it is however subject to limitation (although from a formal perspective, the *preciput* is not a gift, since Art. 984 para. (2) of NCC provides expressly that gifts may be awarded only by donation or will). The NCC Draft IL proposes the supplementation of Art.333 para.(2) so as to provide that the limitation is to be made in line with Art.1096, according to which legacies are subject to limitation before donations. Thus, the observance of rules on legal succession is ensured (the breach thereof causes the absolute nullity of the convention pursuant to Art.332 para. (2)). Unlike French law, prohibiting the spouse entitled to *preciput* to make use of the assets subject to the *praecipium jus* if it causes prejudice to the forced heirship of the children from a prior marriage of the predeceased spouse, entitling only such children to legal action as forced heirs, NCC does not expressly regulate this situation. Again, practice and doctrine shall develop solutions, considering as well the provisions of Art.1090 of NCC.

Another important difference from the French law is provided by Art.333 para.(4), which provides that the *praecipium jus* clause becomes inefficient if the community ceases during the spouses’ lifetime, or if the spouses die at the same time, or the assets subject to it were sold upon the request of the spouses’ common creditors. By interpreting the text, it results that the benefit of the *preciput* may only be established by the spouses mutually, in favor of each other; otherwise, the clause would become ineffective also in case the beneficiary spouse would predecease the spouse establishing the *preciput*. We note that the NCC Draft IL proposes the amendment of NCC so as to clarify the aforementioned aspect, by adding, at Art.333 para.(1), the express stipulation that both spouses or only one of them may benefit from the *preciput* clause and, at Art.333 para.(4), a new case when the *preciput* clause becomes ineffective, *i.e.* when the beneficiary spouse predeceases the spouse establishing the *preciput*.

Finally, NCC does not contain any express provision with regard to the enforcement of the *praecipium jus* in relation to the partition of the spouses’ joint property, stipulating that the assets are to be taken in advance to testamentary partition. The wording used ("joint property") may lead to the conclusion that the Romanian lawmaker intended, just as the French lawmaker, to grant priority to the enforcement of the *praecipium jus* before "any act of partition" (otherwise, the property would no longer be "joint property"), and thus in practice, the assets making the object of such clause shall probably be distributed after each spouse takes his own assets and the joint assets are divided.

Furthermore, in practice, solutions shall be devised for the enforcement of the *praecipium jus* by equivalent, if the enforcement in kind is no longer possible (allowed under Art.333 para.(5)) with observance of the provisions of Art.333 para.(4) stipulating nullity only if the assets were sold by the common creditors, but not if such assets no longer exist due to the negligence of the spouses or of the beneficiary spouse. In the absence of regulations on the relation between the *praecipium jus* and the spouses' joint debts, unfair situations might arise in practice.

(b) Section 2 “Legal Community Regime”

[Art.339-359] *De lege lata*, the marital regime of legal community regulated under NCC is, like the one regulated under the Family Code, a regime of community accompanied by a limited separation of property; the new regulation states as well that the assets acquired by either spouse under such regime are subject to the legal community, becoming the common indivisible property of the spouses (either after the contracting of the marriage, if the marital regime applicable to it was that of legal community from the beginning, or as of the date when the spouses adopt such marital regime by changing the prior conventional one), while certain categories of assets limitedly provided by the law remain personal assets of the spouses.

[Art.359] According to the new regulation, the legal community regime is the general rule of marital regimes; this conclusion arises from several texts (Art.313 para.(3), Art.329, Art.338 etc.). Pursuant to Art.359, any convention contrary to the rules included in the section on the legal community regime becomes null to the extent that it is not compatible with the conventional community regime. The text must be interpreted in the sense that it is impossible to derogate from the provisions of the legal community regime otherwise than by marital convention, executed in observance of the formal and substantive conditions provided by the law. Furthermore, it is understood that the spouses whose marriage is subject to the patrimonial regime of legal community cannot derogate from such regime by convention.

[Art.339,343] With regard to the joint property, NCC maintains the presumption of community from the current regulation (provided under Art.343), which, according to the doctrine developed under the current regime, is applicable to all assets acquired by the spouses during the marriage (from the contracting of the marriage until the termination or dissolution thereof). Under the new regulation, the presumption shall apply to assets acquired by either spouse in the period during which the marriage was governed by the legal community regime, which may start on the date of the marriage or on the effective date of the marital convention executed during the marriage, as the case may be, and shall be valid until the termination or dissolution of the marriage, in case the spouses do not change the marital regime throughout the marriage. The presumption shall be applicable to all assets acquired by the spouses throughout the legal community regime, except for those that are personal assets by nature according to the law.

[Art.341] NCC expressly clarifies the nature of certain revenues as joint property, notwithstanding the date when they were obtained, as long as the spouse's receivable in this respect became due during the community: wages, amounts of money due as pensions under social insurances

and the like, revenues due pursuant to an intellectual property right.⁴⁸ The clarification is beneficial, since there are debates in the specialized literature discussing this matter the nature of certain categories of such assets (wages, indemnities and fees, pensions due under social insurances, revenues arising from copyrights and industrial property rights).

[Art.344] As a general rule, Art.344 expressly allows either spouse to request that a mention be made in the land book or in other registries imposed by the law, specifying that a certain asset belongs to the community.

[Art.345,356,347,350] As regards the spouses' rights in relation to the assets belonging to the legal community, NCC maintains the legal nature of the property right defining the legal community provided by the current code (common indivisible property) implementing however a few changes as to the spouses' rights with regard to their joint property.

First, it should be noted that there are some changes to the presumption of mutual tacit mandate, as established under Art.35 of the Family Code, according to which either spouse, exercising individually the right to manage, use and dispose of the joint assets, is presumed (by legal relative presumption) to have the other spouse's consent, except for deeds of transfer or encumbrance having as object lands or constructions belonging to the joint property, which may only be concluded with the express consent of the other spouse.

Similarly to the current regulation, NCC provides that the acts of use (Art.345 para.(1)), preservation, management (Art.345 para.(2)) of joint property may be concluded by either spouse, without the express consent of the other spouse. Clarifying an ambiguous aspect of the current regulation, Art.345 para.(2) provides the acquisition of joint property among the deeds that the spouse may conclude on his own (the consent of the other spouse being presumed). NCC adds no supplementary clarifications as regards the spouses' rights in various situations that have been causing debates in current practice and doctrine, such as the situation of constructions built by both spouses with common means on the land owned by one of them, constructions built by one of the spouses, with his own means, on the land that is the joint property of both spouses, constructions built by the spouses on a land owned by a third party or granted for use, under concession or lease, or repairs or fit-out works of constructions owned by one of the spouses.

The situation of the deeds meant to change the purpose that the asset serves (Art.345 para.(1)) for which the express consent of both spouses is required, is regulated expressly as well; this solution is maintained by the current regulation, since although it is not an act of disposal, the change of use or of economic purpose of a certain asset exceeds the scope of acts of management which may be carried out without the express consent of one of the spouses.

A new element is that NCC expressly allows the spouse whose interests as to the community of assets were prejudiced by the legal deed executed without his consent (but for which there is the presumption

⁴⁸ Art. 449 of QCC provides that all spouses' assets that are not private assets according to the law are joint assets of the spouses, among them particularly the proceeds obtained from work during the regime and the fruit or income collected from that spouse's private property or acquests during the community regime.

of a tacit mutual mandate) to file a claim for indemnification against the spouse who concluded the deed (Art.345 para.(4)). Pursuant to the same text, this action cannot affect the rights acquired by *bona fide* third parties; considering the purpose sought by this legal action (indemnity, rather than annulment), this last thesis of the text may cause confusion, since a claim for damages against the spouse who executed the adverse deed cannot affect the rights of third parties.

As regards the limits of the mutual tacit mandate, NCC imposes the rule of the express consent of both spouses for “legal deeds of transfer or encumbrance of joint property” (Art.346 para.(1)). We understand that the legal deeds the text refers to include the establishment of security interests, although an explicit specification to this effect would be useful. Since the law makes no distinction, both spouses’ consent shall be necessary for deeds of transfer for good and valuable consideration or free of charge. Acts of transfer *mortis causa* are an exception to the above, since Art.350 expressly provides that either spouse may dispose by will of that part of the community of assets that he would be entitled to upon the termination of the marriage. Furthermore, since the law makes no distinction to this effect, we understand that, unlike the current regulation which requires both spouses’ consent only in case of transfer or encumbrance of a land or construction, NCC provides the condition of the express consent of both spouses for acts of transfer or encumbrance of movable assets as well. Art.346 para.(2) provides an additional rule for movable assets: both spouses’ express consent shall not be necessary for a deed whereby he disposes, against good and valuable consideration, of a joint movable asset, unless such legal deed is “subject to registration formalities pursuant to the law”. Para.(3) of the same article provides an exception from the condition of both spouses’ consent for regular gifts.

According to the sequence and wording of the texts under Art.346 it results that para.(2) provides the rule (all deeds of transfer and establishment of real rights over joint property are subject to both spouses’ consent) and para.(2) and (3) provide the exceptions. While the wording of para.(3) is clear, we believe that clarifications are necessary as regards para.(2), which provides, as an exception from the rule under para.(1), that any of the spouses may dispose for good and valuable consideration of the joint movable assets without the other spouse’s consent, except if the operation is subject by law to registration formalities. First, the scope of application of para.(2) needs to be defined as regards the legal deeds it refers to. The rule under para.(1) refers to deeds of transfer (*inter vivos*, for good and valuable consideration or free of charge), including the establishment of real securities, and the encumbrance of joint movable or immovable assets, while para.(2) refers to any deed of disposal carried out for good and valuable consideration (this category includes transfer, real securities, as well as any other deeds exceeding the scope of acts of management, pursuant to the law, if, according to the premise under para.(2), such deeds are executed for good and valuable consideration). As a first conclusion, para.(2) refers to any acts of disposal regarding joint movable assets, as long as such acts are made for good and valuable consideration, including establishment of security interests.

Secondly, para.(2) requires both spouses’ consent only if the law provides registration formalities for the act of disposal for good and valuable consideration having as object the joint movable asset. Note should be made that such formalities are provided by the law in order to ensure enforceability against third parties, and not the validity of the acts subject to registration, and the parties may derogate from the registration requirement bearing the consequence of unenforceability provided by the law.

According to the above, it results that under the new regulation, both spouses' express consent is necessary for the establishment of real securities on movable property since it is subject to registration with the electronic archive of security interests in personal property. Such securities may be established and registered for any movable property.

The sanctions provided by NCC for breaching the rule and respectively the exception need to be analyzed. Art.347 para.(1) sanctions by relative nullity deeds executed in breach of Art.346 para.(1), providing under Art 347 para.(2) that the third party who made the necessary diligences to obtain information on the nature of the assets shall be protected against the effect of nullity, while the spouse who deems his interests in relation to community of property to be prejudiced by the deed made by the other spouse without his express consent is entitled to an action for liability as provided under Art.345 para.(4).

For the breach of the provisions under Art.346 para.(2), the text provides that the provisions of Art.345 para.(4), regarding the right to claim compensation of the spouse whose consent was not obtained, shall continue to apply. The text is ambiguous, since it fails to state clearly whether the sanction relates to the breach of the provision under Art.346 para.(2) first thesis (according to which, as an exception, the spouse may dispose individually, for good and valuable consideration, of movable property) or to the breach of the provision under Art.346 para.(2) second thesis (according to which acts of disposition for good and valuable consideration regarding movable property that are subject to registration formalities according to the law require both spouses' express consent), or to both. One of the possible interpretations starts from the nature of the sanction. The sanction provided under Art.345 para.(4), that the text at hand makes reference to, is the same as the one applied in situations where one of the spouses acted legitimately under the mutual tacit mandate, performing an act of preservation or use which caused prejudice to the other spouse's interests (Art.345). By its nature, this sanction appears to be appropriate for the breach of Art. 346 para.(2) first thesis, which is establishing the presumption of mutual tacit mandate, but not for the breach of Art.346 para.(2) second thesis, where the law requires the express consent of both spouses, and in the absence thereof, the sanction of relative nullity should apply. Thus, it may be concluded that the hypothesis under Art.346 para. (2) first thesis entails the spouse's liability for the damages caused to the other spouse, whose consent was presumed upon the execution of the act of disposal, and the hypothesis under Art.346 para. (2) second thesis is sanctioned by the relative nullity of the legal act executed without the observance of the conditions on consent, as provided under Art.347 para.(1).

In a contrary interpretation (although the lawmaker apparently intends to establish, under Art.346 para.(2) second thesis, the necessity of both spouses' express consent for certain acts), the absence of a sanction of relative nullity for breach would actually make the text read as establishing the presumption of a mutual tacit mandate in case of acts of disposal for good and valuable consideration regarding joint movable property for which the law imposes registration formalities.

The provisions analyzed before shall be read in the light of the provisions of Art.314, 315 and 316 regarding the conventional mandate, the judiciary mandate of representation and the acts of disposal seriously jeopardizing the family interests. As regards the conventional mandate, we deem valid the solutions given by practice and doctrine based on the Family Code, according to which the spouses may grant each other power of attorney for exercising the rights arising from the legal community, but

this power of attorney cannot be general, because it would eliminate the presumption of mutual tacit mandate, and thus it shall be issued for each legal act separately. We deem that it is necessary to obtain the judiciary mandate of representation only in cases where the law requires the express consent of the spouse who does not have the capacity of expressing his will, while in other cases the presumption mutual tacit mandate operates. Art.316 establishes a judicial exception to the mutual tacit mandate, allowing one of the spouses, pursuant to the law, to request the court of tutorship the limitation of the others spouses' right to dispose of certain properties without his express consent. As regards the spouses' joint property (the interdiction may also concern personal property), Art.316 only refers to such property and acts of disposal related to said property, for which the law does not provide the express consent of both spouses, and which fall under the scope of Art.346 para. (1) and (2).

[Art.348,349] Art.348 contains a specific text, according to which joint property may be the contributed to a company, association or foundation, in observance of the provisions regarding consent as provided under Art.346 para.(1) and Art.347. Art.349 provides, subject to the sanction of relative nullity, that neither of the spouses may dispose of the joint property as contribution to a company or to obtain shares, without the other spouse's consent. According to the reference to Art.347, the provisions regarding the protection of *bona fide* third parties are applicable in this case as well, the latter being protected against the effects of nullity, while the spouse incurring damages shall benefit from the possibility to file an action for liability. The same solution is provided under Art.349 para.(1) second thesis for the situation where the contribution was made to a company whose shares are traded on a regulated market.

Pursuant to Art.349 para.(2) first thesis, "in all cases", the acquired shares of any kind are joint property and pursuant to Art.348 para.(2), in order to exercise their rights as shareholders, the spouses must appoint one of them or a third party to act as common representative (a provision eliminated by the NCC Draft IL). However, the spouse becoming a shareholder in his own name shall exercise individually the rights arising from such title (Art.349 para. (2) second thesis). The NCC Draft IL clarifies the existing NCC regulation, by including express provisions on the nature of the shares out of joint or personal property, depending on whether both spouses gave their consent or not, as well as on the spouses' capacity of shareholders, their rights and the conditions for the exercise thereof.

[Art.351,352,353,354] Similarly to the current regulation, NCC expressly provides the categories of debts for which the spouses are liable with their joint property, rightfully including, in our opinion, the obligations arising in relation to the preservation or acquisition of joint property (Art.351 let.a)). The seizure of joint property is carried out according to Art.353, maintaining the provisions of Art.33 of the Family Code. Art.352 regulates subsidiary liability for common debts, showing that if the seizure of joint property failed to cover the joint obligations, the spouses shall be held liable jointly with their private property; the text reiterates the provision under Art.34 of the Family Code, stipulating expressly the joint liability of debtor spouses. Further to the relation of joint liability between debtor spouses, the spouse who paid the common debt undertakes, by subrogation, the creditor's rights for the part that he incurred in addition to the quota that would be awarded to him of the community, if the liquidation were performed upon the payment of the debt, the latter benefitting from a right of retention over the other spouse's assets until the receivables he holds against such spouse are fully covered.

A special regime is reserved for work earnings and related income, which, although considered to be joint property pursuant to Art.341 of NCC, cannot be seized for common debts undertaken by the other spouse, except for those undertaken to cover the regular expenses of the marriage (Art.354).

[**Art.355,356,357**] NCC regulates the liquidation of the legal community regime – as regards joint property – providing more details than the current Family Code. As a general rule, it is provided that upon the termination of the community regime, the latter shall be liquidated by court order or by authenticated notarized act (Art.355 para.(1)), and that the community continues, as regards the related rights and obligations, until the liquidation is completed (Art.355 para.(2)). If the community is terminated by the death of either spouse, the liquidation shall be carried out by the surviving spouse and by the deceased spouse's heirs, the obligations of the deceased spouse being divided between the heirs pro rata with their shares of the inheritance (Art.355 para.(3)). If the community is terminated further to dissolution of the marriage, the former spouses continue to be common indivisible owners of the joint property until the quotas due to each of them of the joint property are determined (Art.356). The partition of joint property upon the termination of the community regime is made by determining the quota to be assigned to each spouse, according to his contribution to the acquisition of the joint property and to the fulfillment of common obligations, presuming, until proven otherwise, that the spouses participated by equal shares (Art.357 para.(2)). Art.357 para.(3) refers to Art.364 para.(2), providing that the spouses are held liable jointly for the obligations undertaken by either of them in order to cover the regular marriage-related expenses, and the expenses incurred for the upbringing and education of children.

[**Art.358**] Similarly to current regulation, NCC provides the possibility of partition of assets during the regime of community; the novelty introduced by the new code is that it allows for the partition to be made as well by authenticated notarized deed, should the parties reach an agreement, or by the court of tutorship, if the parties fail to reach an agreement (Art.358 para.(1)). Partition during the regime of community is no longer conditional upon the existence of justified reasons. The wording of Art.358 para.(1) may suggest that only the spouses themselves may file such legal action. Mention should be made that, under the Family Code regime, partition of the jointly owned assets during the marriage may be requested as well by the personal creditors of each spouse.

The partition of the property during the regime of community, which may relate to all joint properties or to a part thereof (Art.358 para.(1)), is carried out according to the rules of partition upon the termination of the regime of community (Art.358 para.(2)). Similarly to the current regulation, the assets awarded to each spouse become personal property, while the undivided property remains joint property (Art.358 para.(3)). The partition does not entail the termination of the regime of legal community. (Art. 358 para.(4)).

[**Art.340,342,343**] Also similarly to the Family Code, NCC provides the property which by exception is personal property of each spouse. The list of such assets as provided in the current regulation is maintained, with a few specifications. As regards the assets necessary for one of the spouses to carry out his professional activity, which are considered to be personal property under the Family Code, the new regulation provides that goodwill elements subject to the community of property shall not be considered personal assets (Art.340 let.c)). The spouse's patrimonial intellectual property rights over his creative work and the distinctive signs that he has registered are included on the list of private

property (Art.340 let.d)). Pursuant to Art.341, although said rights represent private assets, the revenues collected by virtue of them are joint assets, to the extent where the spouse's related receivable becomes due during the legal community regime. Express rules are provided with regard to insurance allowance and compensation for damages, stating that they relate equally to moral and material damages caused to either spouse (Art.340 let.f)). Furthermore, not only the replacement value of a personal asset and the asset itself (according to Art.31 let.f) of the Family Code) are considered to be personal assets, but the replacement assets as well (Art.340 let.g)). The fruits of personal property are also regulated as personal property (Art.340 let.h)). We note that the amendment proposed by the NCC Draft IL to the current text of Art.349 NCC (Regime of contributions), *i.e.* that, when both spouses express the wish to become shareholders and there is no agreement to provide for other quotas, each spouse is allotted half of the value of the contributed joint property, should be reflected in Art.340 concerning the spouses' personal property.

Art.342 provides each spouse's right to use, manage and freely dispose of its personal property in observance of the law.

Unlike the Family Code, NCC expressly regulates the probative regime of personal property. The proof that a certain asset is personal is made among the spouses by any means of evidence, and as regards assets acquired by legal succession, will or donation, proof shall be made according to the special rules of evidence provided by the law (Art.343 para.(2)). As a new regulation, Art.343 para.(3) provides that the parties may agree to make the inventory of the movable assets acquired prior to the marriage, either by authenticated instrument, or by private deed. In the absence of such document, the assets are presumed to be joint property until proven otherwise.

(c) Section 3 "Separation of Property"

[Art.360-365] The newly introduced marital regime of the separation of property is defined under Art.360 of NCC as being the regime where each of the spouses is the exclusive owner of the property acquired prior to the marriage, and of the property acquired afterwards on his own behalf. The NCC Draft IL proposes the supplementation of Art.360 by a paragraph (2) to stipulate the conditions for terminating the regime of the separation of property.

When such marital regime is chosen, the notary public drafts an inventory of the personal movable assets, notwithstanding the manner in which they were acquired (Art. 361 para. (1)), which shall be attached to the marital convention and shall be subject to the same registration formalities (Art.361 para.(3)). In the absence of such inventory, it is presumed until proven otherwise that the exclusive ownership right belongs to the spouse who is owner of the asset (Art.361 para.(4)). The exclusive ownership right on property acquired by legal deeds subject to validity conditions or to registration

requirements can be certified only by an instrument observing the formalities required by the law (Art.361 para.(5)).⁴⁹

Throughout the separation of property regime, either spouse may acquire property on his own behalf, and such property is his exclusive property, or he may acquire property jointly with the other spouse, of which the spouses become co-owners of property quotas (Art.360 and Art.362 para.(1)). Such assets are subject to inventory and the proof of ownership by quotas is provided under the same terms as the proof of exclusive ownership; the provisions of Art.361 analyzed above shall apply accordingly (Art.362 para.(2)).

As regards the use of the properties belonging exclusively to the other spouse, Art.363 para.(1) provides that, inasmuch as this use occurs without the owner spouse disagreeing, the spouse that uses shall have the obligations of a usufructuary, with a few exceptions⁵⁰, and shall have the obligation to return only the fruits existing upon the other spouse's request, or upon the cessation or change of the marital regime, as the case may be.

In case one of the spouses concludes alone an instrument acquiring a property by using in full or in part properties belonging to the other spouse, Art.363 para.(2) first thesis provides that the latter shall be entitled to choose between claiming the ownership over such property for himself *pro rata* with the properties used without his consent, or claiming damages from the other spouse. Nevertheless, according to second thesis of the same paragraph, the ownership over the property may be claimed only before the acquiring spouse disposes of the property, except for the case when the third party acquirer was aware that the property was purchased by the selling spouse by capitalizing the properties of the owner spouse. We deem that the wording of Art.363 para.(2) is ambiguous at least as the meaning of phrase "using a property in full or in part" is concerned, as it is not clear whether the lawmaker strictly referred to acts of use, or to acts of disposition of the other spouse's properties or fruits thereof, as well. This ambiguity is increased by the use of the phrase "capitalization of the other spouse's properties" in Art.363 para.(2) second thesis. Also, it is not clear whether the spouse whose properties were used without his consent and who chooses to file action for damages may also request damages after the alienation of the property by the acquiring spouse, considering that Art.363 para.(2) second thesis provides such a prohibitive term only for the exercise of the action for restitution.

As a rule, neither of the spouses may be held liable for the obligations arising from deeds performed by the other spouse (Art.364 para.(1)); nevertheless, as the separation of property regime is concerned, the spouses are jointly liable for the obligations undertaken by any of them to cover common expenses of the marriage and to raise and educate children (Art.364 para.(2)).

⁴⁹ Mention should be made that the solution adopted by the Romanian lawmaker as regards the probative regime of exclusive ownership of assets is more cumbersome for the parties and less formal than the one stipulated by the FCC, which stipulates that the spouse may prove both to the other spouse and to third parties the fact that he is the sole owner of a private asset by any means of evidence. As regards the presumption of ownership, established in favor of the owner spouse by the Romanian lawmaker, note should be made that Art. 487 of QCC stipulates that assets for which neither spouse can provide evidence of exclusive ownership right shall be presumed as common indivisible property of both spouses, in equal quotas.

⁵⁰ Art.723, Art.726 and Art.727 of NCC.

Upon the cessation of the separation of property regime, each spouse is entitled to retain the properties of the other spouse until all debts between the two are fully paid (Art.365).

(d) Section 4 “Conventional Community Regime”

[Art.366-368] Spouses may derogate by marital convention from the legal community regime (Art.366) with respect to certain issues expressly regulated under Art.367. The rules of the conventional community regime thus adopted by the spouses shall be supplemented by the rules governing the legal community regime (Art.368).

By marital convention, the spouses may derogate from the legal community regime with respect to the following issues:

- Derogations from the legal community regime concerning the ownership right over properties: either by including in the community some personal properties acquired prior or subsequent to contracting the marriage, except for personal-use assets and assets dedicated to the spouse’s profession (Art.367 let.a)), or by limiting community to the properties specifically provided in the marital arrangement, irrespective of the time of their acquirement (Art.367 let.b));
- Derogations from the rules to exercise the rights over properties: spouses or future spouses may decide that both of them shall have to give their express consent for the conclusion of deeds regarding the administration of the assets, in which case, should one of the spouses not be able to express his consent or abusively object to such deed, the other spouse may conclude the deed alone with the prior approval of the court of tutorship (Art.367 let.c)).

In addition, the marital arrangement may deal with:

- *Praecipium jus* (Art.367 let.d));
- Modalities to liquidate the conventional community (Art.367 let.e)).

(e) Section 5 “Modifying the Marital Regime”

[Art.369-372] The marital regime may be changed by way of agreement or in court.

1. Conventional Modification

[Art.369] NCC provides certain requirements and terms for the conventional change in the marital regime which, according to Art.369 para.(1), may occur whenever the parties wish to do so throughout the marriage. In the absence of an express restriction, such requirements and terms shall apply irrespective of the current marital regime of the parties and the regime they wish to adopt; according to Art.369 para.(1), the requirements and terms shall apply in case a regime is replaced by another, and in case changes are brought to the existing conventional regime (amendment of the clauses of marital conventions).

The conventional change in the marital regime may occur subsequent to the lapse of a one-year period from the marriage date. With each change, the parties have to comply with both the content and formal requirements provided for the conclusion of marital conventions and to fulfill the registration formalities provided by law. The inventory provided under Art.361 shall also have to be taken.

Art.369 para.(3) and para.(4) regulates the right of creditors prejudiced by the change in the marital regime to file a revocatory action (the extinctive prescription of the right to action is 1 year from the date when the registration formalities are fulfilled or from the date when the creditors learned about the change) and the right to raise an objection, by way of a plea, on the unenforceability of the change in or liquidation of the marital regime made by prejudicing their interests.

2. Judicial Modification

[Art.370-372] As to the judicial change in the marital regime, this is limited by law to the community regime, be it legal or conventional, and consists in the judicial separation of properties (Art.370 para.(1)). Any of the spouses may request a separation of properties to the court of tutorship when the other spouse concludes deeds which endanger the family's patrimonial interests. Together with the separation of properties, the court of tutorship shall also decide on the liquidation of the community and performance of the partition (Art.370 para.(2)). The provisions on the formalities of marital convention registration and properties inventorying shall be applicable.

The separation of property leads to the termination of the marital regime of legal or conventional community between the spouses, and the rights and liabilities thereof shall be governed by the rules on the separation of property regime (Art.371 para.(1)). We note that NCC's lawmaker implicitly kept the rule according to which the partition on the use of joint property is not permitted. Unlike the Family Code, which provides that the division of joint property during the marriage concerns solely the properties existing at the time the division is made, while, for the properties subsequently acquired, the spouses shall be subject to the legal community regime, NCC provides that the marital regime of community ceases upon the division of property and the properties subsequently acquired by the spouses shall be subject to the separation of property regime.

The effects of the separation shall occur between the spouses upon the filing of the request, except when the court, at the request of either spouse, orders that the effects be applicable upon their actual separation (Art.371 para.(2)).

Unlike the current regulation, permitting creditors to request for a separation of joint property during the marriage (through a main or secondary action), NCC grants only the spouses the right to request the court of tutorship for a separation of property. This restriction is explained by the nature of the reasons for which a separation of property may be ordered, which reasons are related to the family's patrimonial interests, and not their creditors' or spouses'. In addition, creditors' rights remain protected, as they are entitled to file a revocatory action and claim unenforceability of the separation of property which causes prejudice to their interests, within the terms and under the conditions provided in Art.369 para.(3) and (4) (Art.372).

(vii). Chapter VII "Dissolution of Marriage"

[Art.373-404] The new regulation includes a dual divorce system (remedy-sanction), meaning that it permits both the divorce occurring as a result of a marriage breakdown beyond remedy, whether this may or may be not attributed to one of the spouses, and the divorce as sanction, enforced on the spouse responsible for breaking down the family relations, as well as a dual system of grounds for getting a divorce (divorce for established grounds and divorce without stating the grounds). Nevertheless, one may notice a relaxation of the conditions required to the parties upon the consensual

divorce, and a change in the judicial-only nature of the divorce, by establishment of the administrative or notarial divorce proceedings. We deem that such legislative innovations shall help relieving courts of their workload and settling certain cases with greater celerity (cases in which the spouses agree to the divorce, but may not resort to a judiciary divorce by consent under the current regulation because they do not meet the formal requirements).

(a) Section 1 “Divorce Cases”

1. General Provisions

[Art.373-381] The divorce cases provided by NCC are as follows:

- Consensual divorce, deemed as such, either for being requested by both spouses, or just by one spouse, with the other spouse joining in (Art.373 let.a)). Consensual divorce may be judicial or administrative or notarial, and the requirements for each such case are provided under Art.374, and under Art.375-378.
- Judicial divorce, grounded on a breakdown beyond remedy of the relations between the spouses and the impossibility to continue the marriage (Art.379 para.(1)).
- Divorce upon request of one of the spouses subsequent to a de facto separation that lasted for at least two years (Art.379 para.(2)).
- Divorce upon the request of the spouse whose medical condition makes the continuation of marriage impossible (Art.381).

2. Consensual Judicial Divorce

[Art.374] In the new regulation, the consensual judicial divorce may be granted irrespective of how long the marriage has lasted and irrespective whether there are minor children resulting from the marriage. The new text eliminates the conditions of the consensual judicial divorce required by the current regulation, *i.e.*, that upon the filing of the petition, at least one year should have passed since the marriage date, and that there are no minor children resulting from the marriage. Although neither NCC nor the Family Code expressly provide it, we deem that “minor children resulting out of the marriage” shall mean both the minor children born inside marriage, as well as minor children enjoying the same legal status as them. Nevertheless, considering that such a provision was included at Art.375 para.(1), a supplementation of the wording of Art.374 para.(1) may prove necessary in order to ensure uniformity to the regulation.

The sole restriction imposed on the parties agreeing to a divorce and referring their case to the court to pronounce it is that neither of the spouses may be legally incapable (Art.374 para.(2)). The court shall have to check the existence of a freely expressed and unvitiated consent from each spouse (Art.374 para.(3)).

3. Consensual Divorce through Administrative or Notarial Procedures

[Art.375-378] An absolute novelty in Romanian legislation, NCC permits consensual divorce through administrative or notarial procedures. This gives the spouses that do not have minor children, born inside marriage or adopted, the possibility to refer their case to the civil registrar or notary public from the place where they were married, or from the last residence shared by the spouses, which shall establish the consensual dissolution of marriage, and shall provide them with a divorce certificate according to the law (Art.375 para.(1)). Besides the substantive condition of not having minor children resulting from the marriage, the law also requires that neither spouse be legally incapable (Art.375 para.(2)). As mentioned above, the NCC provisions on these two procedures have been resumed by Law No.202/2010 and already came into force.

As to the procedure regulated under Art.376, the law requires that the spouses have to file the petition “together”.⁵¹ The civil registrar or notary public shall register the petition and grant the 30-day term provided by law, upon the expiry of which the parties shall have to appear in person to be asked again if they insist on getting a divorce and to be checked whether their consent is freely expressed and unvitiated (Art.376 para.(2)). Should the spouses insist to continue, the civil registrar, or notary public, as the case may be, shall issue the divorce certificate “without any reference as to the spouses’ fault” (Art.376 para.(3)). The final provision of the paragraph seems unnecessary, considering that the text refers to a consensual divorce.

The reference in Art.383 para.(1), according to which the court of tutorship takes note of the spouses’ decision on the names to be taken subsequent to divorce leads us to the conclusion that, in the case of divorce by administrative or notarial procedure, the civil registrar, or notary public, as the case may be, shall make a similar mention in the divorce certificate. The same reference norm provides that the spouses may decide that the names to be taken subsequent to the divorce shall be the names they had during the marriage, or the names each spouse had prior to contracting the marriage.

Spouses’ failure to reach an agreement on the names they will use subsequent to the divorce is ground for dismissing the divorce petition, and the civil registrar, or notary public, as the case may be, shall direct the spouses to refer their case to a court of tutorship by way of a judicial divorce petition (Art.376 para.(4) second thesis). According to Art.376 para.(5), the courts of law shall have jurisdiction over petitions concerning the effects of the divorce to which the parties fail to reach an

⁵¹ In the specialized literature, such requirement was construed in the sense that the respective divorce petition may be filed by only one of the spouses, but has to be executed by both of them. This solution remains valid for the divorce by judicial procedure under the New Codes, in fact being expressly provided at Art.918 NCPC, according to which, in the consensual divorce, the petition shall be signed by both spouses or by a jointly-authorized agent with an authentic power-of-attorney and, should such agent be a lawyer, he shall have to certify the parties’ signature. However, in the divorce by notarial procedure, the term “together” no longer has the same meaning. By Order No.81/2011 of the Minister of Justice, seeking to supplement the norms for the enforcement of Law No.36/1995 with provisions on the notarial divorce further to the coming into force of Law No.202/2010, it is stipulated that spouses’ representation in the notarial divorce is prohibited and that the spouses are to come in person before the notary public to submit the divorce petition and subsequently to prove consistency with their petition and express their free and unvitiated consent to the dissolution of the marriage. We anticipate a similar solution for the administrative divorce.

agreement. Interpreting together the provisions of Art.376 para.(4) second thesis and the provisions of para.(5) of the same article, as well as the provisions of Art.378 para.(1), one concludes that the civil registrar or notary public, as the case may be, shall admit the petition filed by the parties if the following requirements are cumulatively met: (i) there are no minor children resulting out of the marriage, (ii) both spouses agree to the divorce as well as to the names they shall take subsequent to the divorce, and (iii) neither spouse is legally incapable. The spouses' failure to reach an agreement on, for instance, the patrimonial effects of the divorce shall not entail a dismissal of the petition for divorce. It follows that the spouses' agreement on the names they shall take subsequent to the divorce is an actual requirement for the administrative or notarial divorce and therefore it should be accurately regulated under Art.375, which provides the requirements for the consensual divorce by administrative or notarial procedure, referred to by Art.378 para.(1) when laying down the conditions in which the civil registrar or notary public, as the case may be, may dismiss the divorce petition.

Also, it is our understanding that, in the case regulated under Art.376 para.(5), the civil registrar or notary public, as the case may be, shall issue the divorce certificate, and the marriage is deemed dissolved starting from the date when the certificate was issued (as provided under Art.382 para.(3)); however, the divorce shall have the effects on which the parties did not agree (such as patrimonial claims) only after the court of tutorship has settled the case by way of a final judgment. The text requires no special mention on the divorce certificate issued under such circumstances; nevertheless, this issue may be regulated by methodological norms.

According to Art.377, the civil registrar issuing the divorce certificate shall make the required mention in the marriage deed or, if the spouses referred their case to a civil registrar other than the one that concluded the marriage or to the notary public, they shall immediately submit a copy of the divorce certificate to the local authority where the marriage was concluded for such mention to be made.⁵²

As stated above, Art.378 provides that the notary public or civil registrar, as the case may be, shall dismiss the spouses' petition if the requirements provided under Art.375 (spouses consent, no minor children resulting out of the marriage and full legal capacity of the parties) are not met. It is understood, by way of interpreting Art.376 para.(4) second thesis, that the notary public or civil registrar, as the case may be, shall settle the divorce petition, in case of refusal, by way of a dismissal order. There are no means of appeal against this order; nevertheless, the spouses may file a consensual or non-consensual divorce petition with the court of tutorship (Art.378 para.(2)). Also, we deem that nothing prevents the parties from reiterating the divorce petition by administrative or notarial procedure, this time in observance of the conditions provided under Art.375, as the order of the notary public or civil registrar may not be deemed a *res judicata*.

Nevertheless, any of the spouses may file claim for indemnifications to the relevant court, if prejudiced by the public notary or civil registrar's abusive refusal to grant the divorce (Art.378 para.(3)).

⁵² Please note that the terminology used in the legal authority is inaccurate, *i.e.* the use of the concept of "town hall" instead of "town hall headquarters" or, as the case may be, naming the relevant body or department within the local public administrative authority performing the act referred to.

4. *Fault Based Divorce*

[Art.379 para.(1),380] As to the fault based divorce, NCC transcribes the provisions of the Family Code, stipulating under Art.379 para.(1) that when, on solid grounds, the relations between the spouses are seriously damaged and the marriage has been damaged beyond remedy, the court shall dissolve the marriage by divorce, establishing the fault of one of the spouses or a joint fault of the spouses which led to the marriage breakdown.

As a novelty, Art.379 para.(1), in its final sentence, read together with Art.388, provides the right to indemnification for the respondent in the divorce petition, should the petitioner spouse be found exclusively guilty for the dissolution of the marriage. The petition shall be settled by way of the divorce judgment. By contrast, in the current regulation, such situation results in the dismissal of the petition as unfounded, except for the case when the respondent filed a counterclaim, in which case the divorce shall be pronounced by holding the exclusive fault of the petitioner.

Should the petitioner spouse die during the trial, his heirs may continue the divorce proceedings, but the proceedings thus continued by the heirs may only be carried out if the courts establish the exclusive fault of the petitioner spouse (Art.380).

[Art.379 para.(2)] According to Art.379 para.(2), in the case of the divorce petition filed by any of the spouses subsequent to a *de facto* separation which lasted for at least two years, the divorce shall be granted as a result of the exclusive fault of the petitioner spouse, except for the case when the respondent agrees to the divorce, in which case the judgment shall be passed without any reference to the spouses' fault.

This solution may seem unjust, as it establishes a presumption of fault on the part of the spouse initiating the divorce proceedings after two years from the *de facto* separation of the spouses, without distinguishing whether such spouse may, or may not be attributed a fault for the actual separation. Also, the exception (that the respondent spouse's consent results in the passing of a judgment which holds no fault on either party) seems incorrect, because, as long as the spouses ultimately agree to the divorce, irrespective of the grounds for the marriage dissolution, and even in the case when the petition is filed just by one of the spouses and the other joins his consent, the divorce is a consensual judicial divorce, according to Art.374, and any discussion on the grounds for divorce or parties' fault becomes irrelevant.

5. *Divorce based on the Medical Condition of a Spouse*

[Art.381] The divorce at the request of the spouse whose medical condition makes the continuation of marriage impossible⁵³ shall be granted without any reference as to the spouses' fault. The wording of Art.381 regulates a special case of divorce which is also regulated under the Family Code (Art.38 para.(3)). The practice developed under the current regulation held that, if the marriage is dissolved as a result of deterioration in the medical condition of a spouse, the divorce shall be

⁵³ Doctrine held that the occurrence of the state of intellectual disability or mental alienation throughout the marriage is assimilated with a medical condition which makes the continuation of marriage impossible.

pronounced without reference to the fault of any party, and the decision shall be the same, irrespective which of the spouses files for divorce.

(b) Section 2 “Effects of the Divorce”

[Art.382-404] NCC includes a more detailed and better structured regulation of the divorce effects as compared to the Family Code, and also brings certain notable novelties (a right to indemnifications and a right to compensation, and the loss by the spouse by whose exclusive fault the divorce was pronounced of certain non-patrimonial rights arising under the law or agreements concluded with third parties). In addition, the legal provisions on the effects of the divorce on the relations between the parents and their minor children are more accurately stated.

1. Date of Marriage’s Dissolution

[Art.382] As to the date on which the marriage is deemed dissolved, NCC expressly provides for the date on which the divorce judgment remains final, except for the case when the divorce proceedings were continued by the heirs of the petitioner spouse and the court held no exclusive fault on the part of respondent, thus dismissing the proceedings as unfounded. In such case, the marriage shall be deemed dissolved upon the demise of the petitioner spouse. In the case of the consensual divorce by administrative or notarial procedure, the date of the marriage dissolution shall be deemed the date of issue of the divorce certificate.

2. Effects of Divorce on Non-patrimonial Relations between Spouses

[Art.383,384] As to the effects of the divorce on the non-patrimonial relations between the spouses, Art.383 para.(1) of the new regulation brings an amendment to the current regulation, permitting the spouses to keep the name they had during the marriage, including the case when the spouses used their names combined. In the current regulation, spouses may agree that the spouse that took the name of the other spouse during the marriage may keep such name after the divorce. In both regulations, the court has to take note of the spouses’ consent on the name in the divorce judgment.

In the absence of a consent, the court may order, for solid reasons, justified by the interest of one of the spouses or by the best interest of the child, that the spouses keep the names they had during the marriage (Art.383 para.(2)). A similar possibility is given by the current regulation as well; nevertheless, this only applies to the spouse that took the other spouse’s name during marriage, and no provision is made as to whether the court should take into account the best interest of the child upon approving the keeping of the name. In the absence of the parties’ consent and court’s approval, the spouses shall take back the names they had prior to contracting the marriage (Art.383 para.(3)).

Art.384 establishes, under para.(1), that the divorce shall be deemed pronounced against the spouse by whose exclusive fault the marriage was dissolved. The concept is new and of a major relevance with respect to the effects of the divorce on the patrimonial relations between the parties, whereas the lawmaker establishes, as stated above, an obligation to pay indemnifications and an obligation to pay compensation on the part of the spouse against whom the divorce was pronounced. However, the concept has an impact on the non-patrimonial relations between the parties as well, as Art.384 para.(2) provides that the spouse against whom the divorce was pronounced shall lose the rights granted by law

or by agreements previously concluded with third parties to the divorced spouse, and Art.384 para.(3) adds that such rights shall not be lost in case of a joint fault or consensual divorce. Due to the place where it was inserted in this section, the text is deemed to refer to rights of a non-patrimonial nature that the divorced spouse would have, under the law or agreements previously concluded with third parties, if the divorce were not pronounced due to his exclusive fault. One of the non-patrimonial rights of the divorced spouse is the right to request the court of tutorship to be approved to keep the name he had during the marriage. The interpretation of Art.384 leads to the conclusion that the spouse against whom the divorce is pronounced shall lose such right. Nevertheless, by deciding on such issue, the court shall have to take into account the best interest of the child as well (Art.383).

3. Effects of Divorce on Patrimonial Relations between Spouses

[Art.385-395] As to the effects of the divorce on the patrimonial relations between the spouses, NCC introduces certain new concepts, some of them as a result of the regulation of several marital regimes, some independent innovations, such as the right to indemnification or the right to compensation.

I. Effects on Matrimonial Regime

[Art.385,387] First, as to the date on which divorce shall enter into force, the text distinguishes between the effects on third parties and the effects between spouses. As to the third parties, Art.387 provides that the divorce judgment or divorce certificate, as the case may be, shall be opposable to third parties subject to the conditions of law, and the registration formalities provided by law for marriage and marital arrangement shall be applicable, including when marriage is dissolved by administrative or notarial procedure. The new regulation is similar in that to the current regulation, which provides that, as the third parties are concerned, the patrimonial effects of the marriage shall cease on the date when a mention is made about the divorce judgment on the marriage certificate, or when the third parties became aware of the divorce by other means (Art.39 para.(2) of the Family Code).

As to the effects of the divorce between the spouses, Art.385 expressly provides that the marital regime shall cease between the spouses upon the filing of the divorce petition; nevertheless, the spouses may request the court, jointly or separately, in the case of the consensual judicial divorce, to establish the ceased marital regime as of the date of the de facto separation. Same rules shall apply accordingly to the consensual divorce by administrative or notarial procedure (Art.385 para.(3)). Thus, NCC amends the date on which the divorce enters into force between the parties, currently considered in practice as the date on which the divorce judgment remains irrevocable. According to the new regulation, the divorce shall have effects between the spouses upon the filing of the divorce petition with the court or de facto separation, as the case may be, or, in the case of administrative or notarial proceedings, on the filing of the divorce petition with the civil registrar or notary, respectively. Absent clarification, the legal solution seems to be the same in the case of the parties getting a consensual divorce before the notary public or civil registrar, but have failed to agree to the patrimonial issues of the divorce and therefore have to separately refer to the court of tutorship in this respect, which case is regulated under Art.376 para.(5).

[Art.386] In consideration of the above discussed provisions regarding the date on which the marital regime ceases, NCC expressly regulates the situation of certain deeds concluded by deceiving the other spouse subsequent to the filing of the divorce petition, which acts are affected by relative nullity.

First, the text takes into account the deeds provided under Art.346 para.(2), however without distinguishing between the two assumptions included in this paragraph: deeds of transfer of property for valuable consideration regarding joint movable assets which do not require registration formalities (for which a mutual tacit mandate presumption operates) and deeds of transfer for valuable consideration regarding joint movable assets which require certain registration formalities under the law (for which the express consent of both spouses is required). Where the law does not draw any distinction, nor may the interpreter, and, consequently, we understand that the lawmaker sanctions by relative nullity all deeds of transfer for valuable consideration regarding movable assets concluded by a spouse by deceiving the other subsequent to the filing of the divorce petition, irrespective whether for the conclusion of the deeds in question the express consent of the other spouse was or was not required.

Second, the deeds giving rise to obligations incumbent upon the marital community and concluded by a spouse by deceiving the other subsequent to the filing of the divorce petition are also sanctioned by relative nullity. According to Art.351, such deeds are deeds of preservation, administration or acquirement of movable assets (for which the mutual mandate presumption operates) or deeds whereby any of the spouses undertakes obligations to cover the current expenses of the marriage.

Such deeds are affected by relative nullity; nevertheless, according to para.(2) of Art.384, the provisions of Art.345 para.(4) shall apply accordingly. The two norms referred to show that the spouse deceived by such deeds may request their annulment, except for the case when the mutual tacit mandate presumption was operating for the deed in question, in which case the deceived spouse may claim only damages, to the extent that his interests related to the community of property were prejudiced, and without the rights acquired by good-faith third parties being affected. In our view, one of the benefits of setting the date of cessation of the marital regime between spouses on the date of filing the divorce petition is particularly the fact that the spouses may resort to the general rules governing nullities for the deeds concluded subsequent to such date, rather than being limited to the special rules applicable to patrimonial rights within marriage; however, Art.386 para.(2) renders this early cessation of the patrimonial regime void of any effects, subjecting deeds concluded subsequent to the cessation to the same special rules applicable to the deeds concluded during the marital regime.

Also, Art.386 shows that, if one of the spouses concludes alone, subsequent to the filing of the divorce petition and by deceiving the other spouse, a deed encumbering or transferring an immovable asset (provided under Art.346 para.(1)), which deed required the express consent of both spouses and becomes known to the deceived spouse only after the divorce, the deceived spouse shall neither be given the possibility to file the action for annulment provided under Art. 347 para.(1), nor the possibility to file a special action for annulment for deceit under Art.386, but shall have to file against his spouse an application for annulment based on the general rules, requesting annulment for the lack of consent. In the case of such deeds, the deceived spouse shall not be held liable by the provisions of Art.345 para.(4), whereas Art.347 para.(2) and Art.386 are not applicable as well.

II. Right to Indemnification

[Art.388] NCC brings a major innovation on the effects of the divorce on the patrimonial relations between the parties, introducing the right to indemnification of the innocent spouse incurring a prejudice by the marriage dissolution, and such action shall be settled by the court of tutorship in the divorce judgment. The law means to compel the spouse against whom the divorce was pronounced to pay indemnification covering the prejudices suffered by the innocent spouse as a result of the divorce, at the request of the latter. The text draws no distinction and, thus, our understanding is that indemnification may be sought for both material and moral damages. Furthermore, in the absence of an express provision, the right to seek indemnification may be cumulated with the obligation of support.

III. Obligation of Support between the Spouses

[Art.389] NCC maintains the obligation of support between the spouses, which shall be due under the same conditions and within the same terms as in the current regulation, however it changes the amount of the support from 1/3 of the net income from work of the spouse obliged to pay it, to 1/4 of his net income, without limiting the sources of such income to the income from work, and also introduces certain circumstances in relation to which the court shall calculate such amount (the means of the debtor former spouse and the needs of the creditor spouse).

IV. Compensation

[Art.390-395] Another innovation brought by NCC is the introduction of the compensation, an institution inspired by FCC with a few noteworthy differences, such as that the right to such benefit is only granted to the innocent spouse and the obligation to pay compensation as incumbent solely on the spouse by whose exclusive fault the divorce was pronounced (Art.390 para.(1)), as well as a limitation of the cases in which such a benefit may be requested only to the dissolution of marriages which lasted for at least twenty years (Art.390 para.(2)). NCC does not regulate the conventional compensation which, according to French law, is subject to the judge's approval and is vested with the enforcement power of a court decision. The compensation may not be cumulated with the alimony (Art.390 para.(3)).

According to Art.391, the request for compensation may be filed only together with the divorce petition and, in establishing it, the court shall take into account the resources of the spouse requesting it and the means of the other spouse upon the divorce, the effects which the liquidation of the marital regime shall have, and other predictable circumstances likely to change them (such as the age and medical condition of the spouses, contribution to the upbringing of the minor children each spouse had and shall have, spouses' professional training and possibility to carry out an activity generating income, and others of the like).

Taking into account the major changes in the debtor's means or creditor's resources, the court may order an increase or decrease in the compensation (Art.394 para.(1)). If the compensation is set to be paid in cash, the amount shall be *de jure* adjusted as per the rate of inflation, on a quarterly basis (Art.394 para.(2)).

The compensation may be established in cash (as a lump sum or life annuity) or in kind (fruits over certain movable or immovable assets of the debtor) (Art.392 para.(1)). The annuity may be established as a percentage of the debtor's income or as a fixed amount (Art.392 para.(2)). Although the lawmaker expressly indicates in para.(1) of the text only the life annuity as a form of the offset benefit, para.(3) provides that the annuity (like the usufruct) may be established for a shorter period of time to be established in the divorce judgment.

At the request of the creditor spouse, the court may compel the debtor spouse to set up a bond securing the payment of the annuity (Art.393).

Similarly with the obligation of support, the compensation shall cease upon the creditor spouse's remarriage or demise of one of the former spouses. Also, the benefit shall cease if the creditor spouse obtains resources likely to offer him living conditions similar to those during the marriage (Art.395).

4. Effects of Divorce on the Relations between the Parents and their Minor Children

[Art.396-404] NCC provides a more detailed regulation and better systematization of the effects of divorce on the relations between the parents and their minor children.

As with the current regulation, the court is bound to decide on the relations between the parents and their minor children in the divorce judgment, taking into account the best interest of the child, conclusions of the psychosocial investigation report, the parents' agreement, if any, and by hearing both the parents and the minor children that turned 10 (Art.396 para.(1) and para.(2)). Should the court deem necessary and useful, the children under 10 years of age may also be heard (Art.264).

As to the exercise of the parental authority, Art.397 establishes the rule that such authority shall be exercised by both parents, thus amending the current regime, according to which the parental rights and duties are usually exercised by one of the divorced spouses, *i.e.* the spouse that was entrusted with the minor child. However, under the new rules, the court may still decide, for solid grounds and by taking into account the best interest of the child, that the parental authority be exercised only by one of the parents, in which case the other spouse shall keep the right to monitor the way the child is being raised and educated, and the right to consent to his adoption or marriage (Art.398).⁵⁴ By way of exception, the court may decide that the child be placed with a relative or with another family or person, with their consent, or in a child protection institution, which shall exercise the parental rights and duties on the child (Art.399 para.(1)). In this case, the rights over the child's property shall be exercised by the parents, jointly or severally, as the court shall decide (Art.399 para.(2)).

⁵⁴ The NCC Draft IL proposes to eliminate the right of the parent who does not exercise parental authority to consent to the minor's marriage. In our opinion, this requires the amendment of Art.272 para.(2) NCC, which provides, among the conditions for authorizing the marriage of the minor of at least 16 years, "the consent of his parents", and not just the consent of the parent exercising parental authority. On the other hand, the NCC Draft IL harmonizes the provisions of Art.398 on the right of the parent who does not exercise parental authority to consent to the adoption with the provisions of Art.463 NCC, keeping only the reference to the need to have the consent of the biological parents, without drawing any difference as to whether they exercise parental authority or not.

Should the parents fail to agree on this issue, or should their agreement prejudice the best interest of the child, upon pronouncing the divorce, the court shall establish the residence of the minor child with the spouse where the child constantly lives or, if the child stayed with both parents until the divorce, the court would rule as per the best interest of the child (Art.400 para.(1) and (2)). Only if it is in the best interest of the child, and by way of exception, may the court establish the residence of the child with the grandparents or other relatives or third parties, with their consent, or with a child protection institution, which shall exercise child supervision and shall fulfill all common acts with respect to health, education and schooling (Art.400 para.(3)).

Parents that are separated from their child as a result of the residence being established with the other parent or other persons or child protection institution, shall be entitled to have personal relations with the child; this right shall be exercised in the fashion established by the court, should the parents fail to agree and by hearing the child, on a mandatory basis, under the conditions provided under Art.264 (Art.401).

The divorce judgment shall also establish the contribution of each parent to the expenses of upbringing, education, schooling and professional training of the child, subject to the enforcement of the legal provisions on the obligation of support (Art.402).

At the request of either parent or of a member of the family, child, child protection institution or public institution specializing in child protection, and at the request of the prosecutor, the measures taken by the court of tutorship on the relations between the divorced parents and their minor children may be amended, as a result of a change in the circumstances taken into account upon establishing such measures (Art.403).

The effects of the divorce on the relations between the parents and their minor children shall also apply in the case when the spouse of a person pronounced dead remarried and, subsequent to remarrying, the decision pronouncing the death is cancelled, the new marriage remaining in full force and effect if the spouse of the person pronounced dead acted in good-faith. In this case, the court shall decide on the measures to be taken with respect to the relations between the remarried spouse and the spouse that was cancelled the decision pronouncing the death (Art.404).

1.3.(c). Title III “Kinship”

[Art.405-482] NCC brings certain amendments to the current regime of kinship, particularly by broadening the scope of persons entitled to initiate the action to challenge paternity (the mother’s husband, the mother, and the child in question), by regulating medically assisted human reproduction by third party donor, and by regulating in detail the substantive conditions, effects and termination of adoption, taken over from Law No.273/2004.

[Impact] NCC’s regulations on kinship have an estimated reduced impact at an institutional level, taking into account that they mostly and without major amendments take over provisions already existing in the Family Code or other special laws currently in force. Nevertheless, we take note of at least the theoretical possibility of increasing the number of cases of establishing filiation, due to the increase in the number of persons entitled to initiate such proceedings, including by extending the right to action to their heirs in certain cases.

As to the inclusion in NCC of certain general principles on the medically assisted human reproduction by third party donor, estimating an institutional impact at this point would be difficult given the lack of a special law to establish in more detail the procedures to be followed, which shall be the medical institutions involved and what their rights and responsibilities, or the confidentiality regime and information dissemination method, etc. One may notice that the court of tutorship has a reduced role in this procedure to only settling actions to challenge or establish paternity in expressly provided cases. Nevertheless, the analysis of the texts reveals certain inaccuracies, even at the level of general principle proposed by the new regulation, which may entail further amendments, inasmuch as they may not be regulated under a future special law.

As to the adoption, considering that NCC takes over the provisions of Law No.273/2004, no institutional impact may be estimated upon the implementation of the new regulation, except for the fact that the newly-established court of tutorship shall have jurisdiction over all cases involving adoptions. Since the principles and general provisions on adoption as they appear in NCC have been taken over from Law No.273/2004, this law should be amended accordingly upon implementation of NCC, to avoid overlapping.

Also, the court of tutorship shall take over the jurisdiction of courts in the field of parental authority, a concept newly introduced by NCC, but, nevertheless, substantially resuming provisions on parental protection already existing in the Family Code and Law No.272/2004.

(i). Chapter I “General Provisions”

[Art.405-407] The general provisions on kinship in NCC reveal a better organized matter as compared to the Family Code; also, we deem very useful the codification of certain notions and concepts already established in doctrine and practice: “biological kinship” and “civil kinship” resulting from adoption (Art.405), and “affinity” defined as the ties between a spouse and the relatives of the other spouse with the related degrees (Art.407).

(ii). Chapter II “Filiation”

[Art.408-450] NCC proposes a re-systematization of the chapter on filiation, cumulating the separate provisions on filiation by the mother and respectively paternity from the Family Code into a new joint subsection called “Establishment of Filiation”, which brings certain novelties with respect to the persons entitled to file a paternity challenge and defined the “possession of status” (referred to by the Family Code as the “use of civil status”, but not defined). In a separate section, NCC introduces an absolute novelty by providing the general basic principles on medically assisted human reproduction by a third party donor; the procedures, legal regime, methods to ensure the confidentiality and secure dissemination of information in relation to this new method of reproduction shall be established under a special law (the Draft law on reproductive health and medically assisted human reproduction adopted by the Parliament was declared unconstitutional by Decision No.418/2005 of the Constitutional Court). Finally, the third section of the chapter on kinship regulates the legal status of the child (equal rights for the children born outside marriage with the children born within the marriage, the name of the child born inside marriage and name of the child born outside marriage).

(a) Section 1 “Establishment of Filiation”

[Art.408-440] A significant part of the section is focused on establishment of filiation, Art.409-411 setting out the rules for the establishment of filiation by the mother, including the presumption following from a possession of status which is consistent with the deed of birth, and Art.412, 414 the rules regarding filiation by the father (the time of conception and the paternity presumptions). After this preliminary part, NCC separately addresses child acknowledgment and actions related to filiation (challenge to filiation and actions to establish filiation by the mother and by the father, respectively).

1. General Provisions

[Art.413] Art.413 establishes the regulatory scope of the provisions on establishment of filiation, stipulating that within the meaning of the section, child shall also mean a person of full legal age whose filiation is under investigation.

[Art.408] As with the Family Code (Art.47 para.(1), 48 and 52), NCC provides that the filiation by the mother arises from the actual birth (Art.408 para.(1) first thesis), and may be established either by acknowledgment or by court order (Art.408 para.(1) second thesis).

As to the filiation by the father, distinguished distinction is made between the filiation by the father inside marriage, which is established as an effect of the presumption of paternity (Art.408 para.(2)) and the filiation by the father outside marriage, which is established by acknowledgment or by court order, as the case may be (Art.408 para.(3)). The regulation is substantially similar with that in the Family Code, nevertheless, the wording and systematization have significantly improved in NCC.

[Art.409] Filiation is attested by the deed of birth written by the civil registry office and the birth certificate issued on its basis (Art.409 para.(1)). The new text corrects an ambiguity existing in the Family Code which in Art.48, refers to the “certificate establishing the birth” although, under Law No.119/1996, the relevant document in establishing filiation is the “birth certificate”, not the “medical certificate acknowledging the birth”. Para.(2) provides that, in the case of the child inside marriage, filiation is attested by the deed of birth and by the parents’ marriage certificate, as entered in the civil status registries, and by the related civil status certificates.

The deed of birth and the birth certificate are defined under Law No.119/1996. According to it, the deed of birth is drafted by the local community service for personal records, or, as the case may be, by the relevant civil registrar, according to the law, based on the verbal statement of the persons that may make such statements under the law, on the mother’s and affiant’s identity documents, the certificate acknowledging the birth and, as the case may be, the parents’ marriage certificate. The birth certificate attests to the filiation by the mother, and its probative value is such that it attests not only that the woman in question gave birth to a child, but also that there is identity between the child she gave birth to and the that whose civil status is in question.

The analysis of the text reveals that Art.409 regulates in fact two assumptions of evidence of filiation: filiation evidence for the child born outside marriage, and filiation evidence for the child born inside marriage; in the latter case, the paternity presumptions regulated under Art.414 para.(1) shall also operate, according to which the husband of the mother shall be deemed the father of the child born or conceived during the marriage.

[Art.410] Art.410 para.(1) codifies the concept of “possession of status”, defined as a state of facts indicating the filiation and kinship ties between the child and the family he allegedly is part of, mainly consisting of the following circumstances:

- A person treating a child as his own, taking care of his upbringing and education, and the child treating such person as his parent (referred to in literature as *tractatus*);
- The child is acknowledged by the family, society and, if the case may be, public authorities, as belonging to the person that is alleged to be his parent (*fama*);
- The child bears the name of the person that is alleged to be his parent (*nomen*).

According to para.(2) of the text, the possession of status shall have to be continuous, peaceful, public and unequivocal.

[Art.411] According to the doctrine, the possession of status is a state of facts attesting to the fact that a child belongs to a particular woman, consolidating the probative value of the birth certificate and establishing a legal relative presumption of filiation (by the mother).

To this end, Art.411 para.(1) provides that that no person may claim a filiation by the mother another than that attested by his deed of birth and by the possession of status consistent with it, and no person may challenge the filiation by the mother of a person whose possession of status is consistent with his deed of birth.

As the presumption is relative, Art.411 para.(2) provides that another filiation by the mother may be proven by any means of evidence, if a court order establishes that the child was replaced by another, or a woman other than the woman who gave birth to the child was registered in the records as mother.

[Art.412] Art.412 defines the legal time of conception, maintaining the period and fashion of calculation provided under Art.61 of the Family Code (the period comprised between the three hundredth and the one hundred and eightieth day prior to the birth of the child, calculated on a day-by-day basis). The legal presumption of the time of conception in the Family Code is implicitly relative, and applied as such in practice; however, NCC expressly provides its relative character, by stipulating under para.(2) that such presumption may be overturned if the conception is attested, by scientific means, to have occurred in a certain interval within the established legal term, or even outside such term.

2. Presumption of Paternity

[Art.414] Art.414 regulates the “presumption of paternity”, where in fact there are two such presumptions, which follows from the current regulation as well (Art.53 para.(1) and para.(2) of the Family Code) and even from the actual wording of Art.414 para.(1): the presumption of paternity of the child born during the marriage, and the presumption of paternity of the child conceived during the marriage, in both cases the husband of the mother at the time of conception or birth is presumed by law to be the father of the child.

As to the probative value of such presumptions, the doctrine holds that they are of a mixed nature (differing from absolute presumptions which cannot be overturned in any circumstance whatsoever, and from relative presumptions, which have a temporary probative value, until the contrary is proved)

as they may be overturned only by way of a paternity challenge, which may be filed only by the persons expressly entitled to do so by the law. In accordance with these conclusions drawn in the doctrine, Art.414 para.(2) provides that paternity may be challenged only if it is impossible for the mother's husband to be the father of the child.

3. Acknowledgement of Filiation

[Art.415-420] NCC mostly resumes and re-systematizes the provisions of the current Family Code regarding the establishment of filiation by acknowledgement (Art.48,49,57 and 58 of the Family Code), consolidating and clarifying the provisions on acknowledgment by the mother and acknowledgment by the father.

Art.415 establishes the presumed situations of child acknowledgment:

- Acknowledgment by the mother: if the birth is not registered in the civil status registry office or the child is registered in the civil status registry as being born from unknown parents (Art.415 para.(1) NCC, which corresponds to Art.48 para.(1) of the Family Code);
- Acknowledgment by the father: in the case of the child conceived and born outside marriage (Art.415 para.(2) NCC, which reproduces Art.57 of the Family Code);
- Acknowledgment after the child's demise: only if he has biological offspring (Art.57 of the Family Code provides such right to acknowledge for the father only, limitation missing from Art.415 para.(3) of NCC).

Avoiding the overlapping of norms in the Family Code (Art.48 and 57), Art.416 NCC establishes the forms of acknowledgment:

- Acknowledgment by way of statement at the civil status registry office (Art.416 para.(1) NCC);
- Acknowledgment by way of authentic instrument, a copy of which shall be *ex officio* sent to the relevant civil status registry office to make the corresponding notations in the civil status registries (Art.416 para.(1) and (2) NCC);
- Irrevocable acknowledgment by testament (Art.416 para.(1) and (3) NCC).

Art.417 codifies a doctrinary solution regarding the minor's capacity to make the acknowledgment of his child; given its legal nature, the acknowledgment solely requires an expression of conscious will, *i.e.* it requires discernment from the person making the acknowledgment thus, an underage unmarried person has the right to acknowledge the child if his judgment is not impaired upon acknowledgment.

Unlike the Family Code, which fails to expressly provide the cases of acknowledgment nullity, NCC expressly and distinctly regulates the cases of absolute nullity (Art.418) and relative nullity (Art.419) of the acknowledgment. Thus, according to Art.418, acknowledgment is affected by absolute nullity if:

- The acknowledgment regards a child whose filiation, established according to law, was not overturned (Art.418 let.a) NCC). The case of nullity covers the situations in which either the mother or the father acknowledge a child in breach of the provisions of Art.415. According to

the second thesis of the text, the acknowledgment is valid if the previously established filiation is overturned by a court order;

- The acknowledgment concerns a child who died without biological offspring (Art.418 let.b) NCC);
- The acknowledgment is made in breach of the formal conditions required by the law (Art.418 let.c) NCC).

The acknowledgment made with a vitiation of consent by error, deceit or violence is affected by relative nullity; the extinctive prescription for the right to file action for annulment under such circumstances shall start to run upon the cessation of the violence, or the discovery of the deceit or error.

Finally, similarly with the Family Code, NCC provides that the child acknowledgment which is not true to reality may be challenged by any concerned person, such right to challenge being not time-barred (Art.420 para.(1)). If the acknowledgment is challenged by the other parent, the acknowledged child or his offspring, the burden of proof regarding the filiation shall be incumbent upon the person who made the acknowledgment or upon his heirs (Art.420 para.(2)). The wording of para.(2) resumes the provisions of Art.58 para.(2) of the Family Code, which refer to the mother only.

4. Actions regarding Filiation

[Art.421-440] NCC also improves the regulation of the actions regarding filiation by comparison to the Family Code, both in terms of text systematization and contents of the legal provisions, and certain amendments are brought with respect to the holders of the right to initiate actions to establish the filiation. The following types of actions regarding filiation are regulated by NCC: the challenge of filiation, the action to establish filiation by the mother, the actions to establish paternity outside the marriage, the actions regarding paternity inside the marriage (challenge of paternity).

I. Action to Challenge Filiation

[Art.421] The action to challenge filiation is available to any interested person in case the filiation established by the birth certificate is inconsistent with the possession of status (Art.421 para.(1)). The right to challenge filiation follows also from a per *a contrario* interpretation of Art.411 para.(1) and (2), according to which one cannot challenge filiation or claim another filiation than the one resulting from a birth certificate consistent with possession of status.

In this case, the proof of filiation is made by the medical certificate of birth, by forensic examination or, where the certificate is not available or the forensic examination is not possible, by any means of evidence (Art.421 para.(2)), except for testimonial evidence, unless the case concerns child substitution or registration as the child's mother of a woman who is not the one to have given birth to the child, and the case where there are documents that give credibility to the action (Art.421 para.(3)).

The text expressly provides that the action to challenge filiation is not subject to extinctive prescription, a solution similar to that provided in the current legislation (Art.421 para.(1)).

II. The Action for Establishment of Maternity

[Art.422,423] The action for establishment of maternity under NCC has the same legal treatment as the one instituted by the Family Code, but it is more thoroughly regulated. Art.422 (which repeats the definition given by Art.50 of the Family Code) sets forth that maternal filiation may be established in the case where, for whatever reason, it cannot be proven by the medical certificate of birth or when the truthfulness of its contents is contested, by means of an action for establishment of maternity, where any means of evidence are allowed.

The holder of the right to bring action for establishment of maternity is, as in the current regulation, the child, who can bring this action by legal representative (Art.423 para.(1)) however, unlike the Family Code, NCC allows the child's heirs not only to continue, but to also initiate such an action (Art.423 para.(2)).

As in the current regulation, the mother, and after her death, her heirs, have legal standing as defendant (Art.423 para.(3)) but, as far as the extinctive prescription for this right to action is concerned, unlike Art.52 para.(4) of the Family Code, which provides that the right to bring action shall not be time-barred during the life of the child, Art.423 para.(4) sets forth that the right shall not be subject to extinctive prescription, a necessary stipulation considering that the right to bring action is also extended to the child's heirs. However, the right to bring action available to the child's heirs shall expire one year after his death (Art.423 para.(5)).

III. Action for Establishing Paternity outside Marriage

[Art.424-428] The action for establishing paternity of a father outside marriage, currently regulated by Art.59 of the Family Code, also preserved most of its present characteristics under the new regulation, however, with some amendments as to who is entitled to bring action and the extinctive prescription applicable to such action, as in the case of the action for establishment of maternity.

Art.426 introduces a new legal presumption of paternity, which emerges from the fact that the presumed father was cohabiting with the child's mother during the period considered under the law as at the time of conception, a fact which has to be proven. This regulation is also found in the CC1940 as well as in SCC. Similarly with the presumption of paternity of a child conceived or born during marriage, the presumption of paternity of a child from outside the marriage may be overturned if the presumed father proves he could not have conceived the child. We find this new presumption to be equitable to the child, as the establishment of paternity is undertaken on his behalf and in his interest, and the child should have the same legal means to pursue his legal interests regardless if born inside or outside marriage.

As a precondition, the establishment of paternity may be requested in court when the outside-marriage father disclaims paternity of the child (Art.424).

The presumed father and his heirs have legal standing as defendants (Art.425 para.(3)).

The right to bring action is with the child and is exercised by the mother, even when the mother is a minor, or by the child's legal representative (Art.425 para.(1)). Unlike Art.59 para.(2) of the Family

Code, according to which the action for establishment of paternity by a father outside the marriage cannot be extended to the child's heirs, who are however allowed to continue it, Art.425 para.(2) of NCC also allows the child's heirs to initiate such action within one year after the child's death (Art.427 para.(2)). The right to bring action for establishing paternity shall not be subject to extinctive prescription during the child's lifetime (Art.427 para.(1)).

It is to be noted that, under NCC, the mother is no longer entitled to bring claims of paternity of her child against a man outside the marriage in her own name and on her own behalf, as currently allowed under Art.60 of the Family Code. Instead, the mother is given the right to claim indemnity from the presumed father, requesting him to pay half of the birth and postnatal expenses as well as those incurred with her personal care during the pregnancy and postnatal period (Art.428 para.(1) NCC). This provision is taken from the CC1940. The mother may claim such indemnification even if the child is stillborn or has died before the court has ruled on paternity (Art.428 para.(2) NCC), and the right to bring such action is subject to a extinctive prescription of 3 years from the child's birth (Art.428 para.(3)).

We believe that a few comments are required in connection with the last two paragraphs of Art.428 NCC. According to para.(4), the mother cannot claim indemnification from the presumed father unless she has also brought an action for establishing paternity. Whereas the child's mother is not among the individuals indicated at Art.425 as having a personal right to bring an action for establishing paternity, and may only do so as the child's representative, it may be inferred from the wording of Art.428 para.(4) that the mother shall not be able to claim the indemnification provided under Art.428 para.(1) unless she has also submitted a request for establishing paternity, but on behalf of the child. This interpretation seems to be supported by the last sentence of Art.428 para.(2), which appears to indicate that the action for establishing paternity may be brought separately from the indemnity action. The solution is also supported by the fact that the indemnity action may also be brought after the child's death, the right to bring it being also granted to the child's heirs. Still, we are of the opinion that the text should make an express stipulation that the mother cannot claim indemnification unless she has previously filed, in the child's name, a request for establishing paternity.

The second comment concerns the provisions of Art.428 para.(5), according to which, in addition to the expenses indicated under para.(1), the mother and her heirs are entitled to indemnity for any other damages under the general rules. The provision is intended as a clarification that the right to bring the indemnity action expressly provided by Art.428 para.(1) does not rule out the right to claim damages under the general rules, the extinctive prescription being in such case calculated in accordance with the general rules, too (from the date when the damage was incurred).

IV. Action regarding Filiation by the Marital Father

[Art.429-434] The current regulation of the action regarding filiation by the marital father, i.e., the paternity challenge, has been extensively criticized, both before and after the amendment of the Family Code by Law No.288/2007 was adopted. By its Decision No.349/2001, the Constitutional Court declared the provisions of Art.54 para.(2) of the Family Code unconstitutional for allowing only the father, and not also the mother of a child born inside the marriage to bring an action to challenge paternity. The unconstitutional text was to be eventually amended by Law No.288/2007. However, even the current provision given by this law, according to which the right to bring action to challenge paternity is with “either spouse” and the child, was also criticized as flawed, on grounds that the notion of “spouses” the text employs suggests that this capacity should exist at the time the action is filed, while the reason of the regulation requires that the mother and father should be married at the child’s conception or birth.

Seeking to address these criticisms, NCC provides that the holder of the right to bring the action to challenge paternity is the mother’s husband, the mother, the biological father as well as the child, and the action may be brought or continued by their heirs, in accordance with the law (Art.429 para.(1)). Admittedly more detailed and clearer, the new regulation fails however to specify whether the “mother’s husband” is to be read as her husband at the time of the child’s conception or birth, and not to her husband at the time the action is brought. Although Art.430 refers to the application of the presumption of paternity, thus allowing the inference that the holder of the right to bring the action is the same individual as the mother’s husband at the time the child was conceived or born, one could understand that he cannot bring the action to challenge paternity unless he is still the mother’s husband when the action is brought, his right to bring action being thus strictly limited to the duration of marriage. The regulation is, therefore, still open to interpretation.

In Art.430-433, NCC regulates the action to challenge paternity by reference to the holder of the right to bring the action and also adds a challenge of filiation by the marital father available to any interested person when the requirements of the paternity presumption are not met and thus the resumption cannot operate in respect of a child registered as born inside the marriage (Art.434).

Art.430 provides for the challenge of paternity by the mother’s husband. According to Art.429 para.(2) and (3), this action is brought by the mother’s husband or by the tutor or curator of the husband declared legally incapable against the child and, in case the child has died, against the mother and other heirs. The mother’s husband may bring action to challenge paternity within 3 years since learning he was the presumed father of the child, or since learning this presumption was inconsistent with the truth (Art.430 para.(1)). This prescription term shall not apply against individuals declared legally incapable by the court and, even if initiated by the tutor, the action may be brought by the mother’s husband within 3 years since he was relieved of his legal incapacity. If the husband dies before the extinctive prescription on his right to bring the action to challenge paternity runs out, the action may be brought by his heirs within one year from his death (Art.430 para.(3)).

According to Art.431, the mother may bring action to challenge paternity within three years from the child’s birth (Art.431 para.(1)). The provisions governing the action brought by the tutor or curator

for persons declared legally incapable by the court, the stay and reinstatement of the extinctive prescription, and the heirs' right to bring action with respect to the mother's husband shall also be applicable. The mother brings the action against the husband or, if he has died, against his heirs (Art.429 para.(4) NCC).

A novelty is that NCC also grants the right to bring action to challenge paternity to the presumed biological father (Art.432). The broadening of the range of persons entitled to challenge paternity to also include the biological father provides the latter with a legal instrument for establishing his paternity of a child who, being born inside a marriage, is presumed to be of his mother's husband. Under the current regulation, the biological father could only acknowledge the child, but not before the established filiation was invalidated (by admission of a paternity challenge brought by those entitled to do so), otherwise such acknowledgment being null and void.

The action is admissible only if the biological father submits evidence of his paternity (Art.423 para.(1)). The text thus enables the biological father, by providing him with the means to challenge the legally established filiation, to establish a new filiation, in line with the principle laid down by Art.435, according to which, as long as there is a legally established filiation, not challenged in court, no other filiation may be established.

Such action to challenge paternity is brought against the mother's husband or against the child or, if they died, against their heirs (Art.429 para.(5)). The right to bring action shall not be subject to the extinctive prescription during the biological father's lifetime and his heirs may bring it within one year from his death (Art.432 para.(2)). If the biological father is legally incapable, the action may be brought by the tutor or curator.

Lastly, the action to challenge paternity may also be brought by the child and his heirs (in the latter case within 1 year from the child's death, according to Art.433 para.(3) supported by Art. 423 para.(5)). In this case, the action is brought against the husband or his heirs (Art.433 para.(3) supported by Art.429 para.(3)). The right to bring the action shall not be subject to extinctive prescription during the child's lifetime (Art.433 para.(2)).

Art.434, also included in the subsection regarding the challenge of paternity, regulates the challenge of the marital father's paternity, absent from the Family Code, but recognized by case-law and doctrine. This challenge is an action that available to any interested person when the requirements are not met in order for the paternity presumption to operate in respect of a child registered as born inside marriage. The analysis of Art.434 in light of Art.414 shows that this challenge may only be brought when the child was neither conceived nor born inside marriage, as Art.434 only refers to cases where the paternity presumption conditions are not met (i.e., the conditions provided at Art.414 para.(1)) and does not refer to the cases where the presumption applies but it can be overturned in accordance with Art.414 para.(2).

Hence, it follows that the paternity by the marital father may not be challenged in the cases qualified by scholars as "conflict of paternity", when, in contrast with the assumption at Art.434, presumptions of paternity operate towards two individuals (the mother's husband from when the child was conceived, and her husband at the time of the child's birth). In such a situation, according to the doctrine, the case is to be solved in favor of the mother's husband from when the child was born, and,

as regulated under NCC, the husband from the previous marriage may bring an action to challenge paternity as presumed biological father.

V. Common Provisions regarding Filiation-Related Actions

[Art.435-440] NCC closes the section on establishment of filiation with a set of provisions generally applicable to filiation-related actions, most of which are new as compared to the current regulation, but not unknown to the existing doctrine and practice, as governed by the Family Code.

Art.435 lays down the legal treatment of legally established filiation, strengthening the principle that, as long as a legally established filiation is not contested in court, no other filiation whatsoever may be established, by applying the provisions of Art.99 para.(4) of NCC, according to which, if a challenge brought against an individual's civil status, established through a court judgment, is admitted by another court judgment, the first judgment shall lose its effects from the date when the second judgment is ruled as final.

Art.436 provides that the parents and child are to be called in court in all filiation-related proceedings, even if they are not to stand as plaintiff or defendant.

Similarly to the current regulation, the waiver of the right or of the trial are not permitted in filiation-related proceedings in the case where the action is brought in the name of the child or of a legally incapable individual, or when a minor has brought such action on his own (Art.437).

By the judgment admitting the action, the court shall also rule on the child's name, on the exercise of parental authority and on the child support obligation, as well as, where a challenge of filiation is granted, if applicable, on how the child is to maintain a personal relationship with the person who raised him (Art.438).

In the cases where filiation actions may also be brought against the heirs and there is a vacant succession, the action shall be brought against the commune, town or, as the case may be, the municipality from the place where the succession was opened and the summoning to court of waiving parties, if any, shall be mandatory (Art.439).

In the case of criminal offenses the qualification of which requires there to be a filiation that has not been legally established, the criminal judgment is not to be passed before the civil judgment on filiation has been ruled as final (Art.440).

(b) Section 2 "Medically assisted human reproduction with third party donor"

[Art.441-447] NCC introduces, as absolute novelty, a set of ground rules for medically assisted human reproduction, expressly providing that its legal treatment, the confidentiality of the relevant information and transmission thereof shall be regulated by a special law. A first attempt to enact such special law (the law on reproductive health and medically assisted human reproduction) failed in 2005, when the Constitutional Court, upon reference by the President of Romania, ruled that most of its articles were contrary to the fundamental law.

The preliminary regulation brought forth by NCC takes certain provisions from FCC and QCC.

As a general regulation of the effects on filiation of the medically assisted human reproduction with third party donor, Art.441 para.(1) sets forth that it determines no filiation whatsoever between child and donor. No liability action may be brought against the donor (Art.441 para.(2)). We would like to point out that the special law should make clear what is the liability borne by the medical staff or institutions providing medical assistance and handling the donor-parents relationships in such cases.

According to Art.441 para.(3), solely a man and a woman or a single woman may become parents through medically assisted human reproduction with third party donor. Therefore, the text allows both married and unmarried couples to resort to this procedure. This legal provision does not clarify whether under NCC donors can only be males or there can be female donors as well, considering that medically assisted human reproduction with female third party donor is less frequent than the male donor one, but it is medically possible and legally permitted in jurisdictions where medically assisted human reproduction with third party donor is regulated. Moreover, although in the published form of NCC, agreements related to reproduction or the carrying of the pregnancy by another person are no longer expressly banned, as they were under the draft law, it is to be understood from the reference to only reproduction by “donor” that such ban still exists or, at least, that this situation is outside the regulatory framework under analysis. The draft law on reproductive health and medically assisted human reproduction contained provisions related to agreements concluded between the reproductive couple and the carrying or surrogate mother, which were found unconstitutional (in breach of the provisions of Art.26 para.(2) of the Constitution) because of clauses providing for termination of pregnancy without medical recommendation, as well as for the supervision of the carrying or surrogate mother all throughout the pregnancy; the Constitutional Court however has not expressly dismissed as unconstitutional the arrangements as such, provided they do not hamper the individual’s right to dispose of their own person. In our view, the lawmaker has opted for a more moderate solution in the NCC by not expressly banning such arrangements, which could be regulated in the future.

In what regards the conditions incumbent on the parents who, in order to have a child, wish to resort to medically assisted human reproduction with third party donor, Art.442 provides for their obligation to give a written consent before a notary public, who shall also have the obligation to explicitly outline the consequences their act shall have with respect to filiation (Art.442 para.(1)). This is a reasonable solution, as it seeks to ensure that the parents are informed on the civil effects of their decision, and also to secure a formal consent from both partners, when the parents are a man and a woman, on such reproductive method. It should be noted that, under the draft law on reproductive health and medically assisted human reproduction, medically assisted human reproduction was conditional on a request made to the court to issue a judgment establishing compliance with the mandatory legal requirements for initiating such a procedure, which judgment had to be ruled final and irrevocable upon confirmation of pregnancy, the child’s birth certificate being issued based on this ruling. Realizing the risk that the court could establish that the mandatory legal requirements were not met after the pregnancy was confirmed, thereby voiding the child’s defined legal status, the Constitutional Court held this provision to be in breach of the constitutional norms guaranteeing the child’s right to protection and assistance. On this point, the solution offered by NCC is harmonized with the Constitution in that it does not expose the legal status of the child born as a result of medically assisted

human reproduction with third party donor to risks generated by lack of authorization, and, by eliminating a possibly excessive juridical review, it seems, overall, more reasonable.

According to Art.443 para.(2), the consent given by the future parents before the notary public shall become void in case of death, petition for divorce, or *de facto* separation that occur prior to conception. The consent may also be at any time revoked, in writing, including revocation before the doctor called to assist in the medical procedure. The first thesis of this paragraph is aimed at protecting the husband from the effects of the paternity presumption in relation to the child conceived during marriage that relies on his consent to medically assisted reproduction, in circumstances where marriage dissolution is sought or when *de facto* separation occurs, while the voided consent upon the husband's death is meant to protect his heirs from competition with a child conceived through this procedure after the death of their predecessor in title. It is to be noted that the second thesis, considering its positioning within the legal text, only refers to situations where the couple deciding to follow the medically assisted reproduction procedure is a married couple, although according to Art.441 para.(3), couples of unmarried men and women are also allowed to resort to it and, consequently, they should benefit from the same consent revocation conditions as well.

Art.443 sets forth that no one may challenge the child's filiation on grounds pertaining to medically assisted human reproduction with third party donor, nor may the child thus born challenge his filiation. An absolute legal presumption of paternity and maternity is instituted in favor of the man and woman having duly consented to medically assisted human reproduction with third party donor. In such circumstances, filiation may only be challenged for lack of consent (Art.443 para.(2) provides that the mother's husband may challenge his paternity of the child if he has not consented to medically assisted human reproduction with third party donor) or for the reason that the child was conceived otherwise than consented (Art.443 para.(3) provides that the rules on challenge of paternity shall remain applicable in this case as well).

If the man having consented to medically assisted human reproduction with third party donor is not the woman's husband, Art.444 provides that, in case he declines to acknowledge the child thus born outside the marriage, he shall remain liable towards the mother and child, paternity being in this case established in court as provided by Art.411 ("Possession of status consistent with birth certificate", a text which refers to filiation by the mother) and Art.423 ("Legal treatment of the action for establishing maternity"). It follows from the text that, as long as the woman who gave birth to a child is the same with the one having consented to medically assisted human reproduction with third party donor together with the man who is not acknowledging the child, the court shall issue a judgment establishing the paternity of the man having given his consent.

All information in connection with medically assisted human reproduction with third party donor is confidential (Art.445 para.(1)), but the court may allow the information to be disclosed, observing confidentiality, to the doctor or competent authorities, in the cases where the lack of such information could lead to serious harm for the health of a person thus conceived or their descendants (Art.445 para.(2)). The right to information is available to all descendants of a person conceived through medically assisted human reproduction with third party donor, if deprivation of the information they request could seriously jeopardize their health or that of a close relative (Art.445 para.(3)).

According to Art.446, the father has the same rights and obligations towards the child born through medically assisted human reproduction with third party donor as towards a naturally conceived child. The aim of the text seems to be to strengthen the legal status of the child conceived through such a method, in addition to what has already been laid down in respect of filiation, stating clearly that the father cannot decline exercise of his rights or fulfillment of his obligations as a parent on grounds pertaining to the child's method of conception. To the extent that the lawmaker saw this regulation as referring to female donors as well, our opinion is that a similar provision should be introduced in connection with the rights and obligations of the mother of a child born through medically assisted human reproduction with third party donor, who shall not be able to use the method of conception as grounds for not fulfilling her parental obligations or not exercising parental rights.

(c) Section 3 "Legal Situation of the Child"

[Art.448-450] The legal situation of a child born inside or outside marriage encompasses the norms related to his legal status and name. Art.448 of NCC reiterates the provisions of Art.63 of the Family Code according to which the child born outside marriage with duly established filiation enjoys, in relation to each parent and their relatives, the same legal situation as a child born inside marriage. As regards the name, Art.449 and 450 repeat the provisions of Art.62 and Art.65 of the Family Code, adding some procedural aspects relating to the declaration of name.

(iii). Chapter III "Adoption"

[Art.451-482] NCC resumes the tradition that existed before the enactment of the Family Code by including adoption within its regulatory scope. The numerous changes brought to this subject-matter during the last years have actually caused it to completely disappear from the Family Code in 1997, the adoption being currently regulated only by a special law (Law No.273/2004) which was recently amended (by GEO No.102/2008, approved by Law No.49/2009) and republished in late 2009. In Chapter III, Book II On Family, NCC takes over the general rules and principles that deal with the key elements of the legal regime of adoption (general provisions, substantive conditions, effects, termination), elements that have been rather consistently regulated over time, while the procedure and special conditions for adoption are to remain under the scope of the special law. To eliminate the redundancy thus created, the law enforcing NCC shall have to provide for the amendment of Law No.273/2004 as well, by eliminating the provisions taken over by the NCC.

(a) Section 1 "General Provisions"

[Art.451-454] Repeating the provisions of Art.1 of Law No.273/2004, Art.451 of NCC defines adoption as the legal process whereby a bond of filiation is created between the adopter and the adopted, as well as a kinship relation between the adopted and the adopter's relatives. Art.452 reiterates the principles governing adoption under Art.2 din Law No.273/2004, *i.e.* the best interest of the child, the need to ensure the child's maintenance and education in a family environment and the child's continued maintenance and education, without including however the principle of celerity in conducting any adoption-related acts. As mentioned above in a different context, we believe that the principle of the optimum and foreseeable timeframe in civil procedures introduced in the NCPC is not one and the same with the principle of celerity in cases that involve minors, including cases concerning adoptions. Celerity is a special condition which has to ensure that such proceedings are

dealt with expeditiously, notwithstanding the general context of the optimum and foreseeable timeframe in civil proceedings. We note that the NCC Draft IL proposes a remedy for this deficiency of NCC, by supplementing Art.452 with a new let.d), to provide for celerity in the fulfillment of any adoption-related acts. We deem that the principle of celerity should be expressly provided in relation to all cases involving minors.

Art.454 para.(1) grants competence to the court of tutorship to approve adoption. According to Art.454 para.(2), the internal adoption procedure is governed by a special law. The conditions and procedure for international adoption as well as its effect on the child’s citizenship are regulated by a special law (Art.435).

(b) Section 2 “Substantive Conditions for Adoption”

1. Persons that May Be Adopted

[Art.455-458] In what regards the persons that may be adopted, NCC repeats, without modification, the prohibitions and exceptions laid down by Art.5 para.(2) and (3), Art.6, Art.8 para.(1) and (2) din Law No.273/2004. Only minors may be adopted, save for the person of full legal age being adopted by the family or person that raised him while a minor (Art.455). Siblings, regardless of sex, may be adopted by different families only if this is in the child’s best interest (Art.456). Adoption among siblings, regardless of sex (Art.457), is not allowed, nor is that between spouses or ex-spouses (Art.458). Two ex-spouses cannot be adopted by the same person or family (Art.458).

2. Persons that May Adopt

[Art.459-462] According to NCC, only persons having full legal capacity who are at least 18 years older than the adopted may adopt (Art.459 first sentence, 460 para.(1)). However, for justified reasons, the court of tutorship may allow for a 16-year difference between the adopter and the adopted (Art.460 para.(2)); the text is different from Art.9 para.(2) of Law No.273/2004 according to which this exemption was allowed for a 15-year age difference. Individuals who are mentally alienated or intellectually disabled or who have severe mental disorders cannot adopt (Art.459, second thesis)⁵⁵. Art.461 requires for the adopter or adopting family to meet the moral guarantees and material conditions necessary for the child’s raising, education and healthy development, guarantees and conditions which are to be certified by the competent authorities in accordance with the special law (pursuant to Art.19 and 20 of Law No.273/2004, moral guarantees and material conditions are assessed by the general directorate for social assistance and child protection from the place of domicile of the person or family willing to adopt).

⁵⁵ We note that the NCC Draft IL proposes the amendment of Art.459 by replacing the concepts of “mentally alienated” and “intellectually disabled” with “persons with mental disorders and mental handicap”. As the NCC Draft IL contains, on the one hand, a definition of the concepts of “mental alienation” and “intellectual disability” (according to which, these are “mental disorders or handicaps triggering the person’s mental incompetence to act in a discerning and predictive manner as regards the legal consequences which may arise from exercising civil rights and obligations”), we deem that it is not necessary to amend Art.459. If the lawmaker of the NCC Draft IL deems that “persons with mental disorders and mental handicap” who are prohibited to adopt are different from the persons suffering from mental alienation or intellectual disability, as they are defined in the NCC Draft IL, an express clarification in this respect should be made and a definition should be provided.

Art.462 lays down the conditions for simultaneous and successive adoption, prohibited with the exception of spouses who are adopting together or successively. A new adoption may be allowed when the adopter or adopting spouses have died, in which case the previous adoption is considered dissolved from the date of the judgment approving the new adoption, and also when the previous adoption has ended for any other reason. Art.462 para.(3) expressly prohibits two persons of the same sex to adopt together.

3. Consent to Adoption

[Art.463-468] Art.463 para.(1) lists all persons required to give their consent on an adoption, in a better systematization than in Law No.273/2004 (Art.11-18): these persons are the biological parents or the person exercising parental authority, the adopted child of at least 10 year of age, the adopting person or family, the spouse of the adopting person, except when the lack of discernment prevents him from expressing his will. Art.463 para.(2) provides for the general validity condition of the consent to adoption (not to be given in consideration of obtaining benefits) and Art.464, 465, 466 and 467 regulate the special conditions related to the biological parents' consent. They or, if the case, the child's tutor, may consent to adoption only after 60 days have passed since the child's birth, and may withdraw their consent within 30 days after expressing it. The adoption may be approved without the consent of one or both biological parents, only when one of them or both, if the case, are deceased, have been declared dead, or are unable to express their will. The biological parents whose rights have been forfeited or who were sanctioned by prohibition to exercise parental rights shall maintain their right to consent to the adoption, in which cases the consent of the person exercising parental authority is required. The parents' consent shall be free, unconditional and given only after they have been informed on the effects of the adoption, especially on those related to kinship. As regards the abandoned child, the court of tutorship may exceptionally disregard the biological parents' refusal to permit adoption, if it is proved by any means that such refusal is abusive, or when the court believes that adoption is made in the best interest of the minor.

The conditions for expressing the consent are provided by the special law (Art.468).

(c) Section 3 "Effects of Adoption"

[Art.469-474] According to Art.469, adoption becomes effective on the date when the court judgment approving it remains final. The text resumes the provisions of Art.56 of Law No.273/2004, with the amendment required by the changes brought by the NCPC, that the relevant date is the date when the judgment remained final, and not irrevocable.

As for kinship, Art.470 provides that adoption establishes filiation of the adopter with the adopted person, as well as kinship between the adopted person and the adopter's relatives, and terminates the kinship relations between the adopted person and his descendants and between the latter and his biological parents and relatives (except when the adopter is the spouse of his biological or adopting parent, in which case kinship relations shall only cease with the biological parent who is not married to the adopter, and with his relatives).

By adoption, the adopter shall acquire towards the adopted person the parental rights and obligations of the parent towards his natural child, and the adopted person shall have towards the adopter the rights and obligations that a child has towards his natural parent (Art.471 para.(1) and (3)). If the

adopter is the spouse of the biological parent of the adopted person, parental rights and obligations shall be jointly exercised by the two parents (Art.471 para.(2)).

If the adopter's parental rights are withdrawn by the court, the court of tutorship may take all protection measures required under the law (or, according to the supplementation proposed by the NCC Draft IL, may establish tutorship), subject to the mandatory hearing of the child and in consideration of his best interest (Art.472).

As regards the effects of the adoption on the adopted person's name, Art.473 of NCC resumes the provisions of Art.59 of Law No.273/2004.

We would point out that Art.474, which provides that information related to adoption is confidential and that the information methods are to be provided by the special law, does not resume the obligation provided by Art.58 para.(1) of Law No.273/2004 that the adopting parents must inform the child that he was adopted as soon as his age and maturity allow it. Since the extent to which such provision to inform the child is compliant with the constitutional principle on protection of privacy is arguable, we believe that the solution chosen by the lawmaker not to include it in NCC is correct.

(d) Section 4 "Termination of Adoption"

[Art.475-482] Adoption shall cease by dissolution or acknowledgment of its nullity (Art.475, resuming Art.60 of Law No.273/2004).

Adoption is dissolved *de jure* as of the date when the judgment approving a new adoption remained final, after the death of the initial adopter(s) (Art.476). We note that the NCC Draft IL supplements and clarifies the text, for a more thorough regulation.

The adoption may be dissolved at the request of the adopter or adopting family, if the adopted person made an attempt on their lives or on the lives of their ascendants/descendants, or when the latter is guilty of criminal deeds committed against the adopter, punished by a custodial sentence of at least two years (Art.477 para.(1)). If the death of the adopter is caused by the adopted person's deeds, the dissolution of the adoption may also be requested by those who came into inheritance along with the adopted person or in his absence (Art.477 para.(2)). The NCC Draft IL proposes the supplementation of this text by a new paragraph, providing that adoption may be terminated at the adopter's request only after the adopted person acquired full capacity to exercise rights and obligations, even if the deeds have been committed before such date. In his turn, the adopted person may request the dissolution of adoption if the adopter is guilty of the deeds provided at Art.477 (Art.478).

NCC distinctly regulates the causes of absolute nullity and relative nullity of the adoption. Fictitious adoption (namely, the one concluded for a purpose other than the protection of the minor's best interest, as per Art.62 para.(1) first thesis of Law No.273/2004 and Art.480 para.(2) of NCC) and the adoption concluded in breach of the substantive and formal conditions and not sanctioned by relative nullity, are subject to absolute nullity (Art.480 para.(1)). Any interested person may file for the acknowledgment by court of the absolute nullity of the adoption (Art.480 para.(3)).

Adoption may be annulled at the request of the person called to consent thereto, when his consent was vitiated by error on the adopter's identity, by deceit or violence; such legal action may be filed within 6 months from the discovery of the error or deceit or from the cessation of violence (Art.479).

Art.481 states that the court of tutorship may maintain the adoption, despite the grounds for nullity, if it is in the best interest of the adopted child, whose hearing is mandatory under the law.

Upon termination of adoption, the biological parents are reinstated their parental rights and obligations towards their child, except when the court of tutorship considers that the child's best interest requires the establishment of tutorship or another child protection measure provided by the law (Art.482 para.(1)). Moreover, the adopted person reacquires his last name and, if case, his first name used prior to the approval of adoption and the court of tutorship may state, for solid grounds, that the latter may keep his adoptive name (Art.482 para.(2)). Such measures shall entail the child's mandatory hearing, according to the law (Art.482 para.(3)).

1.3.(d). Title IV "Parental authority"

[Art.483-512] NCC introduces the institution of "parental authority", inspired by the FCC, QCC and SCC. No significant amendments are brought to the current legal framework based on the Family Code (Section I of Chapter 1 of Title III, entitled "The Parents' Rights and Obligations Towards Children and Minors", and those of Law No.272/2004. The concept of parental authority comprises the rights and obligations of the parents towards the person of the child and his property, as well as the obligation of support owed by parents to their children, currently regulated along with the other obligations of support.

Still, a clarification is made as to the obligation of support having the legal nature of a joint obligation, while a presumption of mutual mandate between parents is introduced regarding the conclusion of ordinary acts specific to the exercise of parental authority, which presumption only operates in relation to *bona fide* third parties.

[Impact] The amendments brought by NCC to the current regulation reveal a better systematization and a more thorough regulation at a theoretical level, without determining, however, changes as to the competence of the courts – except for the fact that, as in all other family-related matters, the matters arising from the exercise of parental authority are also placed under the jurisdiction of the court of tutorship. The powers established by Law No.272/2004 for the specialized departments of the local public administrative authorities remain unchanged. Therefore we identify no institutional impact to follow the implementation of this specific title of NCC.

(i). Chapter I "General provisions"

[Art.483-486] This chapter contains general provisions referring to the parental authority, its duration, the child's obligations towards his parents, as well as the disputes between parents regarding the exercise of parental authority.

Parental authority is defined as a set of rights and obligations related to the person of the child and to his property, which are equally held by/incumbent on both parents (Art.483 para.(1)) and shall be exercised by them only in the best interest of the child, with the respect owed to his person, and after consulting him in all decisions related to him, depending on his age and maturity (Art.483 para.(2)). Both parents shall be responsible for raising their minor children (Art.483 para.(3)). The texts resumes the provisions laid down by Art.371-1 of the FCC, Art.31 para.(1) and (2) of Law No.272/2004, and,

to a great extent, Art.97 of Family Code, but in a more complete and better wording, compliant with the principles governing the protection and promotion of children's rights.

Art.484 provides that parental authority is exercised until the child acquires full legal capacity. The child owes respect to his parents, regardless of his age (Art.485).

Art.486 institutes the rule according to which any disputes between parents over the exercise of parental rights or fulfillment of parental obligations shall be settled by the court of tutorship, in accordance with the child's best interest, after the parents are heard, based on the conclusions of the report on psycho-social investigation and following the child's hearing according to the law. It is our opinion that, for terminological uniformity, the text should refer to the disputes between parents over the exercise of parental authority, rather than rights and obligations which are a part of it, since this is the concept of reference newly introduced by this regulation. The text resumes the provisions laid down by Art.31 para.(3) of Law No.272/2004 and, with the required improvements, by Art.99 of the Family Code. Article 604 of QCC contains a similar provision, *i.e.* that, in case of difficulties in the exercise of parental authority, the person having such authority may file legal action, and the court must rule in the best interest of the child, after having attempted to conciliate the parties.

(ii). Chapter II "Parental rights and obligations"

[Art.487-502] Parental rights and obligations, which are the content of parental authority, are generically provided by Art.487, according to which parents have the right and the obligation to raise the child, by caring for his health and physical, psychological and intellectual development, for his education, studies and professional training, according to their own beliefs and based on the child's skills and needs (the text resumes and amends Art.44 para.(2) of Law No.272/2004). Parents shall provide necessary guidance and advice for the child, as required for the proper exercise of his legal rights under the law (Art.487 second thesis establishes parental obligations meant to ensure the fulfillment of the child's right to be informed on his rights and on their exercise, provided by Art.29 para.(2) of Law No.272/2004).

As regards specific parental obligations that are part of the parental authority, Art.488 resumes the provisions of Art.32 of Law No.272/2004 and better reflects the provisions of Art.101 of the Family Code. Thus, it is provided that parents have the obligation to raise the child such as to ensure his physical, mental, spiritual, moral and social development harmoniously, for which purpose they shall:

- cooperate with the child and respect his intimate and private life, as well as his dignity,
- present, and allow the child to receive, information and clarifications regarding all aspects and facts likely to affect him, and take his opinion into consideration;
- take all necessary measures for the protection and fulfillment of the child's rights;
- cooperate with individuals and legal entities having powers in the sectors of child care, education and professional training.

We would like to point out that the child's surveillance, provided at Art.32 let.a) of Law No.272/2004, was not resumed in the list of parental obligations made at Art.488, but established separately, at Art.493, since it represents not only a obligation, but also a right of the parent towards his minor child.

As regards the exercise of the right of surveillance, Art.494 provided that the child's parents/legal representative may prohibit the correspondence and personal relations of the child under the age of 14, for grounded reasons. Disputes in this respect shall be settled by the court of tutorship, after hearing the child pursuant to Art.264.

Parents shall take disciplinary measures only with the due respect of the child's dignity. Physical measures and punishments, likely to affect the physical, psychological or emotional development of the child are forbidden (Art.489). These prohibitions and limitations, which are also provided by Art.28 para.(2) of Law No.272/2004, are designed to ensure the observance of the child's right to be respected as a person as well as compliance with the prohibition to submit the child to physical punishments or to other humiliating or degrading treatment, stated under Art.28 para.(1) of the same enactment.

NCC draws a distinction between parental rights and obligations related to the child's person and those regarding his property, in the case of the minor parent who turned 14 and who may exercise parental authority only in connection with his child's person, and not the child's property. Parental authority over such property shall be exercised by the tutor or by other person provided by the law (Art.490).

According to NCC, the following are considered parental rights concerning the child's person:

- Parents' right to guide their child, in accordance with their own beliefs, in choosing a religion, according to the law, but not to obligate him to embrace a certain religion or religious cult and subject to the amendment that, after reaching the age of 14, the child may freely choose his religious confession (Art.491). The text resumes, with amendments, the provisions of Art.25 para.(2) and (3) of Law No.272/2004 stipulating that the religion of the child who turned 14 shall not be changed without his consent and that he may freely choose his religion after turning 16;
- Parents' rights to choose the child's surname and given name, under the law (Art.492, corresponding to Art.8 para.(3) of Law No.272/2004);
- Parents' right to request at any time before the court of tutorship that the child be returned to them by the person holding him illegally, which claim shall be rejected only when the return is clearly against the child's best interest; the court shall rule on the matter only after having heard the child, under the law;
- Parents' right to establish the child's residence (Art.496). According to Art.496 para.(1), the child lives with his parents. If they do not share the same residence, parents have the right provided by para.(2) of the same text to mutually establish the child's residence and, in case of dispute, it is for the court of tutorship to decide, based on para.(3). The child's residence established in the aforementioned conditions may be changed without the parents' consent only in the cases provided by the law (para.(4));
- The right of the parent who does not live with the child on a steady basis to have personal relations with him, at the child's residence (Art.496 para.(5)). The court of tutorship may limit this right when the child's best interest requires it.

- The right of the parent who does not live with the child to agree that the minor changes residence when he lives with the other parent, if such change affects the exercise of parental authority or certain parental rights. Any dispute related thereto shall be settled by the court of tutorship pursuant to Art.497;
- Parents' right to object to the wish of the child who turned 14 to change his type of studies or his professional training or the residence required for completing such studies (Art.498). If the parents object, the child may file action before the court of tutorship, which shall rule according to para.(2).

Pursuant to Art.500 of the new regulation, resuming Art.106 of the Family Code, patrimonial relations between parents and children are governed by the principle of independence, according to which parents have no right over the child's property, and the child no right over the parents' property, except for the right to come into inheritance and the right of support. While succession is regulated separately, NCC provides, in the chapter on parental authority, for the following parental rights and obligations of patrimonial nature:

- Parents' rights and obligation to manage the minor child's property (Art.502 para.(1) first thesis, resuming the provisions of Art.105 para.(1) first thesis of the Family Code);
- The right and obligation to represent the minor when concluding deeds or to approve such deeds, as the case may be (being expressly mentioned that, after he reached the age of 14, the minor may freely exercise his rights and fulfill his obligations, under the law, subject to the approval given by the parents or the court of tutorship, as the case may be) (Art.502 para.(1) second thesis and para.(2), resuming and amending Art.105 para.(1) second thesis and para.(2) of the Family Code).

Art.499 of NCC re-systematizes the matter of the obligation of support, such as it is provided by the Family Code, including the rules on the parents' obligation to provide support for their minor child in the chapter regarding parental authority. Nevertheless, we consider that the provisions of this article must be accordingly supplemented with those in Title V "The Obligation of Support".

The parents' obligation of support, as defined by Art.499 para.(1), is a complex obligation of the parents towards their minor children, consisting in ensuring their living (to be interpreted, according to current doctrine, as ensuring food, clothing, medicines, residence for the minor), as well as their education, studies and professional training. A similar definition is already mentioned by the current doctrine and in Art.44 para.(2) of Law No.272/2004.

The new regulation provides for an express clarification of the legal nature of the obligation to support, regulated by the Family Code, stipulating that this "joint" obligation shall be fulfilled by both parents. As such express provision is absent from the Family Code, the legal practice and doctrine developed under the Family Code regime determined that this is an *in solidum* obligation. The consequence of such type of obligation is that the parents are considered jointly obligated to support the child, each of them contributing individually, pro rata with his means. The contribution is relevant only as regards the relations between the parents, while each parent is held liable towards the child for the entire support of such child.

As in the existing regulation, the obligation of support subsists when the minor has his own income, but this income is insufficient. Para.(3) of the new text enshrines the parents' obligation to support their child after he had reached full age so that he can complete his studies, but only until he reaches the age of 26 (Art.499). This is solution that has been constantly applied in practice, based on the interpretation of Art.86 para.(1) of the Family Code which provides that the obligation of support exists between parents and children, without drawing any distinction according to their age, and, also, for reasons of similarity, based on the regulation of the alimony due to the survivor. Any dispute shall be settled by the court of tutorship, under the conditions provided by para.(4).

Art.502 provides that parental rights and obligations related to the child's property are similar to the tutor's, except for the establishment of the inventory mentioned by Art.140, when the child only has personal use property (provision equivalent to Art.105 para.(3) of the Family Code).

(iii). Chapter III "Exercise of Parental Authority"

[Art.503-507] An entire chapter of NCC deals with the exercise of parental authority, both in usual circumstances and in special circumstances such as divorce, parental authority towards the child outside marriage, by agreement of the parents and by one parent.

Parents normally exercise parental authority jointly and equally (Art.503 para.(1)). The principle of the parents' equality regarding their rights and obligations towards their minor children, regardless of their nature, is already provided by the Family Code (Art.97 first thesis), and it also arises from the principle of the spouses' equality and from the absence of any contrary legal provisions in this respect.

Art.503 para.(2) introduces a presumption of a mutual mandate between the parents for concluding ordinary deeds in view of exercising parental rights and fulfilling parental obligations, which presumption shall operate in case of *bona fide* third parties.

In the case of the parents' divorce, parental authority shall be exercised according to the provisions on the effects of divorce over the parent-children relations (Art.504). The rules governing divorce shall also apply to the exercise of parental authority by the parents of the child born outside the marriage, when they do not share the same residence (Art.505 para.(2)), as well as to the establishment of filiation (Art.505 para.(3)). If the filiation of the child born outside the marriage was established towards both parents, they shall jointly and equally exercise parental authority (Art.505 para.(1)).

Art.506 allows parents to reach an agreement on the exercise of parental authority or on the measures to be taken for the child's protection, in compliance with the interest of the latter and with the approval of the court of tutorship, which shall hear the minor, according to the law. The text is open to interpretation, as it is not clear if it refers to arrangements concluded by the parents and which derogate, for instance, from the rule of equality and joint exercise of parental authority and, in this case, if derogation must be confined to certain acts, rights or obligations and becomes effective only for a limited period of time.

Except for the cases of divorce, establishment of filiation, child born outside marriage having parents who do not cohabit, and cases in which the court of tutorship may grant the exercise of authority only to one parent, parental authority may be exercised by only one parent when the other parent is dead,

declared dead by court judgment, declared legally incapable by the court, forfeited from parental rights or unable to express his will for any reason (Art.507).

(iv). Chapter IV “Forfeiture from the Exercise of Parental Rights”

[Art.508-512] NCC introduces a more detailed and thorough regulation on the forfeiture of parental rights, taking into consideration the Family Code, as well as Law No.272/2004.

Art.508 para.(1) provides that the court of tutorship, upon notification by the public administrative bodies with attributions in the field of child protection, may order forfeiture of parental rights when the parent endangers the life, health or development of the child by mistreatment, consumption of alcohol or drugs, abuse, gross negligence in fulfilling parental obligations or by a serious infringement of the child’s best interest.

The local public administrative bodies referred in this text are the general departments of social assistance and child protection or, as the case may be, the social public services which, under Art.36 of Law No.272/2004, are entitled to make house calls to minors who allegedly live in a dangerous family environment and, if these calls reveal that the child’s physical, mental, spiritual, moral or social development is at risk, legal action shall be immediately filed with the relevant court, which shall order that one or both parents be totally or partially forfeited from their parental rights.

Under Art.508 para.(2), the legal action is settled with urgency, with service of process to the parents, and upon analyzing the psycho-social investigation report, the presence of the prosecutor being mandatory. The text does not expressly provide the court of tutorship’s obligation to hear the minor in accordance with the law even though, according to the general principles on child protection and promotion of children’s rights, the minor should be heard in all matters regarding him, and, if the lawmaker intended to establish such exception to this principle, it should have done so expressly.

Forfeiture of parental rights is total and covers all children born before the judgment is passed. However, the court may order that forfeiture concern only certain rights, or that the exercise of parental authority be limited only to some of the children, as long as this does not endanger their upbringing, education, studies and professional training (Art.509). Considering that these are very serious matters, we believe that when establishing a partial forfeiture the court must make sure that the limitation of such measure does not jeopardize children’s life, health or physical development, not only their upbringing, education, studies and professional training as Art.509 requires.

Forfeiture of parental rights does not exempt the parent from the obligation to support the child (Art.510).

If, following the enforcement of the forfeiture measure, the child is left without both his parents, a tutor shall be appointed for him (Art.511).

The court of tutorship shall allow the parent to resume the exercise of his parental rights if the circumstances causing their forfeiture ceased, or if the parent no longer jeopardizes the life, health and development of the child and, until the claim is settled, the court may allow the parent to have personal relations with the child, if the child’s best interest requires it.

1.3.(e). Title V “Obligation of support”

[Art.513-534] The last title of Book II “Family” of NCC contains provisions on the legal obligation of support, existing between husband and wife, lineal descendants, siblings, and between the other persons expressly provided by the law, including former spouses in accordance with the law. As previously mentioned, the parents’ obligation to support their children was included by NCC in Title IV “Parental Authority”, but we deem that the provision of Art.499 must be accordingly supplemented with the provisions included under this title.

The new regulation does not bring any major amendments. We note the amendment of Art.94 of the Family Code, in the sense that the obligation of support is to be calculated out of the debtor’s net income, and not out of his work-generated earnings, which, in our opinion, is a fairer solution. Furthermore, the new regulation expressly clarifies how the obligation of support is to be fulfilled. Such obligation is mainly satisfied in kind, and only in subsidiary by equivalent. Also, NCC codifies a solution already used in practice as regards the reimbursement of support to the person who provided it without having an obligation to do so.

[Impact] The NCC provisions in this title do not seem to have any institutional impact. As regards the fact that, under the new regulation, the matters on the obligation of support shall come under the jurisdiction of the newly established court of tutorship, we note that currently the cases on the obligation of support fall under the jurisdiction of the courts, divisions, respectively, as the case may be, panels for minors and family. Therefore, at least in a first stage of NCC implementation when the competences of the court of tutorship are to be exercised by the aforementioned, we deem that the new regulation will not have an impact on the human resources or finance.

(i). Chapter I “General provisions”

[Art.513-515] The new regulation expressly provides that the obligation of support is of legal nature and it only exists among the persons indicated expressly by the law, and subject to the fulfillment of the express legal requirements (Art.513). These conditions, although constantly mentioned by the doctrine, were not expressly provided by the Family Code. Besides being legal and, according to the doctrine, mandatory, the obligation of support is also mutual (as it follows from the wording of Art.513 first thesis) and personal, it is discharged upon the death of the creditor/debtor, unless the law provides otherwise, and it cannot be transferred (actively or passively) (Art.514). Art.515 provides that no one can waive his future right to support.

(ii). Chapter II “Persons Who Owe Support to Each Other and the Order in which such support Is Owed”

[Art.516-523] The new regulation expressly provides for the categories of persons having an obligation to support each other (Art.516), maintaining the current regulation (Art.86 of the Family Code). The inclusion of the express provisions on the parents’ obligation of support towards their children in the title on parental authority cannot be considered as a modification of the legal regime, as the text of Art.516 para.(1) expressly provides that the obligation of support is owed among lineal relatives, including relatives by adoption, and Art.525 expressly sets out the requirements for the obligation of support owed to the child by his parents. Therefore, despite their being placed separately

within the corpus of NCC, the special regulations on the parents' obligation to support their children are deemed supplemented by the provisions of this chapter.

NCC expressly regulates a few special cases of obligation of support. Art.517 provides for the case of the child who was supported by the spouse of his parent, when such spouse contributed child support and the child's parent is dead, missing or in state of need, setting out the mutual obligation of the child to support the person who supported him for 10 years (a provision taken over from Art.87 of Family Code).

Art.518 provides for the obligation of support incumbent on the heirs to the person who was obligated to provide child support to a minor, or provided support for the latter without having such obligation under the law; the heirs are bound to continue to provide support, within the limit of the inherited property, if the minor's parents are dead, missing or in a state of need, but only during the minority of the supported child. If there are several heirs, they have a joint obligation, each contributing to the support of the minor, pro rata with the value of the inherited property. The text resumes the provisions of Art.96 of the Family Code.

The order in which those owing alimony under the law must provide it, as set forth in Art.89 of the Family Code, is maintained by Art.519 of the new regulation, subject to two clarifications. First, NCC expressly sets out the category of the former spouses who, together with the spouses, have an obligation to support each other, before the other persons who have this obligation (let.a)). In the current regulation, this rule resulted from a joint interpretation of Art.24 para.(1) and Art.41 para.(2)-(5) of the Family Code. Secondly, NCC eliminates the express provision in the current regulation, according to which the adopter owes support before the biological parents, such rule being one of the effects of adoption on kinship. For the sake of clarity, Art.520 specifies the effects of the termination of adoption on the obligation of support, the adopted person being allowed to request support only from his biological relatives (or, as the case may be, from the spouse), which is also an application of the effects caused by the termination of adoption on kinship.

The support shall be owed by spouses and former spouses, but also by descendants before ascendants and, if there are more than one person owing support, by the next of kin before the farthest kin (Art.519 let.b)), and, finally by siblings after their parents, but before their grandparents (Art.519 let.c)).

The provisions of Art.90 of the Family Code in connection to multiple debtors are resumed in NCC. In such case, each of them is held liable depending on his means, and the parent having the right to be supported by several of his children continues to be allowed to initiate legal action, in urgent cases and only against one of the children; the child shall have a right of recourse against the other children, for their individual contributions (Art.521).

Art.91 of the Family Code was also maintained in connection to the subsidiary nature of the obligation in case of lack of means (Art.522), as well as Art.92 on the divisibility of support when the debtor of the obligation to support cannot simultaneously ensure support for all his entitled creditors (Art.523)

(iii). Chapter III “Conditions to the Obligation of Support”

[Art.524-528] NCC generally maintains the conditions to the obligation of support from the current legislation, containing, however, more detailed and better systemized provisions.

As regards the creditor, the rule was kept according to which only the person in need has a right to support when he cannot provide for himself through his work/property (Art.524 resuming Art.86 para.(2) of the Family Code). As for the state of need of the minor requesting support from his parents, mention is made that the latter is in a state of need when he cannot provide for himself through his work, even if he owns property; however, if the parents cannot support them without endangering their existence, the court of tutorship may approve that the support be ensured by capitalization of the child’s property, except for strictly necessary property (Art.526).

Any creditor of the support who is guilty of illegal or immoral deeds against the debtor of the obligation of support shall lose such standing as creditor, and the creditor who is in a state of need due to his own fault may only claim the strictly necessary support (Art.527).

The debtor of such obligation shall be a person able to pay or obtain the required amount, which amount shall be established based on his revenues and property, his ability to obtain them and, also, on his other obligations (Art.527).

The obligation of support – the creditor’s state of need and the debtor’s means – shall be proved by any mean of evidence (Art.528).

(iv). Chapter IV “Establishment and Performance of the Obligation of Support”

[Art.529-534] Art.529 maintains the rule provided under Art.94 of the Family Code, stipulating that support is owed by reference to the state of need of the person who requests it and the means of the payer. Given the criteria for establishing the obligation, the court of tutorship may increase or decrease the alimony or cease the payment thereof, if changes occur in connection to the creditor’s state of need or debtor’s means (Art.531 para.(1)).

The quotas out of the net monthly income (Art.94 para.(2) of the Family Code strictly refers to “work-related earnings”) owed by the parent as child support shall be maintained, being established, under Art.529 para.(3) that the child support owed to the children plus other forms of support shall not exceed half of the debtor’s net monthly income. This ceiling originates in Art.41 para.(3) of the Family Code, which sets out the maximum amount of alimonies payable to children and the former spouse.

Unlike Art.93 of the Family Code, Art.530 of the new regulation expressly states that the obligation of support is usually performed willingly and in kind (para.(1)), and only in subsidiary, when not fulfilled willingly, the court of tutorship may order support to be provided by payment of an alimony or of a fixed amount (indexed *de jure* on quarterly basis, according to Art.531 para.(2)) as a percentage share of the debtor’s revenues, in compliance with the maximum shares provided by the law.

Alimony shall be owed from the date when the claim is submitted or from a previous date, if filing the claim was delayed due to the debtor’s fault (Art.532), and shall be paid in periodic installments on the

dates established by the parties or by the court of tutorship (Art.533 para.(1)) or, if the parties so agree, or the court of tutorship so decides for grounded reasons, it shall be paid as an upfront lump sum for a longer period or even for the entire period for which alimony is owed (Art.533 para.(3)).

Finally, Art.534 regulates the solution given by the doctrine and jurisprudence, according to which the person who, for whatever reason, proves that the alimony he has given, willingly or based on a court judgment was not owed, may request the refund thereof by the person towards whom it provided it or by the person who actually owed it, on grounds of unjust enrichment.

1.4. Book III “About Goods”

1.4.(a). Title I “Assets and general provisions on real rights”

[Art.535-554] It should be firstly noticed that the provisions of this title represent, to a great extent, the transposition of constant opinions expressed by the legal doctrine and in case law with regard to the definition and classification of assets and to the identification of real rights. Apart from such enactment of doctrinary opinions, this title contains also clarifications and new approaches of concepts that had been already regulated by the CC. As a novelty, we note there is an express definition of the ownership forms – private property, public property.

[Impact] Given the fact that the provisions of this title represent, to a great extent, an enactment of the approaches that have been already taken in case law and sustained by the legal doctrine, we deem these provisions will not have a financial or budgetary impact on the current legal system, and will not require an analysis from human resources perspective.

(i). Chapter I “General issues about the assets”

(a) Section 1 “About the classification of assets”

[Art.535-546] We firstly note that Art.535 contains a definition of “assets”, a notion that had been used also in the CC regime but had been defined only by the legal doctrine. NCC takes over the predominant opinion of the legal doctrine, according to which the concept of “assets” pertains two different meanings –thing, and, respectively, the right pertaining to such thing- and transposes such opinion in its Art.535, which refers to the narrow meaning of such concept, namely things that are object of a patrimonial right, and in its Art.542, which refers to the rights on the assets.

NCC abandons the previous classification of immovable assets on the basis of their nature, purpose or object. Art.537 defines the immovable assets mainly with reference to their nature, but contains also a new definition of the “immovable assets by destination”, which are to be identified on the basis of their subordination to an immovable by nature, irrespective whether such subordination arises or not out of the will of a person, but provided that such subordination is “permanent”. Consistent with the principle established by Art.537 with regard to the immovable by destination (a concept that is however not expressly used by the NCC), Art.538 states that things do not lose their immovable feature if they are partially detached from another immovable asset provided that they maintain their destination to be reintegrated into such immovable asset (in such manner, both the subordination and its permanent character are maintained). However, we consider that the provisions of Art.538 para.(2), despite of being consistent with Art.537 and with Art.538 para.(1) –according to which the subordination determines the immovable feature of an asset- are improperly worded. Having regard to

the provisions of Art.538 para.(2), it is arguable which is the moment in time when the assets become immovable, as such article makes reference to two different moments: “brought materials”, respectively “the moment when they have been given such destination”. Having regard to the principles established by Art.537, which defines subordination by “incorporation” of a thing into an immovable asset, we consider the provisions of Art.538 para.(2) should be read in a similar manner, namely that materials are designated to become an immovable asset in the moment when they are permanently incorporated into an immovable asset. It is therefore recommendable that the lawmaker clarifies this aspect, in order to prevent contradictory interpretations in the case law.

Art.539 gives a new definition of the “movable assets” that is consistent with the doctrine opinion according to which such concept needed a simpler definition. We also note that the examples of movable assets used under the NCC have been updated, as reference is made to “electro-magnetic waves” and to “any type of energy”. We also note the new definition in Art.540 para.(1) of “movable assets by destination”, a concept that has been used by the legal doctrine. Art.540 para.(2) is also answering to the opinions saying that movable assets in anticipation have a relative movable character, as such classification may be binding only between contracting parties, and becomes enforceable against third parties only after such assets are actually detached from the asset in which they had been incorporated. Consequently, according to Art.540 para.(2), in order to ensure the enforceability against third parties of a legal deed by means of which immovable assets become movables by anticipation, such deed must be registered in the land book.

A novelty is also the regulation in Art.541 of a *de facto* universality. Although this concept was thoroughly recognized by the legal doctrine, there were inconsistent opinions whether such concept could have any effects under the CC system, as the legal scholars did not agree whether such *de facto* universality could have been created out of the will of person and in the absence of express legal provisions.

The transposition in a legal enactment (NCC) of a classification of assets as developed by the doctrine is also a premiere; Art.543-546 classify the assets on the basis of the criteria identified by the doctrine.

(b) Section No.2 “Products of the assets”

[Art.547-550] Art.547-550 contain updated definitions of the concepts of fruits (Art.548) and products (Art.549), as well as clarifications with regard to the moment in time when the ownership right on such assets is born. Art.550 para.(4) is a new regulation that embodies a part of the opinions expressed by the doctrine and in the case law, and establishes that the person who has advanced the necessary expenses for the production and harvesting of such fruits/products benefits of a right of retention thereon, until the owner of the fruits/products repays such expenses. We note such express recognition by NCC of the right of retention, a concept that represented a creation of the case law.

(ii). Chapter II “General provisions on real rights”

[Art.551-554] This chapter of NCC contains a list of real rights (Art.551), types of ownership (Art.552), as well as the criteria on the basis of which the assets that are part of private property (Art.553) or of the public property (Art.554) are identified.

Without giving a definition of real rights, NCC presents in its Art.551 a list of real rights (both principal or secondary), list that is consistent with the interpretations given by the legal doctrine to this concept. We note that the real rights have a “legal” feature, as Art.551 point 11 expressly states that real rights are “the rights qualified as such by the law”, as well as the fact that the class of real rights includes the administration right, the concession right as well as the right of usage. Although the administration right with regard to assets that are part of public property (*our emphasis*) and the concession right have been unanimously defined by the doctrine and in the case law as real rights, their listing within the NCC underlines once more the up-to-date character of this legal enactment. As regards the qualification of the usage right as real right, we note that, on one hand, this article does not explain the type of real right it refers to, and, on the other hand, NCC contains special provisions applicable to the gratuitous usage right, which pertains to the assets that are the object of public ownership. As the legal doctrine referred, prior to the NCC, to a real usage right on parcels of land, according to Art.18 para.(3) of Law No.18/1991, but also qualified a usage right arisen out of lease agreements as a receivable right, the current provisions of Art.551 point 9 might lead to different interpretations in practice. Given these reasons, it would be recommendable that the future law for the implementation of NCC clarifies what type of usage right is referred to in Art.551 point 9 (e.g. our assumption is that the lawmaker referred to the gratuitous usage right governed by Art.874-875). As the list of real rights is limited (and they have a legal character), we note that the retention right – a right that was recognized prior to the NCC only by the legal doctrine and case law- is not qualified as a real right, despite of the majority opinions expressed by legal scholars prior to the enactment of NCC.

We also take note, as a novelty, of the definitions given to the object of the private property right (Art.553), as well as of the public property right (Art.554). Also new are the provisions of Art.553 para.(2) that, unlike the previous Art.447 CC, state that vacant successions and the immovable asset without an owner (i.e. immovable asset in respect of which they owner waived its ownership right), become part of the private domain of communes, towns and municipalities. This new approach under the NCC is consistent with the classification criteria used for determining whether an asset is object of public property, as the public usage or public interest would be hardly justified in the case of vacant successions or of the assets without owner.

1.4.(b). Title II “Private property”

[Art.555-692] This title of the NCC contains a detailed presentation of the rules governing the object, extent and the termination of private ownership right, the limits of its exercise, the accession – as a method for obtaining the ownership right- as well as two of the specific types of private ownership, namely the joint ownership and the periodic ownership.

As many of the NCC provisions included within this title represent new approaches of some of the issues extensively debated upon by the legal scholars, we made detailed comments with regard to these issues within the analysis of each relevant provisions. Nevertheless, we emphasize the importance of the rule enacted under Art.556 para.(4), according to which the final registration (*in Romanian “intabulara”*) of a certain right with the land book has a constitutive effect, leading to the creation of the respective right. This new approach will change the essence of land book publicity

system and shall have a major effect on the activity of land book offices, being also able to trigger a significant raise of the number of certain types of law suits in front of the courts of law.

Mention should be made also of the regulation, as a premiere, of the restitution claim (*in Romanian “actiune in revendicare”*), and also fo the detailed regulation of the principles governing the accession and the joint ownership.

[Impact] As the provisions included in this title represent, to a great extent, a replication of the principles stated under the CC or of the majority opinions expressed by the doctrine and in the jurisprudence, it is not likely that they have a financial-budgetary impact or effects on the human resources allocated to the current legal system, except for the significant increase in the workload of land book offices that may also trigger an increase of the number of personnel required by such offices. Apart from the above, and despite of the fact that such analysis does not make the object of this assignment, we take note of the new powers and duties granted to the courts of law that, under the new regulations, have the right to step into the legal relationships and take decisions in lieu of one of the parties thereto; as a novelty, the decision of a court of law will replace a party’s will, and for such purpose the court will not be limited to assessing obligations previously undertaken by the respective party, but will be entitled to issue its decision on the basis of the court’s assessment of the utility or opportunity of having certain deeds concluded; moreover, the courts may even impose to co-owners to give up their ownership quota (Art.692). We consider that, in many cases, these new powers given to the courts of law are excessive and may even raise constitutionality questions; more details on these aspects have been included in the following analysis.

(i). Chapter I “General provisions”

[Art.555-566] We note that certain principles, which are fundamental for a complete regulation of the legal regime of private ownership, have been defined and systemized. In this respect, apart from a complete listing of the means for obtaining the ownership right, which is made with the observance of the opinions expressed by the legal doctrine, we note that the cases when the private ownership right ceases, as well as the specific mode for defending the ownership right against third parties, are also regulated.

[Impact] Given that the principles enacted within this chapter have been already recognized by the doctrine and applied in the case law, we deem that they will not have an impact from a financial-budgetary or human resources perspective on the current judicial system.

(a) Section 1 “Subject, extent and cessation of the private ownership right”

[Art.555-562] As indicated above, the NCC contains express and more detailed provisions with regard to the private property than those of Art.480-482 CC. In addition, the new provisions are better systematized, which should allow for a better understanding of the concepts regulated thereby.

In Art.555 NCC takes over the definition given by Art.480 CC with regard to the subject of private ownership right, but amends such definition in accordance with the interpretations and recommendations given by the legal doctrine.

Defining the limits for the exercise of the private ownership right, in Art.556, is a new approach, having regard to previous regulations. Although such definition is consistent with the majority opinions expressed by the doctrine, we note that NCC indicates as criterion for determining the limits of such exercise, the corporeal limits of the things that are the subject of the ownership right. Nevertheless, this criterion does not apply to intangible assets; therefore, it will be the duty of legal doctrine and case law to agree and determine the limits for exercising the ownership right on intangible assets. The provisions of Art.556 para.(2) and (3), according to which the exercise of the ownership right may be limited by law or by agreement is consistent with both the provisions of the Constitution and of the ECHR Convention.

Art.557 contains a complete list of the means for obtaining the private ownership right, by taking over the critics made by the legal doctrine with regard to the previous provisions of Art.644 and Art.645 CC. Of specific importance is the provision of Art.557 para.(4), according to which the ownership right on immovable assets is obtained by registration of such right with the land book, unless the law expressly provides otherwise. The constitutive character granted to the land book registrations represent a major amendment brought to the current legal system, and which will have evident benefits in the future. Given the novelty of this provision, it may be expected that the practical effect of this regulation is very strong, an increase of the workload of land book offices and of the number of law suits referring to land book registrations being also expectable. Being a fundamental change of the modalities for obtaining the private ownership right on immovable assets, we consider that a public information campaign should be conducted, in order to ensure that the rights of public are effectively protected.

Art.558 enacts the *res perit domini* principle, stating that such principle may be amended by the parties' agreement.

Art.559 regulates the limits of the private ownership right on lands, namely the surface, the underground and the air above the respective lands. This new regulation, which amends the previous provisions of Art.489 and Art.490 CC, represents a particular application of the corporeality principle enacted by Art.556. However, it should be underlined that the exercise of the ownership right on the underground, on the water and of the air above the lands has to be made in accordance with the special legal provisions governing such subjects. As the wording of Art.559 is very general, it is recommendable that the future law for the implementation of NCC provides for the necessary details in this respect, and that includes also the rules applicable to the abusive exercise of rights.

The obligation to put boundaries, as regulated by Art.560, is not new, but is a rephrase of the provisions of Art.584 CC. The right to put boundaries, regulated by Art.561, represents, at its turn, a rephrase of Art.585 CC.

We note, as a novelty, that the cases when the private ownership right ceases are also regulated in Art.562, and that such regulation was missing from previous enactments. As regards an owner's right to give up its ownership right, such case has been only indirectly regulated by Law No.18/1991. In this respect, a novelty is the provision according to which the private ownership right on an immovable asset ceases upon the registration with the land book of the owner's waiving of its ownership right, a provision that is consistent with the new role of the land book under the NCC.

(b) Section No.2 “Defending the ownership right”

[Art.563-566] We have to underline the novelty of NCC provisions referring to the means of action for defending the private ownership right, as such means of action have been already recognized by the legal doctrine and case law. The absence of an express regulation of the restitution claim (*in Romanian “actiune in revendicare”*) has been already considered an important deficiency of the current CC.

Art.563 incorporates the unanimous opinions expressed by the legal doctrine and in the case law with regard to the restitution action both with regard to its unlimited (imprescriptible) character and its exercise. The recognition of the ownership right in favor of the bona-fide third party acquirer is consistent with the case law solutions, and represents in the same time an important measure ensuring the stability of the legal environment. Nevertheless, as Art.563 para.(3) refers to the bona-fide acquisition of the ownership right according to legal requirements, and given the fact that such principle has been subject to various interpretations of legal scholars, we recommend that the law for the enforcement of NCC indicates the cases that are referred to under Art.563 para.(3). Such legal interpretation would allow a consistent practice of the courts of law.

Consistent with the constitutive character of land book registrations, Art.565 provides that the ownership right is evidenced by the land book excerpt. In practice, this provision may lead to an increase of the law suits for land book rectification, as this is the sole type of action for verifying the legality and the validity of the documents that were used for land book registrations.

As regards the effects of the restitution action, the provisions of Art.566 that refer to such effects are consistent with the opinions of the legal scholars and with the resolutions issued so far in the case law, which should determine an effortless implementation of the new legal provisions. We take note again of the express recognition of the retention right in favor of the third party who made useful and necessary expenses with regard to the asset subject to the restitution claim, a retention right that is effective until the third party receives back its expenses or a satisfactory guarantee that such expenses will be repaid.

The express regulation of the means of action referring to the denial of a third party’s alleged right on an asset (*in Romanian “actiuni negatorii”*) is also a novelty. As these provisions represent an expression of the legal doctrine and case law, their enforcement is not likely to have any significant impact.

(ii). Chapter II “Accession”

[Art.567-601] NCC contains a detailed regulation of the accession - modality of obtaining the ownership right; such regulation has been made by taking over, on one hand, the principles established under the CC and, on the other hand, by defining new rules that should clarify the accession mechanism, in some cases by taking over opinions expressed by legal scholars. Nevertheless, some of the NCC provisions with regard to accession are still not very clear (especially those referring to the moment when ownership right is born), and they should be reviewed under the future law for the implementation of NCC.

As regards its structure, this NCC chapter treats separately the accession of movable assets from the accession of immovable assets, and in the latter case provides different regulations for each type of accession – natural or artificial – as identified in the legal doctrine and case law.

[Impact] Given that the provisions of this chapter propose several solutions to the theoretical problems analyzed by the legal scholars, which reflect, to a great extent, the opinions already expressed with regard to those issues, such new provisions are not likely to have a legal or financial impact on the current legal system. However, as indicated before, due to the change of the main role of the land book, and to the constitutive effect that registrations in the land book will have, it is likely that the activity of land book offices significantly increases, which may have effects on the number of personnel required to perform the respective activities. A detailed comment on this issue is included in the analysis referring to Title VII “Land Book”.

(a) Section 1 “General provisions”

[Art.567-568] Art.567, which defines accession as a mode of obtaining the ownership right, rewords the previous definition given by Art.482 and Art.486 CC without mentioning the principle according to which the owner of an asset obtains the products of such asset by means of accession. For better structuring purpose, Art.568 contains a list of the accession types, namely natural or artificial.

(b) Section 2 “Natural immovable accession”

[Art.569-576] The NCC provisions in this matter (Art.569-574) reflect, with minor differences triggered by language evolution and systematization purposes, the provisions of Art.495-498 and Art.500-502 of the CC.

New is the rule established by Art.575, which, unlike Art.502 CC, provides that the dried bottom of river that had changed its course will be subject to the legal regime established under specific legislation. This provision is consistent with the principles currently applicable under Romanian law to the legal regime of waters, and it allows the lawmaker to intervene any time a change of such special provisions is required.

As regards the natural accession on animals, Art.576 establishes new rules than those provided under Art.503 CC. Firstly, Art.576 para.(1) refers to natural accession of domestic animals, a case that was missing from Art.503 CC. According to the new provision, the owner of the land on which the domestic animals have entered becomes the owner thereof, if they are not claimed back by their initial owner within 30 days after the date when the owner of the land submitted to the cityhall a written information stating that such animals have entered on his land. Moreover, Art.576 no longer makes reference to wild animals, which were the subject matter of of Art.503 CC, as the accession thereof is subject to special legal provisions, but to those animals and birds referred to by the legal doctrine as “semi-wild”. An innovation is also the express rule regarding the swarm of bees, the respective provisions of Art.576 para.(3) being taken over from the ICC. Having regard to these new provisions of Art.576, the enforcement of the accession rules with regard to animals and/or birds will require that more complex evidences are administered, than requested under the current legal provisions.

(c) Section 3 “Artificial immovable accession”

1. Common provisions

[Art.577-579] NCC contains detailed provisions with regard to artificial immovable accession; these provisions represent, on one hand, a reflection of certain majority opinions of legal doctrine and case law and, on the other hand, new solutions to certain practical problems that have been identified in time with regard to artificial immovable accession.

From a structural perspective, the NCC provisions on artificial immovable accession are treated as common (general) provisions, specific rules depending on the type of accession they refer to (namely to works performed by the land owner with materials belonging to a third-party owner, or to works performed by a third party on another owner’s immovable), and express provisions. This structure is consistent with the categorization made by the doctrine when analyzing the rules applicable to artificial immovable accession.

Firstly, we note that the main criterion for artificial immovable accession is “the immovable”, and not “the land”. Although this aspect has been already agreed upon in practice, we note its reflection in the relevant legal provisions.

Art.577 contains an express regulation of the main principle of artificial immovable accession, according to which the constructions, works, plantations and any other works performed on an immovable asset (generally referred to as “works”) belong to the owner of the respective immovable asset (hereinafter referred to as “the landlord”). We note that Art.577 provides also an answer to the doctrinal dilemma referring to the moment when the ownership on such works is born in the landlord’s patrimony. In this respect Art.577 para.(2) provides that the landlord obtains the ownership right on the works made with regard to its immovable asset from the moment when the work is commenced, throughout its performance, unless the law or a legal deed expressly provide otherwise. We note that, by means of this rule, the lawmaker has embraced one of the opinions expressed in the legal doctrine, which has stated that the landlord obtains the ownership right on the works by means of the mere incorporation of the materials in the immovable asset. Nevertheless, as indicated below, other NCC provisions imply that an expression of the landlord’s will is required in order for the accession to take place and for the landlord to obtain the ownership right on the works made with regard to its immovable asset, and that such expression of will is made by the landlord’s request for registration of its ownership right in the land book. For this reason, we deem that the law for the enforcement of the NCC should clarify and amend the general provisions of Art.577 para.(2) in order to be consistent with Art.557 para.(4).

Art.578 contains a classification of works depending on their autonomy and also on their utility. A classification of works that are added to an immovable asset is also made in consideration of the durable or temporary character thereof.

Art.579 para.(1) takes over the provisions of Art.492 CC, establishing the assumption that any work made on an immovable asset belongs to the owner of such asset and that it is made on his expense, unless otherwise proven. According to Art.579 para.(2), such assumption is dismissed when the work is made by the holder of a superficies right, or in the case the landlord has not registered his ownership right on the new work in the land book, or in other cases expressly provided by the law. These

provisions of Art.579 para.(2) should be coordinated, in order to be correctly interpreted, with the provisions of Art.577 para.(1), according to which artificial immovable accession operates in favor of the landlord, unless otherwise stated by the law or by a legal deed; consequently, any legal deed by means of which the landlord allows a third party to perform a work on his immovable and recognized the third party's ownership right thereon should represent an "evidence" for the purpose of Art.579 para.(2). We deem that also the provisions of Art.579 para.(2) stating that the accession assumption is dismissed if "the landlord has not registered his ownership right on the new work" may be interpreted in different manners in practice. As provided by Art.557 para.(4), the ownership right is obtained by registration with the land book, unless the law otherwise provides. Corroborating the provisions of Art.557 para.(4) with Art.577 para.(2), it follows that a firm manifestation of the landlord's will to make use of the accession on the work is required, in the absence of which the accession assumption does no longer operate. Therefore it is obvious that, finally, the lawmaker considers that the ownership right on the work is not born in the landlord's patrimony during the time when the work is performed, as provided in Art.577 para.(2), but only upon the registration of such ownership right on the work in the land book. Apart from this contradiction between Art.557 para.(4) and Art.577 para.(2), the rule according to which the accession assumption is dismissed if the "landlord has not registered the ownership right on the new works" seems to be incompletely worded. We recommend that the law for the enforcement of NCC provides for how long should the landlord remain passive, as regards the registration with the land book, so that such passivity triggers the dismissal of the accession assumption. Moreover, this obligation of registration with the land book, which is indirectly imposed on the landlords, should be correlated with the legal provisions currently applicable with regard to constructions. It is therefore necessary to take into account that, according to Law No.50/1991, until the execution of the handing-over receipt minutes, a construction may not be finally registered in the land book. Consequently, the landlord is not able to ask for the registration of his ownership right on a construction until the completion thereof and the execution of the handing-over receipt minutes (execution that is controlled by the constructor), and during this time his passivity may be regarded as an evidence against the accession assumption according to Art.579 para.(2). These issues should be clarified by the future law for the implementation of NCC.

2. Works performed with a third party's materials

[Art.580] Art.580 takes over, in a slightly different wording, the provisions of Art.493 CC, and provides the rules applicable when the work is made by the landlord but with materials belonging to a third party. The solution proposed by Art.580 is not different from that provided under Art.493 CC, namely the landlord becomes the owner of the respective work and the owner of the materials is entitled to receive the price of such materials and to be indemnified for any damages he might have incurred due to the performance of the respective work.

As stated above, NCC regulates the accession of autonomous works separately from the accession on added works. This approach is new, if compared with CC, which did not specify which rules applied to added works.

3. Durable autonomous work made on a third party's immovable

[Art.581-582] Art.581 regulates the case when durable autonomous works are made by a bona-fide third party on an immovable asset belonging to another owner. In such a case, the owner of the immovable asset (landlord) benefits of any of the following rights: (a) to ask the court of law to order his registration in the land book as owner of the work, and to pay, at his choice, either the value of the materials and workforce used for the performance of such work, or the amount with which the value of the immovable asset has increased due to the respective work, or (b) to ask that the author of the work purchases the immovable asset at the market value such asset would have had should the work had not been performed. While the solution provided by Art.581a) takes over the principle established under Art.494 para.(3) second thesis of CC and also observes the newly-established constitutive effect of land book registrations, the solution regulated under Art.581 let.b) is an innovation. This latter measure, which may be ordered by the court upon the landlord's request –ordering the bona-fide third party who performed the work to purchase the immovable asset – represents a solution that ensures the effective protection of the landlord's rights, as it represents an equitable answer to the hypothesis in which the landlord was not interested in taking over the work. In the same time, the proposed solution is equitable also for the bona-fide third-party, who may consolidate his ownership right and use the performed work.

Art.582 refers to the case in which the long-lasting autonomous works are performed by a third party in bad faith. In such case, the landlord is entitled: (a) to ask the court of law to order his registration in the land book as owner of the work, and to pay, at his choice, either half of the value of the materials and labor used for the performance of such work, or half of the amount with which the value of the immovable asset has increased due to the respective work, or (b) to ask that the author of such work demolishes it, or (c) to ask that the author of the work purchases the immovable asset at the market value such asset would have had should the work had not been performed. We note that, in addition to the new solution proposed (i.e. the landlord's possibility to force the third party to purchase the immovable asset) that is identical as in the case of bona-fide constructors, the fact that the landlord may take over the work by paying only half of the value of materials and workforce, or half of the value of the amount with which the value of the immovable asset has increased. By these provisions, the lawmaker answered to the critics raised in the legal doctrine with regard to Art.494 para.(3) first thesis CC, which stated that the treatment of the bad-faith third party was better than that of the bona-fide third party in the case when the landlord elected to take over the work. According to the new provisions, given the landlord's right to pay only half of the value of the work, the sanction applied to the bad-faith third party is evident. The comments made by the doctrine and case law, according to which constructions may be demolished only on the basis of the authorizations issued according to legal provisions, have been also taken over and reflected in the wording of Art.582 para.(2).

4. Durable added work made on a third party's immovable

[Art.583-585] NCC regulates in Art.583, Art.584 and Art.585 the obligations of the landlord who, on the basis of accession, obtains the ownership right on long-lasting added works performed by a third party with regard to the landlord's immovable asset.

Art.583 provides that the landlord obtains the ownership right on the necessary added works since the moment when such works are performed, and that he has the obligation to pay to the author of such works the reasonable expenses made for such works, even if the immovable asset does no longer exist. If the author of the work has acted in bad-faith, the landlord is entitled to deduct from the due amount the value of the immovable's fruits minus the value of the expenses made for obtaining such fruits.

Art.584 contains provisions with regard to useful added works, which provide for different treatment depending whether the author thereof had acted in good or in bad faith. Consequently, according to Art.584 para.(1), the landlord becomes the owner of the useful work made in good-faith ever since the moment when such work is performed and has the obligation to pay, at his choice, either the value of materials and workforce, or the amount with which the value of the immovable has increased. If the work was performed in bad-faith, Art.584 para.(2) provides that the landlord may chose between: (a) becoming the owner of the work, with or without registration in the land book, depending on the type of the work, by paying to the author of such work half of the value of work, or half of the amount with which the value of the immovable asset has increased, or (b) requiring that the author of the work is obliged to demolish it and to put back the immovable asset in its initial status and also to payment of damages. Should the work have a consistent value, irrespective whether it has been performed in good or in bad faith, the landlord is entitled to ask the author of the work to purchase the immovable asset at the value such immovable has if the work had not been performed. We note that the cases regulated by Art.584 para.(1) and Art.584 para.(2) are not consistent with the rule established with regard to the moment when accession operates (i.e. the moment when the work is performed). This inconsistency should be clarified by the law for the enforcement of NCC.

As regards the works without a mandatory character, Art.585 provides the landlord's right to take over these works, without any land book registration being required, and without having any obligation to indemnify the author of the work for its loss, and also the landlord's right to ask for the demolition of such works. Moreover, Art.585 para.(2) provides that the bona-fide constructor is entitled to dismantle the works until the immovable asset is given back to the landlord, provided that the initial status of the immovable asset is re-established. Having regard to such right of the author of the work, it is our understanding that the landlord does not obtain the ownership right on the respective work upon the moment when such work is effected (as previously stated by NCC), but only in the case when the immovable asset is given to him and he expresses his will to take over the work.

5. Meanings of terms

[Art.586] We should note the novelty of Art.586 definition of bona-fide, with regard to a third party who performs a work on an immovable asset belonging to another person. The lawmaker has taken over to a great extent, also in this case, the opinions expressed by legal scholars; it is therefore clarified that a third party who considered himself as owner of the immovable asset when he performed the work, has acted in good-faith; such belief should have been grounded on the land book content, or on an ownership cause that did not have to be registered in the land book, except when the defect of the third party's alleged ownership title was evidenced by the land book or was otherwise known by such third party. According to Art.586 para.(3), a third party executing a work on the basis of a superficies right or on the basis of any other right entitling him to obtain the ownership right on the work performed on an immovable asset is also acting in good-faith. The wording of Art.586

para.(3) should be clarified by the law for the enforcement of NCC, as the third party referred to therein should be not aware of the defects of the title that granted him the respective superficies right. In the absence of such clarification, it could be interpreted that the landlord who had granted a superficies right might also benefit of accession according to Art.581, which would make the superficies right useless. The opinions expressed by the doctrine that bona-fide presumption does not operate if the author of the work failed to obtain the administrative authorizations required under the legal provisions for the performance of the respective work are also reflected in Art.586 para.(2).

6. Special provisions

[Art.587-597] As mentioned above, NCC took over numerous opinions expressed by the legal scholars with regard to different aspects pertaining to the artificial immovable accession that have been noticed in practice. A part of these opinions are reflected in Art.587-597.

Art.587 refers to a long-lasting work that is made partly on the land owned by the author of such work, and partly on the neighboring land, a difference being made for the bona-fide and the bad-faith constructor. If the author of the work acts in good-faith, the owner of the land on which part of the work is performed is entitled to ask for the registration in the land book of a joint ownership right on the resulting immovable asset, including the land; the ownership quota will be established on the basis of the contribution of each owner to the respective immovable. According to Art.587 para.(2), if the author of the work acted in bad-faith, the owner of the neighboring land is entitled to ask for the demolition of the work and to ask damages from the author of the respective work, or, alternatively, to ask for the registration in the land book of a joint ownership right on the resulting immovable asset; in such latter case, the ownership quota will be determined by taking into consideration half of the value of the work. If the parties fail to agree on the determination of the ownership quota, the value of each party's contribution will be established by the court of law. These solutions provided by Art.587 are new, and they are likely to be often applied in practice.

Art.588 settles the rule for the accession on temporary works. According to this provision, the temporary work has to be dismantled by its author, unless there is another agreement between the author of the work and the landlord; nevertheless, the third party who performs the work in bad faith is obliged to indemnify the landlord for all damages incurred by the latter, including the damages arising due to the landlord being temporarily deprived of the usage of its immovable asset. We note that Art.588 first thesis makes reference to an "agreement" that may be concluded by the landlord with the author of the work; a possible interpretation is that landlord would not be entitled to ask for the ownership of the respective work, unless the author of the work agrees.

Art.589 states that any land book registration of the ownership right obtained by means of accession shall be made, when such registration is necessary, either on the basis of an authenticated agreement concluded between the relevant parties, or on the basis of a court decision. This rule established by Art.589 does not deviate from general provisions applicable to land book registrations, but contravenes to the previous provisions of the NCC stating that the ownership right is borne, on the basis of the accession, while the works are performed. As indicated before, this inconsistency should be solved by means of the future law for the implementation of NCC.

A novelty is also the rule established by Art.590, according to which, until the agreement is concluded or until the landlord files a claim with the court, the author of the work is entitled to dismantle the work and take the respective materials. According to Art.590 para.(2), only the author of the work who acted in bad faith may be obliged to pay damages to the landlord. Although the reason behind Art.590 is obvious, we underline the fact the constructor's right to dismantle the work contravenes with the previous principles referring to the moment when the landlord's ownership right is born, and such inconsistency should be clarified.

Art.591 para.(1) states that the time period after which the author's right to demand the amounts owed to him by the landlord would be barred, is not counted as long as the author is allowed by the landlord to hold the immovable asset. This provision reflects the opinions of the legal scholars, who have admitted that, until there is an expression of the landlord's will to use his accession right, the author of the work is not entitled to claim the indemnity to he is entitled. We note the novelty of Art.591 para.(2), according to which the bona-fide author of the work benefits of a legal mortgage on the immovable asset until he receives from the landlord all amounts to which he is entitled.

NCC establishes the rules applicable if the landlord requires that the author of the work purchases the immovable asset, according to Art.581, Art.582 or Art.584. Art.592 provides that, if the parties fail to reach an agreement, the landlord may ask the court to settle the sale-purchase price and issue a judgment standing for a sale-purchase agreement. In such a case, the landlord will benefit of a legal mortgage on the immovable, as guarantee for payment of the purchase price by the author of the work.

Art.593 refers to another problem debated by the doctrine, namely to the influence that the landlord's passivity during the performance of the works has in the process of determining whether the author of the work acts in good or bad faith. This time, the solution given by Art.593 is different from the solutions rendered in the case law, as it states that the bad-faith of the author of the work is not diminished by the landlord's passivity. However, a different solution had been given for such hypothesis in the case law, as it had been found that a landlord's request for demolition of a construction was abusive, if such landlord had been passive during the construction of the respective work.

Art.594 establishes the obligation of the third party who executes a work on an immovable asset belonging to another owner with materials owned by another party to indemnify the latter for the value of such materials plus any damages, as the case may be.

The solutions given in the case law with regard to the methods for calculating indemnities to which the authors of the works were entitled, are reflected in Art.594, which provides that the court of law vested with a request for calculating the indemnity has to take into consideration the market value of the asset at the date when the judgment is given. We note that, although the principle settled in Art.594 had been constantly applied by the courts, it was a solution criticized by the doctrine, which stated that the indemnity should be calculated on the basis of the value of the asset at the date when the work had been performed.

According to Art.596, the holder of a superficies right or of any other real right on another party's immovable asset that entitles him to obtain ownership on a work performed on the respective immovable, will, in the case of accession, benefit of the rights and be bound by the obligations

provided for the landlord, unless otherwise expressly provided by an agreement. The author of the work who holds a real right that does not entitle him to obtain ownership on the respective work will be treated as a bad-faith constructor, or, in the case the work is added, as a holder of a usufructus right.

Art.597 provides that the works performed by a mere holder of an asset are subject to the rules applicable to the bad-faith author of works, except that such holder may not be obliged to purchase the immovable asset. Given that NCC does not contain specific rules applicable to the bad-faith possessor, but to the bad-faith author of a work, the wording used in Art.597 should be unified.

(d) Section 4 “Movable accession”

[Art.598-601] Unlike the previous provisions of the CC, NCC provides for more simple rules applicable with regard to movable accession. Consequently, the sole criterion used in order to determine the person entitled to exercise the ownership right on a movable asset created with the materials of another person is to determine the proportion between the value of the materials and the value of the work, without classifying the assets in main assets and accessories.

According to Art.598, if an asset is manufactured with the materials belonging to a different owner, the ownership right on the movable asset obtained belongs to the manufacturer or to the owner of the materials, depending on the proportion between the value of the materials and the value of the works at the manufacture date. The owner of the asset has to compensate the owner of materials, or the manufacturer, as the case may be, for the value of materials or the manufacture.

According to Art.599, in the case the difference between the value of the materials and the value of the manufacture is not significant, a joint ownership will be exercised on the respective asset, according to the joint ownership rules.

The ownership right on an asset created by adjoining two or more assets having different owners will be determined according to the rules established by Art.598, respectively by Art.599. In addition, Art.600 sets-forth that each of the owners of the adjoining assets may request their separation, provided that such separation does not cause to the other owners damages that exceed ten percent of the value of their respective assets.

(iii). Chapter III “Legal limits of the private ownership rights”

[Art.602-630] NCC reflects the opinions expressed by the legal doctrine with regard to the classification of the obligations arisen out of or in connection with neighborhood relationships as actual limits to the exercise of the ownership right. This chapter of NCC regulates both the rights and obligations qualified under the CC as natural easements, and the obligations imposed on owners of immovable assets under specific legal provisions, and defines them as legal limits of the ownership right. Apart from such limits, the principles governing the conventional limits, or the limits defined by the courts of law, are also defined.

[Impact] Although the provisions included in this chapter are important from a theoretical perspective, they are not expected to have an institutional, financial/budgetary or human resources impact on the current judicial system.

(a) Section1 “Legal limits”

[Art.602-625] NCC includes among the legal limits for the exercise of the ownership rights all obligations arisen in connection with the protection of environment, and with neighborhood that, according to legal provisions or to customs, belong to the owner, as well as the obligations referring to a right of way for utilities, for the execution of works, for regaining possession, or those determined by the status of urgency. The legal limits analyzed under the NCC will be added to those that may be established by means of special legal provisions governing the legal regime of certain assets, or which define the conditions for performing certain activities.

1. Common provisions

[Art.602-603] The subsection entitled “Common provisions” includes the principles that explain the reasons for imposing limits to the exercise of the ownership right. Art.602 takes over the provisions of Art.586 CC, stating that the legal limits of the ownership right may be established either for public or for private interest; depending to the type of interest protected, the limits that serve a private interest may be amended by the agreement of the relevant parties, but their creation and content have to be registered in the land book in order to become enforceable against third parties. In order to have a complete regulation of the principles governing the limits for the exercise of the ownership right, Art.603 repeats the provisions of Art.44 para.(7) of the Constitution.

A detailed regulation is provided also with regard to those limits that had been qualified before by the CC as natural and legal easements.

2. Water usage

[Art.604-610] The NCC provisions referring to water usage take over and detail the provisions of Art.578-582 CC, but make reference to new limits for the exercise of the ownership right.

Establishing the obligation of the landlord owning a lower land to accept the natural running of waters coming from the upper land located in the vicinity of his land, and taking over the provisions of Art.578 CC, Art.604 settles also the right of the landlord of the lower land to perform, with the authorization of the court, any works that are necessary in order to change the course of such waters running on its land. Art.605 refers to special cases that are defined as natural running of waters. It is considered that the landlord of an inferior land may not stop the running of waters released by underground works effected on the upper land, or of waters coming from drainage of swamps, or of the waters that were used for household, agricultural or industrial purpose, if the course of such running waters is going to another course of water or to a sewage channel. The landlord of the upper land has to take all necessary measures in order to ensure that rights of the landlord of the lower land are affected as less as possible, and to repair any damages brought to the lower land. The obligations provided by Art.605 with regard to the owner of the lower land are not applicable, if a construction, garden, yard or graveyard are built on such land. It is arguable whether such concept of natural running waters may include the waters used for household or industrial purposes by the landlord fo the upper land, as well as the reasons taken into consideration when only the lands with constructions have been excluded from the application of Art.605. Moreover, it is not justified the absence from Art.605 of the right of the landlord of the lower land to make the necessary works in order to change the course of the running waters, if such waters determine any damage.

There is a new regulation with regard to the right of landlord who disposes of water sources to make any necessary works in order to collect such waters on the land of the neighboring land (Art.606). The notions used within this article, respectively “natural or artificial waters”, as well as the provisions referring to performance of works, need to be determined, in practice, on the basis of the special legal provisions applicable with regard to this matter, namely Law No.107/1996.

A new limitation with regard to the landlord’s right to dispose of the excess water is provided for in Art.607, which establishes such landlord’s obligation to make available such excess of water (against compensation) to the landlord who would obtain the necessary water only with excessive expenses.

As regards the usage of water springs, Art.608 takes over the provisions of Art.581 CC and in part of Art.579 CC, without making reference to the “rights gained” by the landlord of the lower land with regard to a water spring. In order to avoid inconsistent interpretations of these provisions in practice, we recommend that the law for the enforcement of NCC clarifies the methods by means of which the landlord of the lower land may obtain such rights on the springs located on the upper land, and details the formalities that have to be performed in order to ensure that such rights are created or perfected, as the case may be.

The principle established by Art.609 with regard to the right of the owner on the land of which a spring is located to receive indemnities if another person has determined the drainage, reduction or has otherwise affected the waters of the respective spring, does not represent a limit in the exercise of the ownership right but a consequence of torts, therefore it should have not been included in this chapter of NCC.

Art.610 makes reference to special legal provisions governing the waters legal regime, but is improperly worded. The provisions of Art.610 (“the provisions of this paragraph are to be completed with [...]”), should be corrected, as the special legal provisions would apply with regard to the entire chapter.

3. Roof rain drops

[Art.611] The limits for the exercise of ownership right previously defined by the NCC as legal easements are also reflected in the NCC. The landlord’s obligation to construct the roof of his house in such a manner so that the rain waters do not fall from the roof on the neighboring land, as it has been provided by Art.615 CC, is also reflected by Art.611.

4. Distance and intermediary works required for certain constructions, works and plantations

[Art.612-613] The rules referring to the distance that needs to be respected for certain constructions, works or plantations, to the view on the neighboring land and to the right of way, as established by Art.607-609, Art.611-614 and Art.616-619 CC, have been reflected, with some amendments, by the NCC.

Art.612, which refers to the minimum distance between constructions, works or plantations and the border line between neighboring lands, establishes, unlike Art.610 CC, the obligation to observe a distance of at least 0.6 m unless otherwise provided by the law or town-planning documentation. A clarification has been brought with regard to the previous provisions of CC with regard to planting of

trees, as Art.613 NCC provides that the trees whose height reaches at least 2 m, may be planted at a distance of at least 2 m from the border line. Art.613 para.(2) and (3) reflect the provisions of Art.608 and Art.609 CC.

5. The view on the neighboring property

[Art.614-616] As regards the limits referring to the view on the neighboring property, Art.614, which refers to the construction of a window or of another type of opening in the common wall between two constructions, takes over the initial provisions of Art.612 CC. New distances have been established for the construction of windows that enable viewing on the neighboring property (Art.615), as follows: 2 meters between the limit of the immovable belonging to another owner and the immovable belonging to the owner of the immovable in which the window, balcony, etc. have been incorporated, respectively 1 m if such window, balcony, etc. are not parallel with the border line. The provisions of Art.616 are new and they incorporate solutions given in the case law, according to which windows for light may be created at any distance from the neighboring land, if they are not built so as to allow the view on such land.

6. Right of way

[Art.617-620] The right of way, namely the limits imposed for the ownership right of a landlord on which such right of way is created, are detailed in Art.617-620. Although the new provisions are consistent with the previous provisions of Art.616-619 CC, we take note of the fact that certain concepts have been clarified, although certain inconsistencies are still to be corrected.

Art.617 establishes the right of way on the neighboring land in favor of the owner of a parcel of land that does not have direct access to a public road. NCC does no longer include the provisions referring to the exercise of such right of way (i.e. on the shortest road), but establishes that such right of way must be used so as to affect as less as possible the exercise of the ownership right on the land that has access to the public road. Art.617 para.(4) provides that the right of way is not subject to the status of limitations, and in such manner incorporates the opinions unanimously expressed by the legal doctrine, and provides also that the right of way is terminated once the land in favor of which it has been created obtains an access to the public road. We take note that Art.617 does not refer to the right of the landlord on whose land the right of way is imposed, to receive indemnification for the losses incurred due to the exercise of the right of way. However, as Art.620 refers to the status of limitation applicable to the claim for indemnification, it seems that an express reference to such type of claim could be easily included in Art.617.

Art.618 refers to special cases for the exercise of the right of way; according to Art.618 para.(1), if the absence of access to the public road was caused by the execution of a legal deed (sale, exchange, partition, etc.), the right of way will continue to be exercised in the same manner (place) as exercised before the conclusion of the respective deed. According to Art.618 para.(2), if the absence of the access is due to the fault of the landlord who loses the access to the public road, the right of way on the neighboring land will be granted only with the approval of owner of the land that already has access to the public road, and against payment of a compensation. The provisions of Art.618 para.(2) should be clarified, so as to prevent contradictory interpretations in practice. Firstly, the criteria used for determining whether the access to the public road has been lost due to the fault of the landlord

should be defined; in this respect, the case law considers that even if the landlord lost the access to the public road due to the conclusion of a sale-purchase agreement or partition agreement, he would no longer be entitled to benefit of a right of way, unless such right is expressly granted by the owner of the land having access to the public road. Given that this case is expressly referred to in Art.618 para.(1), it may be construed that the responsibility for concluding such deed does not belong to the landlord who lost access to the public road, according to Art.618 para.(2). Moreover, even the grounds of Art.618 para.(2) are doubtful. This is mainly due to the fact that the right of way established with the consent of the neighboring landlord represents a conventional, and not a legal limitation of the exercise of the ownership right. Therefore, the provision according to which the “passage may be made against payment of the double amount of the indemnification” is not accurate, given the fact that the right of way is established by means of the parties’ agreement, and that such agreement may detail the conditions in which the right of way may be exercised; last, but not the least, the term of “indemnification” is not accurate, as the legal provision refers to a “price” for the right of way, and “indemnification” refers to compensation for damages. For these reasons, we recommend that Art.618 para.(2) is revised.

Art.619 lists the modalities by means of which the right of way may be obtained, namely by agreement, court decision, or further to continuous usage for at least ten years. This latest provision is an innovation, and it deviates from the opinions expressed in the case law. According to Art.617 para.(3), the right of way is not subject to the status of limitations, and does not cease if it is not exercised. Therefore, it is arguable how the right of way may be obtained by continuous usage. Moreover, it should be required that the right of way is exercised without any opposition of the owner on the land on which the right of way is exercised, but such requirement is not included in the NCC. As a conclusion, the provisions referring to the right of way obtained by continuous usage should be reviewed, in order to prevent potential abuses that may occur in practice.

Art.620 clarifies the initial provisions of Art.619 CC referring to the duration of the term applicable under the status of limitations with regard to the indemnification claim that could be exercised by the owner of the land on which the right of way is exercised.

7. Other legal limits

[Art.621-625] NCC lists also other special cases in which the exercise of the private ownership right is limited by the obligation of granting a right of way in favor of another person. These provisions refer generally to the right of way for utilities networks that supply lands located in the same neighborhood or area (Art.621). Although the right of way for utility networks has been already established by special legal provisions, we deem that the law for the enforcement of NCC should clarify some of the terms used under Art.621 para.(2), which refers to unclear criteria –“very expensive”- in order to determine whether the right of way may be granted, as well as under Art.621 para.(3) and (4), which refers to “new utilities”. Such wording –“new utilities”- is not accurate, as it seems that the purpose of this regulation is to refer to new locations of the utilities networks. Moreover, for a complete regulation, the regime applicable to utilities networks that are already in place should be also detailed.

The right of way provided under Art.622 is also new, as it refers to the obligation of a landlord to allow the use of its land during the performance of works that are required for the neighboring land, and also for gathering the fruits from the neighboring land. Art.622 para.(2) refers to the right of the owner who has granted the right of way to receive compensations for any damages that have been caused to the land by “the asset”, but its wording is unclear and should be clarified.

The hypothesis regulated under Art.624, referring to the right of indemnification in favor of the owner of an asset that has been used or destroyed by another person in legitimate defense, does not represent a limit to the exercise of the ownership right, but an application of the tort rules.

The special limits established by Art.621-624 are only explanatory, and specific legal limits should be determined on the basis of the special legal regime applicable to certain types of assets; this principle is also established under Art.625.

(b) Section 2 “Conventional limits”

[Art.626-629] Recognizing the owners’ right to freely establish conventional limits to their ownership right, as long as such limits do not breach public order or morals (Art.626), NCC details in Art.627-629 the legal regime applicable to the inalienability clause.

Firstly, we take note of the express regulation of the principles applicable to the inalienability clause, which have been previously developed by the legal doctrine and the case law. According to Art.627-629, the principle recognized under CC that an inalienability clause is valid only in certain conditions is still maintained, but such validity conditions are expressly defined.

According to Art.627, an agreement or a will may prohibit the transfer of an asset, but only for a maximum duration of 49 years and only if there is a serious and legitimate interest. Art. 627 para.(1) defines the moment when such inalienability term begins to elapse, namely the date when the asset is obtained by the respective owner. Art.627 para.(2) reflects the opinions of legal scholars, according to which the effects of the inalienability clause may cease by means of court order, if the cause that justified the inalienability does no longer exist, or, as a novelty, if “there is a superior interest”. Such latter concept –“superior interest”– used under Art.627 para.(2) is likely to generate contradictory interpretations in practice, as it establishes the right of the courts of law to determine which is the prevalent interest at a certain moment in time. We recommend these provisions are clarified or even removed from Art.627 para.(2) as the termination of the inalienability clause on grounds of “superior interest” is doubtful; the purpose of the inalienability clause is, on one hand, to prevent the transfer of an asset as long as there is a certain interest, irrespective of the evolution of circumstances, and, on the other hand, the concept of “superior interest” is vague and may trigger abusive decisions. We consider that the possibility of terminating an inalienability obligation whenever the court of law deems there is a superior interest than that taken into account when the inalienability clause was agreed upon, may deprive the inalienability clause of its purpose.

Whenever the inalienability clause represents the main consideration of an agreement, its invalidity triggers the invalidity of the entire agreement (Art.627 para.3). According to the NCC, the inalienability clause is deemed to be prevalent whenever it is included in an onerous agreement. Although such assumption may be overturned, we recommend that the legal provision is clarified, as “onerous agreements” is a very broad concept, and the usage of such assumption may be excessive.

Art.628 provides that, in order to be enforceable against third parties (who, in the matter, include the particular title successors and the creditors of the acquirer of the asset subject to inalienability obligation), the inalienability clause has to be made public under the publicity formalities provided under the law. Consequently, if the subject matter of the inalienability clause consists of an immovable asset, such clause must be registered with the land book according to Art.902. In all cases, even if the inalienability clause is not enforceable against third parties, the beneficiary is not prevented from requesting damages from the owner of the asset who failed to observe it.

Art.629 establishes sanctions for the breach of the inalienability clause, which are similar with those general applicable for breach of contractual obligations: the seller may apply for the rescission of the contract, and the beneficiary of the inalienability clause may apply for the annulment of the deed concluded in breach of such clause (but only in case the inalienability clause was enforceable against the third party who acquired the asset).

Art.629 para.(3), according to which the assets that are subject to the inalienability clause may not be subject to forced sale as long as the clause is still effective, represents, at its turn, a reflection of the doctrine opinions.

(c) Section 3 “Judicial limits”

[Art.630] Art.630 para.(1) provides that an owner who produces damages to his neighbor due to the exercise of his ownership right, may be forced by the court to restore the initial status, if such restoration is possible. We note that such principle referring to indemnification is an application of torts rules, and not a limitation per se in the exercise of the ownership right. Only Art.630 para.(2) refers to a limitation of the ownership right that may be ordered by the court if it considers that the damages to be incurred by the landlord are insignificant by comparison with the necessity or the importance of the activity that may result in damages, and implicitly forces the landlord to allow that the damaging activity is performed. Nevertheless, this does not affect the landlord’s right to apply for indemnification. We consider this provisions should be re-analyzed and removed from NCC, as it may be regarded as a breach of Art.44 para.(1) of the Constitution, and its application may lead to abusive decisions. According to the constitutional provision, the limits of the ownership right exercise may be settled only by law, and not by decision of courts of law. As the court would allow the performance of a potentially harmful activity according to Art.630, it means that such court makes an assessment on the importance and opportunity of having an ownership right exercised in a certain manner in relation with another ownership right; therefore, we consider these powers of the court may be regarded as contrary to the constitutional principle indicated above and may lead to abusive decisions.

(iv). Chapter IV “Joint ownership”

[Art.631-686] Unlike CC, NCC contains a detailed presentation of joint ownership. The provisions of this chapter take over (with some exceptions, including the constitutive effect of the division deed) the principles established under the CC, or reflect opinions expressed by the doctrine or the case law.

[Impact] Apart from our general comment regarding the expected increase in the workload of land book offices, we do not foresee a significant impact from a budgetary/financial or human resources perspective on the current legal system.

(a) Section 1 “General provisions”

[Art.631-633] NCC defines the joint ownership (Art.631), its forms –co-ownership (joint tenancy) and the forced joint ownership (Art.632), establishing a relative presumption of joint ownership whenever an asset is jointly held (Art.633). Although the wording used is not clear – as it is arguable how “held” should be construed – this presumption may lead, in practice, to new interpretations of the bona-fide of third parties who acquire the assets that may be regarded as jointly held.

(b) Section 2 “Common provisions”

[Art.634-645] The provisions of this section represent, to a great extent, reflection of case law decisions taken with regard to joint ownership. Provisions with regard to determining the ownership quota (Art.634), allocation of benefits (including fruits) and obligations between co-owners (Art.635 and Art.637), the exercise of the right of use on the asset (Art.636 and Art.639), rules for concluding legal deeds with regard to the asset (Art.640-Art.642), the co-owners legal capacity to stand in trial (Art.643), conclusion of administrative deeds with regard to the asset (Art.644), and a new rule stating that the principles applicable to joint ownership are applicable to any other real right jointly held, are included in this section.

Stating that the fruits of the jointly-owned asset belong to all co-owners thereof, according to their ownership quota (Art.637), NCC details also the manner in which the co-owners may exercise their rights on such fruits (Art.638 para.(2)). Maintaining the difference between natural and industrial fruits, NCC provides, unlike the opinions expressed by the doctrine, that industrial fruits are subject to division as long as they have not been consumed or disposed of. The wording of the second thesis of Art.638 para.(2), referring to the co-owners right to be indemnified, should be revised; on one hand, consumed industrial fruits, or fruits that have been disposed of, are not subject to division, while the same article provides that indemnities have to be provided in all cases.

As regards the usage of the jointly-owned asset, Art.639 provides that the co-owners agreement in this respect is required, or, in the absence thereof, a court decision. This principle should be reviewed, as the courts might replace the will of the parties and decide on a certain usage of assets; the case law has found, in similar cases, that in the absence of the co-owners agreement on the usage of the asset the co-owners may apply for the division thereof.

Provisions that are not reflecting the doctrine opinions, or are not accurately worded, are also included in Art.641-642 referring to the conditions for concluding administration deeds and deeds of disposal with regard to the jointly-held asset.

Art.641 para.(1) derogates from the current rule applicable to administration deeds, which were considered as being able to be concluded by any of the co-owners, stating that administration deeds with regard to the joint asset may be concluded only with the approval of the co-owners holding the majority of the ownership quotas. Mention should be made that Art.641 para.(1) refers to assignments of benefits of immovable assets as administration deeds, while the same assignment of benefits of immovable assets is defined in Art.641 para.(4), as a deed of disposal. This inaccurate wording should be reviewed and corrected.

Art.641 para.(2) is also an innovation, and states that any administration deed that affects a co-owner's capacity to use the asset, or is excessive to such owner having regard to his ownership quota, may be effected only with the approval of the respective co-owner.

According to Art.641 para.(3), the court may issue a decision standing in lieu of the will of a co-owner who is not able to express his will, or who abusively stands against an administration deed that is mandatorily required in order to ensure the utility or the value of the asset.

As regards the deeds of disposal, NCC maintains the general rules and Art.641 para.(4) expressly states that such deeds may be concluded with the unanimous consent of the co-owners.

A new principle is established by Art.643, according to which each co-owner may stand in court, as plaintiff or defendant, in any litigation referring to the joint-ownership, including in the case of restitution claims. We deem this solution would be grounded only in the case that one of the co-owners acts as plaintiff. Allowing a co-owner to stand alone as defendant is not consistent with the principles set-forth under the NCPC and is inequitable for the other co-owners who do not take part to the litigation, although according to Art.643 para.(2) the decisions that are not favorable to a co-owner are not enforceable against the other co-owners.

According to Art.644, co-owners may conclude an administration agreement with regard to their assets, establishing thereby on the exercise of the usage right, allocation of benefits and obligations, etc. Art.644 para.(2) states that any co-owner may unilaterally terminate the administration deed. In case of immovable assets, the administration deed and the termination thereof will be registered in the land book.

We note the novelty of the principle established by Art.645, according to which the rules applicable to joint ownership apply to any other real right jointly owned. In this respect, please note that Art.645 makes reference to "joint exercise of a real right"; this wording should be amended to specify that it refers to co-holders of a real right.

(c) Section 3 "Forced joint ownership"

[Art.646-666] Similar with the provisions referring to joint ownership, the provisions of this section also reflects, to a great extent, the solutions given by the doctrine and case law.

1. Common provisions

[Art.646-647] NCC sets-forth the cases of forced joint ownership, without making any reference to the criteria on the basis of which such cases are identified.

At its turn, Art.647 sets-forth the general legal regime applicable to forced joint ownership: the rule according to which the usage right is exercised with regard to the entire asset, provided that the designation of such asset, and the rights of other co-owners are also observed (Art.647 para.(1)), the rule according to which the jointly held asset may be transferred only together with the ownership right on the principal asset (Art.647 para.(2)), and the rule referring to allocation of expenses (Art.647 para.(3)).

2. Joint ownership on common parts of buildings with more floors or apartments

[Art.648-659] This subsection (Art.648-659) includes certain provisions taken over from special legislation but also some new rules.

I. Common parts

[Art.648-652] Special rules have been provided with regard to the exercise of the forced co-ownership right on the common parts of buildings having more floors or apartments.

While Art.648 defines the “common parts” in buildings or residential areas, by using as criterion the designation of the asset, Art.649 makes a list of such assets, indicating that other assets of common usage may be qualified as common assets. A new principle is included in Art.649 para.(2), according to which the chimneys, and other areas ancillary to the roof of the building are deemed as common parts only for the co-owners who use such facilities according to the drawing of the building. Although the wording used is not very clear, this principle may be often applied in practice and represent an equitable solution for the cases in which the exercise of a joint ownership right on such common parts would have represented a breach of other owners’ rights (*e.g.*, access to the laundry room is possible only from one of the apartments, etc.). Therefore, the wording of this clause should be reviewed and clarified (*e.g.* “utilities” should be replaced with “common parts”, it should be clarified the meaning of “usage according to building project”). Moreover, it could be useful to expressly state the manner in which the expenses referring to these common parts exclusively used by some co-owners, are allocated among the co-owners.

Another important derogation from the principle that the usage right on the entire common asset is exercised by each of the co-owners is also stated by NCC. Art.650 para.(1) allows that certain common parts are granted for exclusive usage to some of the co-owners, if such does not “affect the rights of the other co-owners”. Such decision may be taken with two thirds of the number of co-owners and ownership quotas. The wording of this Art.650 should be reviewed for the purpose of clarification. As the principle governing the exercise of the usage right on jointly-owned assets is that any of the co-owners may exercise its usage right on the whole of such assets, it may be construed that any limitation to such principle represents a manner in which their rights are affected. Moreover, an exclusive usage may be regarded as a usage division, an operation deemed to be incompatible with the principles applicable to forced joint ownership. In addition, by taking such decision on exclusive

usage without the unanimous consent of all co-owners involved contravenes to the rules governing the ownership right. According to Art.626 a conventional limitation of the exercise of the ownership right is possible but only with the consent of the relevant party. Or, according to Art.650 para.(2), the decision with regard to exclusive usage could be taken even without the consent of the owners who loose the usage right on their asset, and whose ownership right is consequently limited by means of an external will. For these reasons, we recommend that the future law for the implementation of NCC, or other legal enactment, amends the provisions of Art.650 para.(2) in order to provide that the decision granting exclusive usage has to be taken with the unanimous vote of all co-owners.

Starting from the definition of common parts, Art.651 establishes that the ownership right on common parts is ancillary to the ownership right on the principal asset, and provides that (Art.647 para.(2)) the ownership quota on the common parts may be transferred only together with the transfer of the principal asset.

Art.652 establishes the rule for determining the ownership quota, if such quota is not settled in the ownership deed, namely as a proportion between the useful area of each apartment and the total useful area of the dwellings in the building. This rule would not be applicable in the special case referred to under Art.649 para.(2), which underlines the necessity of having such legal provision further completed.

II. Co-owners rights and obligations

[Art.653-658] Defining the rights and obligations belonging to co-owners of common parts, NCC reflects the opinions of the legal doctrine and case law, as well as certain provisions already included in special legislation (*e.g.* obligation of the owners to allow access in their principal assets, Art.656).

Art.657 sets-forth special provisions for the case when the building is distructed, in order to ensure that the rights of co-owners are observed. According to Art.657 para.(1), any co-owner may apply for public sale of the land and of the construction materials resulting after the building is destroyed (completely or more than half of the building). This provision should be clarified by the future law for implementation of NCC, in order to detail the conditions for public sale and the method to be used for allocation of proceeds among co-owners. If the building was destroyed to a lesser extent, Art.657 para.(2) establishes the co-owners obligation to participate to the reconstruction of the building, pro-rata with their ownership quotas, as well as the sanction applicable to those who refuse to observe such obligation. This sanctions consists in the obligation of the co-owner who refuses to participate to the building reconstruction, to transfer his ownership quota to the other co-owners, against a price to be determined by the parties or by the court. We deem this provision should be revised, given that this solution is not consistent with the rules applicable for forced joint ownership: due to the subsidiarity between the co-ownership on common parts and the ownership right on the main asset (dwelling), the ownership quota on the common part may be transferred only together with the ownership right on the main asset (this hypothesis is not clear in the wording of Art.650 para.(2)).

The provisions of Art.658 establish new principles with regard to the cessation of the forced joint ownership. Starting from the rule according to which the forced ownership is determined by the designation of the jointly held asset, respectively by the need to used it in order to exercise the ownership right on a principal asset, Art.658 refers to the cessation of the forced joint ownership upon

the co-owners' decision that the common usage on common parts of the building is no longer required. Although this solution may be theoretically applied with regard to certain parts of a building, it would not be possible in the case of those assets who are designated, according to their nature, to be jointly used (*e.g.*, building foundation, pipes within the building, etc.). Moreover, according to Art.658 para.(1), the decision referring to the cessation of the joint usage of the asset may be taken with two thirds of the number of co-owners, irrespective of the ownership quota held by them on the jointly-held assets, which may lead, as in the case of Art.650 para.(2), to an unacceptable limitation of the exercise of the ownership right by the will of third parties. In a similar manner, the provision referring to conclusion of certain deeds of disposal (Art.658 para.(2) makes reference to "transfer" and "mortgaging") with the approval of solely two thirds of the number of co-owners may affect the ownership right of those co-owners who did not take part to the vote or vote against such decision. The solution under Art.658 para.(3), respectively the right of such co-owners who have been affected by the majority decision to be indemnified is not an equitable solution if the limitation of the ownership right is the consequence of an opportunity decision. We consider these provisions are not consistent with the principles applicable to joint ownership and, in practice, they are likely to be abusively enforced, and may even result in a limitation of the ownership right that contravenes to constitutional principles.

3. Joint ownership on common fences

[Art.660-666] NCC establishes in Art.660-666 the joint ownership on common fences, taking over in a new wording the principles established by Art.590-609 CC.

(d) Section 4 "Joint tenancy"

[Art.667-668] NCC reflects in Art.667 the definition of joint tenancy, as it has been agreed upon by the legal scholars, as well as the opinions on the means for creation of such ownership: legal provisions or the will of the parties. According to Art.668, the rules applicable to joint tenancy are those applicable to community of assets, unless the law on the basis of which the joint tenancy has been created expressly provides otherwise.

(e) Section 5 "Division of joint ownership"

[Art.669-686] NCC contains detailed regulations on the division of joint ownership, which reflect, to a great extent, the opinions expressed by the doctrine and the jurisprudence solutions, but which also reflect some new principles consistent with the new provisions applicable to joint ownership.

Starting from the rule provided by Art.728 CC stating that the right to ask for division of joint property is not subject to status of limitation, Art.669 regulates the possibility to have the division suspended, either by means of agreement or by court judgment; the cases when the division of joint ownership may be suspended are detailed in Art.672 and Art.673.

Art.671 provides for certain cases when assets may not be divided. NCC maintains the rule recognized by the legal scholars, according to which the assets subject to community regime, and the assets located on the common boundary between two estates held by different owners are not subject to division, but derogates from the rule according to which the assets subject to forced joint ownership

can not be divided; in the latter case, NCC recognizes the right of co-owners to apply for a division of their jointly-held assets if such assets are no longer subject to common usage. This provisions completes the principle established by Art.658, on which we raised some critics given the general wording thereof.

NCC reflects in Art.672 the principle of Art.728 para.(2) CC, referring to the suspension of the division procedure for a period of maximum 5 years. In order to render such agreement enforceable against third parties, as regards the division of an immovable asset, the publicity formalities have to be fulfilled.

A new case for suspending the division is regulated under Art.673, according to which the court of law may order such suspension for a period of maximum 1 year, if there is a risk that the interests of a co-owner may be affected.

NCC set-forth in Art.676 the principles applied in jurisprudence with regard to division of jointly-held assets which depend on whether the nature of the assets allows for a direct division thereof.

Recognizing the co-owners right to ask for the division, in order to obtain a payment of the debts incurred in connection with the jointly-held asset, Art.677 restricts these debts to those that are or become due during the year when the division takes places; nevertheless, this limitation is not justified, as the co-owners should agree on the manner in which the debts have to be paid, so as the interests of all co-owners and creditors are fully observed.

Referring to the rules applicable in the case of forced sale of a jointly-held asset, Art.678 para.(2) refers to the preference right at equal price that the co-owners may benefit of for the purpose of acquiring the jointly-held asset. Art.678 para.(3) and para.(4) refers to the right of the secured creditor to pursue the asset, and to the publicity formalities that have to be performed in order to render the agreement on suspension division enforceable against third parties.

As regards the rights of the co-owners' creditors, Art.679 reflects the rules established by Art.785 CC.

We note the new principle established in Art.680, which, unlike the rules applicable until this date, establish the constitutive feature of the division of assets. Moreover, according to new rules governing land book registrations, the division of immovable assets is effective after its registration with the land book. The constitutive character of the division does not prevent the usage of the previous rule referring to the validity of deeds concluded by the co-owners, as expressly provided by Art.681.

Art.684 sets-forth the cases in which the division may be terminated, and Art.685 specifies that, in case a co-owner has transferred the assets obtained further to division, he is no longer entitled to claim the nullity of the division deed. Both these provisions reflect the opinions unanimously expressed by legal scholars on these issues.

The provisions of Art.686, according to which the rules applicable to division are also applicable to the assets that are subject to joint ownership and to assets under the community regime are redundant, as Art.669-671 have already regulated the same issues.

(v). Chapter V “Periodic ownership”

[Art.687-692] We take note of the novelty of the rules applicable to periodic ownership, i.e. an ownership right on immovable assets that may be exercised only for limited periods in time. Regulation of these principles is grounded, on one hand, on the provisions of Directive 94/47/CE referring to the protection of consumers in contracts referring to the usage for a limited duration of immovable assets, and on the other hand by the provisions of Art.12 of Law No.282/2004, according to which the provisions of such special law are to be corroborated with the civil law principles.

As regards the impact on the current judicial system of these new provisions, we note that, according to Art.691, the courts of law are entitled to order, upon the request of concerned co-owners, one of the co-owners to sell his ownership quota to the other co-owners. The procedure detailed by Art.691 consists of a general verification by the court of whether the request is admissible, followed by a verification on the merits of the request. This special procedure should be taken into account when an evaluation of the workload of the courts is made.

Although NCC establish principles governing the rights and obligations of co-owners in periodic ownership, we note that the rules for determining the ownership quota are not determined, although an indirect reference is made to the time period for which a co-owner may use the respective asset. These provisions should be further completed with express rules for determining the ownership quota, in order to facilitate the implementation of these provisions.

Art.687 defines the period ownership. A new provision refers to the possibility of exercising periodic ownership on a movable asset. Nevertheless, having regard to the legal regime applicable to movable assets, as well as to the special rules applicable to periodic ownership, we recommend this chapter of NCC is completed with further provisions, or that more detailed provisions are included in special legislation, especially for the purpose of creating publicity system for period ownership on movable property, which would ensure protection of the co-owners but also of third parties.

According to Art.689, each co-owner is entitled to dispose freely of his ownership quota, which, in this matter, refers to the time period in which the respective owner may use his asset. Administration or disposal deeds concluded by a co-owner without the observance of his limited right on the asset subject to periodic ownership are not enforceable against the co-owners whose rights have been affected, but are subject only to relative nullity if the third parties acquiring the respective rights have acted in good faith. In order to ensure an effective protection of the rights of co-owners on movable assets in the case of periodic ownership, we deem that a publicity system should be implemented (for example, similar with the Electronic Archive of Security Interests in Personal Property).

Art.690 sets-forth that the rights and obligations of co-owners of periodic ownership are subject to the same rules that are applicable in case of ordinary joint ownership.

We take note of the novelty of Art.691, according to which the co-owner who seriously affects the exercise of periodic ownership by other co-owners may be obliged to sell his ownership quota to the other co-owners. This provision may be regarded as contrary to the constitutional principles referring to the guarantee of the ownership right. In this respect, the provision that has as effect depriving a co-owner of his ownership right for indemnification purposes (such forced sale would be a sanction for

the respective co-owner's actions) may be regarded as being inconsistent with the principles established by the Constitution.

Art.692 refers to a sole case when the periodic ownership ceases, namely the case when a co-owner or a third party acquires all ownership quotas; other cases may be defined by special legal provisions.

1.4.(c). Title III "Dismemberments of the Private Ownership Right"

[Art.693-772] Consistent with the opinions upheld by the doctrine, the NCC legislator has laid down a separate title addressing the ownership right dismemberments, as independent real rights that constitute the attributes stemming from the core of the ownership right. The provisions contained in this title are, to a large extent, transpositions of the previous CC provisions and of interpretations which the doctrine and case-law have given to the principles concerned, but new rules are also introduced, most often triggered by reasons of equity.

[Impact] As no new institutions are being regulated, the provisions under Title III in Book III should not have an impact in what regards the budget, finances or human resources necessary to be allocated for the current legal system. Nonetheless, the future law for implementation of NCC will have to clarify some of the NCC newly introduced provisions, particularly in what regards the superficies right, the usufruct right and the easements (*i.e.* right of way).

(i). Chapter I "Superficies"

[Art.693-702] Although not expressly regulated in the CC, the superficies right is unanimously qualified by scholars and practitioners as a dismemberment of the ownership right. Inspired by the analyses provided in the doctrine, the NCC dedicates an entire chapter to regulating the legal regime governing the superficies right, but it also institutes principles that deviate from the unanimous opinions so far expressed by the doctrine.

According to Art.693 para.(1), the superficies is a person's right to hold or erect a building on another person's land (whether located above or beneath such land), as well as the right of use over such land. Notwithstanding the fact that the definition of the superficies right refers only to buildings, Art.702 sets forth, in accord with the views constantly upheld by the doctrine, that the provisions governing the superficies right on buildings is also to apply to plantations and other long-term independent works.

As regards the acquisition of the superficies right, Art.693 para.(2) provides that it may be acquired by virtue of a legal deed, by usucapio, or as otherwise provided by law; however, the establishment of such right requires that it be registered with the land book. Although not constituting distinct ways of acquiring a superficies right, as they are circumscribed to the general hypothesis of acquisition by "legal deed", Art.693 para.(3) and Art.693 para.(4) lay down two of the situations qualified by the doctrine as generating a superficies right: the transfer of ownership over the building separately from the ownership over the land (Art. 693 para.(3)) and the waiver by the land owner of his right to claim accession to the building erected by a third party, as well as the assignment to a third party of his right to claim accession (Art.693 para.(4)). Despite the fact that Art.693 para.(3) and para.(4) are addressing two cases of transfer of the superficies right that are analyzed by the doctrine, we note that the current regulation fails to tackle the problems that have been raised in practice. Thus, the regulation of Art.693 para.(3) first thesis, which states that "the superficies may also be recorded on

the basis of a legal deed whereby the owner of the entire property transferred the building exclusively” seems to be reflecting the NCC lawmaker’s embrace of the opinions expressed in the doctrine, according to which the superficies right may be transferred upon the mere transfer of ownership over the building, even when there is not a special provision on the superficies right in place. The provision in the first thesis of Art.693 para.(3) shall need to be correlated with the current provisions at Art.2 para.(2) in Law No. 247/2005 – Title X – Legal Circulation of Lands, as to the required form of the deed contemplating the exclusive transfer of the ownership and, implicitly, the superficies right to the building; thus, the general rule is that the ownership right to buildings (except for dwellings) may be transferred by way of private deed, while real rights may be established by *inter vivos* deeds, as per Art.2 para.(2) in Law No. 247/2005 – Title X – Legal Circulation of Lands, solely in authentic form. To avoid any divergence of interpretations or even doctrinal disputes, we hold that the provisions at the first thesis of Art.693 para.(2) shall need to be clarified as regards the required form of the deed establishing a superficies right; if case be, the provisions at Art.2 para.(2) of Law No.247/2005 – Title X shall have to be amended.

A rephrasing would also be needed for the provisions of Art.693 para.(4) second thesis, stating that “(The superficies) may be registered in favor of a third party on the basis of the assignment of the right to claim accession”. The wording of this text is improper, as one could at most infer that the NCC lawmaker considered the possibility for the superficies right to be acquired by a third party having constructed a work on another person’s land and who later acquired, as assignee, the right to claim accession to such building; in this instance, the term “third party” should be replaced with “constructor”, which would also clarify the fact that the right to claim accession is assigned to the constructor.

There is however a salient difference as compared to the previous approach of the doctrine as to the duration of the superficies right. Thus, in contrast to the views previously expressed in doctrine and case-law, according to which the superficies right is to last for the entire lifetime of the work (building), Art.694 provides that the superficies may be established for a maximum period of 99 years, being subject to renewal. This limitation operates solely in the case of the superficies acquired by a legal deed, being incompatible with the usucapio of the superficies right; since this difference is not apparent from the wording of Art.694, we recommend that this aspect should be clarified by the future law for implementation of the NCC.

As far as the extent and exercise of the superficies right are concerned, the first thesis at Art.695 para.1 points to the limitations and conditions laid down in the “establishment deed” of such right. As the superficies right may be acquired in other ways than by a legal deed, we recommend that the first thesis of Art.695 para.1 should be amended, all the more so since it is the first time that the term “establishment deed” is used in this chapter.

Art.695 para.(2) confines the exercise of the superficies right to the physical boundaries of the building in the case where a third party acquires the ownership to the already raised building, establishing that the holder of the superficies right shall not be entitled to change the structure of the building. The term employed – “structure” – is however unclear and we recommend that it be amended or clarified, as the hypothesis which should be actually considered is the footprint of the building concerned.

Should the superficies right holder disregard the limits generated by the physical boundaries of the building, the land owner shall have, according to Art.695 para.(3), the option between calling for the termination of the superficies right or returning to the former condition. In the first case, the owner's right to file legal action may be exercised throughout a 3-year period, the NCC legislator failing however to indicate the moment when this period starts to run. As the change of a building is an activity that is carried out in the course of time, it should be indicated with precision, in our view, the moment when the land owner's right to claim the termination of the superficies right starts to run (for instance, the issue date of the building permit for the new building).

In line with doctrinal opinions, Art.695 para.(4) reiterates the principle according to which the holder of the superficies is free to dispose of his right over the building (work), but may conclude acts of disposition that contemplate his superficies right only at the same time with those that contemplate the building itself.

According to Art.696, the holder of the superficies right may take the necessary steps to safeguard his right, since, as provided at Art.696 para.(2), no period of prescription applies to the confessory pleading of superficies. Our suggestion is that this last provision should be reanalyzed, considering that, under the NCC, superficies is a temporary right.

A noteworthy novelty is the regulation at Art.697, namely the criteria proposed for assessing the equivalent value of the superficies right granted to the holder of the superficies right under a legal deed concluded for good and valuable consideration. We would however encourage the rephrasing of Art.697 para.(1), which refers to "payment modalities", whereas the regulation is evidently referring to the quantum of a payment obligation. We also recommend a clarification of the provisions of the same Art.697 para.(1) as the assessment criteria proposed, which the courts shall have to take into account when called upon to determine the amount owed by the holder of superficies right in exchange for the use of the land, disregard the fact that the holder of the superficies right is the owner of the building.

Laying down the cases when the superficies right terminates, Art.698 takes on the opinions expressed in the doctrine on this subject. Consistent with the new regulation according to which the superficies right has a limited duration, which is not necessarily related to the lifetime of the building, Art.698 item (c) provides that the loss of the building shall result in the termination of the superficies right, provided that there is a special provision in place to this effect. In our view, these provisions under Art.698 should be clarified by the future law for implementation of NCC, so as to provide a distinct regulation for the termination of the superficies right acquired by way of usucapio.

Art.699 regulates the effects of the termination of the superficies right by expiry, drawing a distinction between the ownership right to the building erected by the holder of the superficies right, and the dismemberments and warranties established by the same. According to Art.699 para.(1), unless otherwise provided, the land owner shall acquire through accession the ownership right to the building erected by the holder of the superficies right, having the obligation to pay to the latter the equivalent value of said building, calculated as of the expiry date of the superficies right. According to Art.699 para.(2), in case the value of the building erected by the superficies right holder is equal to or higher than the value of the land, the land owner may ask the constructor to purchase the land at the market

value it would have had if the building had not existed; the constructor is entitled to decline only if he removes the building and return the land to its former condition. This solution is inspired by the provisions at Art.1116 para.2 of the QCC, being triggered by reasons of equity. We note however that the text of Art.699 para.(2) incorrectly employs the term “constructor” while it should be referring to the “holder of the superficies right”.

Art.699 para.(3) and para.(4) regulate the situation of dismemberments agreed by the holder of the superficies right and of mortgages established by same with regard to the building and the superficies right. The solutions suggested according to the opinions previously provided by doctrine are also inspired by the stipulations under Art.954 and Art.2816 of the ICC.

Note should be made that the NCC does not regulate the legal regime applicable to the building in case of termination of the superficies right established further to the transfer of the ownership right over an existing building. This hypothesis should be regulated expressly by the NCC, since the rules of accession are not applicable in this respect, and on the other hand the rule provided under Art.694, regarding the limited duration of the superficies right seems to apply in case of superficies established by the transfer of the ownership right over existing buildings.

According to the cases of termination of the superficies right, Art.700 and Art.701 regulate the effects of superficies right termination by consolidation or total damage of the building.

(ii). Chapter II “The Usufruct”

[**Art.703-748**] The NCC provisions regarding the usufruct mostly maintain the principles previously regulated under Art.517-564 of the CC, which it rephrases and clarifies, but they also regulate new rules, which are resumed by the lawmaker from doctrine or legal practice, or from similar provisions of the QCC or the FCC.

[**Impact**] Although the provisions in this chapter are not likely to generate a financial-budgetary or human resources impact on the current legal system, a few of the newly inserted provisions shall have to be reanalyzed, so as to be clarified under the future law for the implementation of NCC or to be rephrased by a law amending the current NCC. In addition, the provisions on performing registrations with the Electronic Archive of Security Interests in Personal Property shall have to be amended to adequately reflect the provisions of Art.737.

(a) Section 1 “General Provisions”

[**Art.703-708**] This section of the NCC includes general provisions on the definition of usufruct, the method of establishing and defending such real right, object and duration thereof. Generally, the provisions of the NCC on such issue are restatements of the previous provisions of the CC, supplemented by doctrinary opinions.

Consequently, the definition of the concept of usufruct, expressed under Art.703, restates and clarifies the previous provisions of Art.517 of the CC, expressly providing the usufructuary’s right to collect the fruits of the property subject to the usufruct right.

Art.704, on the methods of establishing the usufruct right, complies with the principles established under Art.518 of the CC, but expressly provides the requirement of registering the usufruct right with

the land book, in accordance with the NCC's newly-inserted provisions on the constitutive effect of registrations with the land book.

Another novelty is the express provision under Art.705 of the usufructuary's right to initiate a confessory pleading to defend his right.

In addition, we deem noteworthy the provision under Art.706 para.(1) according to which the usufruct may concern a factual universality, an estate or a share thereof; this comes in reply to the doctrinary opinions regarding the possibility of establishing a usufruct right over a goodwill or share of a patrimony. The provisions on the object of the usufruct right are supplemented by Art.707, which takes over the principles established under Art.535 of the CC, however, without keeping the unjustified restriction regarding alluvia.

The provisions of Art.708 on the duration of the usufruct are a restatement of the previous provisions of Art.559 and Art.560 of the CC as well.

(b) Section 2 "Rights and Obligations of the Usufructuary and Bare Owner"

[Art.709-736] Upon regulating the rights of the usufructuary and bare owner, NCC's lawmaker keeps most of the principles established by the CC, and it also brings certain major amendments.

A first change is the amendment of the principle initially established under Art.526 of the CC in matters of the quasi-usufruct with respect to the usufructuary's obligation to return either property in the same quantity, quality or value, or the equivalent value thereof to the bare owner, upon the termination of the usufruct. Unlike Art.526 of the CC, which allowed the usufructuary to choose between the methods of fulfilling the obligation, Art.712 expressly provides that the choice shall belong to the bare owner, which shall be entitled to request the usufructuary either to return certain similar properties, or the equivalent value such would have upon the termination of the usufruct.

A new principle is established with respect to the usufruct over certain property which, although not consumable, becomes wore as a result of its use. In addition to the cases already regulated under Art.528 of the CC, restated in a new wording under Art.713 para.(1) and para.(2), Art.713 para.(3) regulates the situation of such property which rapidly deteriorates as a result of its use; in this case, NCC's lawmaker took over the solution provided under Art.1128 of the QCC, establishing the usufructuary's right to dispose of such property, and his obligation to return the equivalent value such property would have had upon the termination of the usufruct to the bare owner. Although Art.713 para.(1) and Art.713 para.(3) regulate distinct cases, a distinction between the scopes of application – "property which becomes wore as a result of its use", and "property which rapidly deteriorates as a result of its use" – is hard to be drawn in practice; consequently, the lawmaker should propose distinction criteria in the future law for implementation of NCC.

Another novelty is the amendment under Art.714 of the principle of the usufruct's inaccessibility applicable with the prior regulation of the CC. As a result, according to Art.714, the usufructuary shall be entitled to dispose of his right, being able to assign it without the consent of the bare owner, unless otherwise agreed. According to the new rules applicable in matters of the land book, the usufruct's assignment shall have to be registered with the land book to generate effects. We also

notice the provisions of Art.714 para.(3) thesis II, according to which, subsequent to the notification of the assignment, the initial usufructuary shall remain liable to the bare owner as surety of the assignee, thus setting a guarantee obligation arising by virtue of law and incumbent upon the initial usufructuary. We recommend that the wording of Art.714 para.(3) be amended so as to use a unitary terminology: thus, although it refers to the initial usufructuary – assignor in the regulated case – NCC’s lawmaker uses the concept of “usufructuary”, which may lead to contradictory construals in practice. As to the provisions of Art.713 para.(4), which are intended to clarify, according to the French doctrine’s solutions, the potential ambiguities with respect to the duration of the usufruct right in case of its assignment, we recommend an amendment of the text so as to be correlated with the principles laid down under Art.708 para.(4), establishing a special case for the existence of the usufruct right, even after the demise of the person in favor of whom such right was established.

The regulation under Art.715, regarding lease contracts concluded by the usufructuary, is another novelty as compared to the principles established under the CC. Art.715 para.(4) establishes the rule according to which all leases concluded by the usufructuary shall be extinguished together with the usufruct right, if the latter is terminated as a result of the expiry of the term for which it was established. Nevertheless, different rules shall apply when the usufruct right is unexpectedly terminated, *i.e.* demise or termination of the legal entity usufructuary, when, according to Art. 715 para.(2), leases of real estate shall continue until the expiry of their term, but no longer than 3 years from the extinguishment of the usufruct right, provided that such leases were registered with the land book. The special provisions shall also apply, according to Art.715 para.(3), to the case when the usufructuary had renewed the lease or land lease contracts, prior to the expiry of the initial contracts, registering this renewal of the term with the land book.

As to the rights of the usufructuary over the works and improvements to the property subject to the usufruct right, Art.716 para.(1) and para.(2) keeps the solutions previously regulated under Art.539 para.(2) of the CC, providing that the usufructuary shall be entitled to receive indemnifications only for the necessary works performed to a real estate, and shall not be entitled to receive indemnifications for any other type of works, even if such works increase the value of the property. However, this rule is contradicted by the regulation under Art.716 para.(3), according to which the usufructuary shall be entitled to be indemnified for the works performed with the owner’s consent, which increased the value of the property. Consequently, we recommend that the wording of Art.716 para.(1) and Art.716 para.(3) be reanalyzed so as to eliminate the inconsistencies.

The provisions under Art.717-Art.722 on the usufructuary’s rights to operate young forests, high forests, fruit trees, and stone and sand quarries, and treasures are restatements of existing rules, provided under Art.529-533, Art.537 para.(1) and Art.538 of the CC.

The same principle of restating principles previously regulated in a new wording, shall also apply to the usufructuary’s obligations of inventorying the property (Art.723), liability for damages (Art.725) and establishment of the guarantee for the fulfillment of the obligations incumbent upon him (Art.726). Another novelty is represented by the provisions of Art.724, which provides the usufructuary’s right to change the property’s destination, provided that such change would not prejudice the rights of the bare owner, and the provisions of Art.726 para.(3), regulating the possibility of establishing certain preservative measures in case the usufructuary endangers the rights of the bare

owner. Although newly-regulated, such provisions arise from already established rules and are not likely to trigger a major impact.

As to the usufructuary's obligation of establishing a guarantee for the fulfillment of his obligations, Art.727, which takes over the previous provisions of Art.542 and Art.543 of the CC, also brings a novelty, by regulating the appointment of a manager to manage the real estates subject to the usufruct, and the fruits of the other properties.

The provisions on the usufructuary's rights in case of a late establishment of the guarantee (Art.728), performance of repairs (Art.729 and Art.730), and obligations incumbent upon the usufructuary and bare owner in case the property subject to usufruct is destroyed due to age or fortuitous events (Art.731), or the obligations incumbent upon the usufructuary in connection with the debts related to the mortgaged property (Art.732), disputes on the use of the property (Art.733 and Art.734), or bearing the encumbrances of the property (Art.735), and the obligations in case of herd's loss, are also restatements of the principles regulated by the CC, supplemented according to the opinions and clarifications of the doctrine.

However, new provisions are inserted by the NCC in the subsection called "Special Provisions" of the section regarding the rights and obligations of the usufructuary and bare owner.

Thus, Art.737 provides the registration formalities which have to be fulfilled in case a usufruct right is established over receivables, which shall lead to the need of accordingly supplementing the provisions on the performance of registrations with the Electronic Archive of Security Interests in Personal Property. The rights and obligations to be incumbent upon the usufructuary in case of a usufruct right concerning receivable rights are regulated under Art.738.

Another novelty is the current regulation under Art.739 of the obligation to repay the amounts collected in advance by the holder of a usufruct right over a life annuity, which derogates from the rule previously established under Art.527 of the CC.

We notice the provisions of Art.740 referring to the bare owner's right to increase the capital subject to the usufruct, and to the usufructuary's right to exercise the usufruct over the property thus obtained, as well. A special regulation is inserted by Art.740 para.(2), according to which the usufruct right shall also cover the property acquired by the bare owner further to the assignment of his right. The wording of Art.740 para.(2) is deficient, as it is not clear whether the lawmaker referred to the property acquired further to the assignment of the bare ownership, or of the right to increase the capital. In both cases, we recommend that the wording be reviewed to clarify such provisions.

The provisions under Art.741 referring to the method of exercising the right to vote related to certain shares or other securities, joint quota or to another property, and under Art.742 referring to the right to collect dividends, may also be deemed as a novelty. We recommend that the future law for implementation of NCC clarify the provisions of Art.741 para.(2) referring to the cases in which the right to vote belongs to the usufructuary and harmonize the same with the provisions of Art.113 of Law No.31/1990 on business companies.

Art.743, regulating the bare owner's obligation of repaying the amounts advanced by the usufructuary that paid the debts related to the estate received as usufruct, restates in a new wording the general

provisions of the CC and the supplementations given by doctrine. Nevertheless, we recommend a review of the wording of Art.743 para.(3) which, although takes over the principle established under Art.550 of the CC, it uses the concept “the person inheriting a usufruct”, instead of the correct one regarding the acquirement of a usufruct right by way of a legacy. We recommend an amendment of this wording to avoid the confusions which may occur in connection with the potential transfer of the usufruct right by way of succession, which is incompatible with the lifelong nature of this right.

The provision under Art.744 referring to the creditors’ right of initiating enforcement proceedings against the property subject to usufruct to obtain the payment of the debts related to the estate has the nature of a novelty, as well, but the regulated principle is a consequence of the previous provisions of Art.743, unlikely to trigger a different construal.

Moreover, we notice that Art.745 establishes certain special provisions on the rights which the usufructuary may exercise with respect to the property forming the goodwill.

(c) Section 3 “Termination of Usufruct”

The cases of usufruct termination, regulated under Art.746-748, are only innovative as regards certain provisions applicable in special situations of termination of the right of usufruct. Therefore, according to the new terms applicable for acquisitive prescription, the right of usufruct is extinguished in case of non-use for a period of 10 years, respectively 2 years if the object of the usufruct is a right of receivable, pursuant to Art.746 para.(1) let.(e). Since the regulation under Art.746 para.(2) is a consequence of the fact that usufruct is a right granted for life, we recommend that it should be supplemented so as to be correlated with the provisions of Art.708 para.(4).

We would like to point out the novelty of the provision under Art.747 para.(3) thesis II, pursuant to which, in order to warrant the payment of the annuity due by the bare owner to the usufructuary, in case the usufruct is extinguished or the bare owner resumes the use of the immovable asset, the court may order the registration with the land book of a legal right under a mortgage, for the benefit of the usufructuary.

(iii). Chapter III “Use and Occupation”

[Art.749-754] The NCC provisions regarding the right of use and occupation mostly resume the prior principles established under the CC, with two significant amendments.

First of all, Art.750, regulating the right of occupation, extends the range of beneficiaries of the right of occupation. Therefore, the holder of the right of occupation is entitled to inhabit the bare owner’s dwelling not only together with his family members, but also with the parents or other dependant persons that he is supporting. Since the lawmaker fails to make any distinction, it results that the parents of the other spouse could benefit as well from the right of occupation established for the benefit of one of the spouses. This aspect, together with the definition of the concepts of “family” and “dependant persons” should be clarified by the lawmaker, perhaps by the implementation law of the NCC, so as to provide the practitioners with legal interpretation criteria.

Another novelty is the provision under Art.752, derogating from the previous principle, established under Art.572 para.(2) of the CC; pursuant to Art.752, the holder of the right of occupation is no longer entitled to assign his right or to lease the part of the immovable asset that he is not using. This

solution is grounded on the *intuitu personae* nature of the right of occupation, which is therefore pointed out by the NCC's lawmaker.

[Impact] Whereas the provisions under this chapter do not derogate from the current rules under the CC system, save for the aforementioned exceptions, a financial-budgetary or human resources impact thereof is not to be expected. As regards the actual regulation, we should like to recommend that Art.751 on the establishment of the right of use and of occupation be supplemented so as to correlate its provisions to the principles applicable in land book-related matters.

(iv). Chapter IV “Easements”

[Art.755-772] Regulating natural easement as a restriction to the exercise of the ownership right, in addition to easements arising from neighborhood relations, the NCC lawmaker establishes under this chapter the rules applicable to easements established by “act of man” (by *usucapio* or by legal deed), without excluding however the easements previously analyzed in Chapter III, Section 1, Title II. As a principle, save for the exceptions that are expressly provided below, the new provisions do not derogate from the principles previously established under the CC, but they rephrase and clarify certain prior stipulations.

[Impact] Considering that the provisions under this NCC chapter do not derogate substantially from the rules previously established under the CC, it is not likely that the new regulations should bear a financial-budgetary or human resources impact on the current legal system. However, we deem that some clarifications and references to the provisions applicable for rights of way are necessary at theoretical level.

(a) Section 1 “General Provisions”

[Art.755-764] This section incorporates the provisions on the establishment of easements (Art.756 and Art.763), the means of defending such right (Art.757), and a classification by types of easement (Art.760-Art.762).

Since natural easements, and respectively those arising from neighborhood relations, were analyzed under Title II, Chapter III, Section 1, Art.756 only lists the legal deed and *usucapio* as means of establishing easement. The NCC lawmaker thus points out his intention of distinguishing between easement as a dismembered ownership right and easements arising from neighborhood relations, representing restrictions of the exercise of ownership right. However, considering that this chapter also includes regulations applicable to the right of way, regulated as a restriction of the exercise of ownership right, the provisions thereof, including those regarding the manner of establishing easement, need to be correlated to those under Section 1, Chapter III, Title II.

Resuming opinions that are unanimously held by doctrine, Art.758 expressly provides the possibility to establish an easement in view of a future utility of the dominant estate.

Moreover, the provisions under Art.759 para.(2), regarding enforceability against third parties of the easements registered in the land book, and the classification of easement types under Art.760-763 are mere transpositions of doctrine interpretations.

The provisions of Art.764, pursuant to which the manner of exercising the right easement is acquired under the same terms as the easement is however redundant, and it should be eliminated from the NCC.

(b) Section 2 “Owners’ Rights and Obligations”

[Art.765-769] The rules on the exercise and preservation of easement (Art.765), the servient estate owner’s possibility to be exempt from the obligation to contribute to the expenses related to works that are necessary for the exercise and preservation of easements (Art.766), changing the place where easement is exercised (Art.767), the obligation of the dominant estate owner not to worsen the status of the servient estate (Art.768), as well as the means of exercising easement rights in case of division of the dominant and respectively servient estate (Art.769), represent the transposition by redrafting of the principles established under Art.630-635 of the CC, and of the solutions identified by doctrine as necessary consequences thereof.

(c) Section 3 “Extinguishment of Easement”

[Art.770-771] As regards the reasons causing the extinguishing of easement, reference should be made to the provisions under Art.770 para.(1) let.(d), stipulating the servient estate owner’s possibility to redeem the easement, and to the new term provided under Art.770 para.(1) let.(e).

A solution already acknowledged by doctrine, but newly regulated under the NCC, is Art.771 para.(2), second thesis, pursuant to which the exercise of the right of easement by the usufructuary is beneficial to the bare owner, similarly to the effects generated by the exercise of the easement by one of the co-owners.

As regards the possibility to extinguish easements by redemption, the provisions under Art.772 on redeeming the right of way in case of obvious disproportion between the utility granted to the dominant estate and the inconvenience or damage caused to the servient estate. We deem that the premise regulated under Art.772 is that of an easement other than the right of way provided under Art.617-620, otherwise there would be an obvious conflict between the possibility to extinguish the right of way by redemption and the provisions under Art.617 para.(3). On these grounds, we recommend the clarification of the provisions applicable in relation to the right of way – dismemberment of ownership right, in the NCC implementation law.

1.4.(d). Title IV “Trust”

[Art.773-791] The trust and the legal regime applicable thereto are regulated for the first time in Romanian law. Resuming the provisions governing this institution in internal law, particularly by the transposition of the provisions under the FCC – Title XIV, was determined by the large-scale application of fiduciary operations and the necessity to ensure the legal framework for the performance thereof in Romania.

The provisions concerning this matter provided by the NCC are general, and they shall be detailed, as arising from Art.774 para.(2), by a special enactment.

[Impact] The general regulation of the institution of trust shall firstly determine the necessity to supplement the applicable legal framework, both as regards the status of fiduciaries (supplementing

the special laws regarding the activity of credit institutions, investment and investment management companies, insurance and reinsurance companies, notaries public and attorneys), and the Fiscal Code provisions, in order to regulate the manner of registering fiduciaries and their related obligations to pay taxes and levies. Furthermore, Art.774 para.(2) refers to the supplementation of the legal framework applicable to the trust, by adopting a special enactment; we deem that this enactment must regulate, among others, the manner in which fiduciaries hold records of the fiduciary assets entrusted to them, the operations performed and the results obtained, the fiduciary debts and the procedure for verifying and/or challenging them available to the settlor or beneficiary, as well as the means by which the fiduciary assets are transferred from the fiduciary to the beneficiary or, as the case may be, settlor, in case the trust contract terminates.

In addition, an enactment must be adopted to regulate the establishment and organization of a national registry of trusts, pursuant to Art.781. Note should be made that the NCC Draft IL proposes the amendment of the current provisions under Art.781 in the sense of replacing the national registry of trusts with the Electronic Archive of Security Interests in Personal Property, and in such case the enactment regarding the organization of such registration system must be amended to ensure that the manner of making registrations is properly regulated. Although the option regarding the determination of the publicity registry related to trust contracts is at the exclusive discretion of the lawmaker, we deem that, given the necessity to observe the authentic form of the trust contract for the validity thereof, the national registry of trusts could be managed by notaries public.

[Art.773-791] Analyzing the NCC provisions on trust, we should like to note, first of all, the definition given to this concept by Art.773, pursuant to which the transfer of the property rights from the settlor to the fiduciary is made to the effect of the administration thereof for a certain purpose. The NCC Draft IL proposes that this definition be amended, in the sense of specifying the fiduciary's right to exercise the rights over the fiduciary assets for the purpose indicated by the settlor, thus making the required distinction between trust and the institution of administration of another person's property.

Moreover, we should like to point out the contradiction between the provisions under Art.777, pursuant to which the fiduciary may act as a beneficiary of the trust, and the provisions under Art.775, prohibiting the making of indirect gifts in favor of the beneficiary. We deem that it is necessary to amend the provisions under Art.777, through the NCC implementation law, eliminating the fiduciary's possibility to act as beneficiary.

Art.780 sets out the obligation to register trust contracts with the fiscal authorities and with the local competent tax authorities. The current provisions under Art.780 should be supplemented so as to grant to the settlor the possibility to fulfill the registration formalities of the trust contract. Furthermore, we recommend that the special enactment which will regulate the procedure of entering registered rights in the land book should also detail the procedure of entering the transfer of registered rights, pursuant to a trust contract, as well as the contents of such registration (in accordance with Art.782 para.(2) the immovable assets registry must state the fiduciary's name and his capacity).

The NCC implementation law should clarify the provisions under Art.787, since the terms used with regard to the assets allotted for the fulfillment of the fiduciary's obligations, *i.e.* "the other rights

related to his estate”, are inaccurate, because it is impossible to allot other fiduciary assets which might be part of a fiduciary’s estate, at a given moment, for same to fulfill his personal obligations.

1.4.(e). Title V “Administration of the property of others”

[Art.792-857] For the first time in Romanian law, the NCC introduces regulations on the administration of the property of others, by means of transposing the CCQ provisions (Book V, Title VII, Art.1299-1370) into the national law.

These provisions are the general legal framework which shall apply to administration of assets, unless the law, the articles of association or concrete circumstances require the use of another statutory administration regime. It results that, in the absence of express legal provisions or of parties’ agreement, the courts shall have the right to analyze the conditions in which the administration was made and establish the statutory regime applicable thereto.

[Impact] In this matter, we should first note the right of the courts, recognized by the NCC, to assess the circumstances in which administration shall be carried out, establish the statutory regime applicable thereto, the remuneration to which the administrator is entitled, as well as the extent of the obligation to indemnify and remedy the damage caused by the administrator, as well as the appropriateness of his replacement. It should be also mentioned that the area of application of the administration legal regime should be further defined, and correlated with other special legal provisions.

Since the administrator exercises his duties based on a power of attorney granted under an agreement or a legacy, we recommend the supplementation of the NCC provisions or the adoption of a special enactment providing for the formal conditions to be met by the deed granting the necessary power of attorney to the administrator, considering that, in the case of full administration, the administrator concludes acts of disposition regarding the administered assets.

Furthermore, it would be advisable to institute a publicity system for the granted rights of the administrator, in order to protect the third parties acting in good faith and the beneficiary from the acts abusively concluded by the administrator.

Apart from the fact that this title makes reference to derogating rules which could be imposed by a special enactment, thus triggering the need to issue such provisions, we estimate that these provisions will not have any institutional or financial/budgetary impact on the current judicial system.

(i). Chapter I “General Provisions”

[Art.792-794] The provisions of this chapter define the concept of administrator, establish the rules applicable to the establishment of his remuneration and the scope of the provisions contained herein.

According to Art.792 para.(1), the administrator’s capacity arises from the power of attorney granted by legacy and accepted by the administrator or under an agreement. Art.729 para.(3) establishes the general character of the provisions of this title, which shall apply whenever the law, the articles of association or certain concrete circumstances do not require the use of another legal administration regime. However, we note that there is a contradiction between these provisions and Art.794, which

states that the provisions of Title V of the NCC shall apply in all cases, in the absence of statutory provisions to the contrary, which contradiction may be eliminated under the future law for implementation of NCC.

(ii). Chapter I “Forms of Negotiorum Gestio (Gestion d’Affaires)”

[Art.795-801] The NCC defines two forms of administration, governed by specific rules: (i) simple administration, having the purpose of preserving the assets and performing the acts required for them to be used in compliance with their usual destination (Art.795), and (ii) full administration, aiming to preserve and operate the assets profitably and increase the patrimony in favor of the beneficiary (Art.800).

(a) Section 1 “Simple Administration”

[Art.795-799] Regulating the powers of the administrator empowered to carry out simple administration activities, Art.796 provides for the right of the aforementioned to collect the fruits of the assets, to collect the administered receivables and issue discharging receipts, to exercise the right of vote, conversion and redemption related to the administered securities.

Art.799 also provides for the administrator’s right to conclude acts of disposition regarding the individually determined assets, but only with the express authorization of the beneficiary or of the court, except when the asset is subject to depreciation, or when it is part of an estate and its transfer or encumbrance is required for a good administration of the universality of assets. Art.799 para.(3), second thesis, reiterates the provisions of Art.799 para.(1) regarding the acts of disposition which may be concluded in connection to individually determined assets, therefore they should be removed, to avoid double regulation.

(b) Section 2 “Full Administration”

[Art.800-801] Under Art.801, in the context of full administration, the administrator may conclude acts of disposition on the administered assets, or he may change their destination (Art.801).

(iii). Chapter III “Legal Regime of the Administration”

[Art.802-845] This chapter generally provides for the administrator’s obligations towards the beneficiary, the obligations of the administrator and of the beneficiary in their relationships with the third parties, the rules applicable to inventory, warranties and insurances owed by the administrator, collective administration and delegation, investments considered safe, profit and loss distribution and the annual statement owed by administrators.

(a) Section 1 “Administrator’s Obligations towards the Beneficiary”

[Art.802-812] Under these provisions, the administrator is bound to act strictly within the limits of the powers granted to him, being obligated to observe the obligations incumbent on him, under the law or pursuant to the parties’ agreement.

The administrator shall act in a diligent, honest and loyal manner (Art.803), shall avoid conflicts of interests and shall inform the beneficiary on their occurrence, and shall keep separate records for the administered assets, distinct from the records on his own assets (Art.807). Furthermore, the

administrator shall not be entitled (unless expressly authorized by the beneficiary or by a court) to acquire rights in relation to the administered assets (Art.806), to use the administered assets in his own interest (Art.808), or to dispose, free of charge, of the assets or rights that have been granted to him.

In this matter, we would like to point out the provisions of Art.812, according to which the court has the right to reduce the scope of liability and of indemnifications owed by the administrator, based on the circumstances under which the administration was undertaken, or on the gratuitous character of the service rendered by the administrator. In practice, this power of the courts is likely to cause the issuance of certain decisions which might be contrary to the interests of the beneficiaries and even the intent of the contracting parties.

(b) Section 2 “The Obligations of the Administrator and of the Beneficiary in their Relationships with the Third Parties”

[Art.813-817] The provisions contained in this section reiterate the rule upholding that the administrator shall act within the limits of the powers granted to him, otherwise he shall be personally bound towards the third parties with whom he entered the contracts. Mention should be made that the provision of Art.815 para.(2), stating that the administrator who individually exercises the powers he was supposed to exercise together with other person shall not be held liable for the non-fulfillment of the obligation, insofar as such exercise is more profitable for the beneficiary. Although there is no express provision thereon, it is obvious that, in such case, the courts shall have the right to assess whether or not the administrator should exercise the powers granted to him.

Art.816 and Art.817 establishes the rule stating that the beneficiary shall be held liable towards third parties for the damages caused by the administrator in exercising the powers granted to him by the aforementioned, but only up to the amount of the earnings obtained, and for the contracts concluded by a administrator apparent, insofar as the beneficiary supported or created such appearance.

Having regard to these provisions, we recommend that the provisions of this title be supplemented with new regulations, to ensure the publicity of administration cases, and at least allow third parties to know the limits of the powers granted to administrators.

(c) Section 3 “Inventory, Warranties and Insurance”

[Art.818-824] This section establishes the rule according to which the administrator is not bound to make an inventory of the administered assets, to subscribe an insurance policy or provide further warranties for the appropriate performance of the obligations incumbent on him, unless such obligation arises under the law, the parties’ agreement or is required by court judgment. However, the administrator is entitled to request the court to discharge him from these obligations, for serious reasons. Obviously, such exemption might be granted to the administrator only if the circumstances thereof have fundamentally changed after the initial judgment was issued.

Art.823 on the inventory communication and challenge provides that the inventory shall only be made public in the cases provided under the law and in compliance with the legal procedures. It results that the NCC lawmaker considered the supplementation of the general framework provided by Art.792-857 with special provisions, by further issuance of a special enactment.

(d) Section 4 “Collective Administration and Delegation”

[Art.825-830] Among the provisions on the rules applying to the decisions adopted by several appointed administrators, their liability for the decisions made and the presumption of decision approval, we would like to mention the provisions of Art.826 para.(2) and para.(3) on decision-making in special circumstances. Thus, Art.826 para.(3) provides for the right of the courts to settle the disputes between administrators that are likely to jeopardize the administration, to establish a new way to make decisions, distribution of powers among administrators, granting a decisive right of vote in favor of one of the administrators, or even decide on the replacement thereof. These extended powers of the courts are likely to be abusively applied in practice, which may affect the beneficiaries’ interests.

(e) Section 5 “Investments Considered to Be Safe”

[Art.831-836] The NCC defines several types of investments considered solid, prudent, which may be established, *inter alia*, by the administrators empowered to exercise a simple administration. The NCC Draft IL already suggests a new list of criteria for identifying safe investments, in line with the current economic situation.

It is noted that the provisions of Art.832 on the prudential limits established for the investments provide for very wide criteria, based on which the administration efficiency shall be determined. We recommend that this article be amended, in view of instituting certain objective criteria for assessing the investments made by administrators.

(f) Section 6 “Profit and Loss Distribution”

[Art.837-841] The NCC establishes the rule according to which the profits and losses shall be distributed between the beneficiary of the fruits and the beneficiary of the capital, according to the parties’ agreement (*i.e.* the articles of association), and other rules relating to the debiting of the income account (Art.838), the capital account (Art.839), as well as the date when the beneficiary’s right to the net income is born (Art.840).

(g) Section 7 “Annual Statement”

[Art.842-845] This section establishes the administrator’s obligation to present an account on its administration to the beneficiary, at least once a year, and to allow the latter to examine at any time the registries and supporting documents on the administration.

(iv). Chapter IV “Cessation of Administration”

[Art.846-857] Under this chapter, the NCC lawmaker distinctly establishes the causes for the cessation of the right of administration, as well as the obligations incumbent on the administrator and on the beneficiary, upon the cessation of the administration.

(a) Section 1 “Causes for Cessation”

[Art.846-857] Regulating the cases for cessation of administration, Art.846 let.(e) refers to the replacement of the administration by the court, at the request of the party concerned. In this case, as with the ones previously mentioned, we note that a right has been granted to the courts to intervene,

based on their own assessment of circumstances, in the development of a administration which was initially established by will of the beneficiary.

Considering the provisions of Art.849 on the obligations of administrators and beneficiaries after the cessation of administration, especially towards the third parties acting in good faith, we recommend an analysis on the institution of a publicity system for the cases of administration, to render the deeds relating to the power of attorney given to administrators and the cessation of their rights enforceable towards third parties.

(b) Section 2 “Account on and Delivery of Assets”

[Art.850-857] This section provides for the obligations of the administrators after the cessation of the administration to deliver to the beneficiary the assets which were subject to, or were acquired in the course of the administration, or, if need be, the equivalent amount thereof (Art.852-853), and to present a final account in order to allow the beneficiary to verify how the right of administration was exercised (Art.850).

The NCC also establishes the beneficiary’s obligations to incur the expenses related to the administration (Art.854), as well as the administrator’s right to withhold the remuneration owed to him by the beneficiary from the balance of the administration (Art.856). In the matter of obligations of beneficiaries towards the administrator, Art.857 establishes the beneficiaries’ joint liability.

1.4.(f). Title VI “Public Property”

[Art.858-875] The regulation of the legal regime applicable to public property, along with the regime of private property, is one of the novelties brought by NCC. However, the general provisions applicable in this matter (Art.858-865) are, to a great extent, a transposition of Law No.213/1998, while the provisions on the right of management (Art.867-870), the right of concession (Art.871-873) and the right of free use (Art.874-875) are, in their turn, the expression of provisions which may be found in the special laws or in the doctrinal opinions.

[Impact] Considering that the provisions under this title represent, to the highest extent, a transposition of the provisions contained in the special laws already applicable to this matter, as well as of the approaches already existing in the doctrine, we deem that NCC’s regulation on the legal regime of public property will not have any finance, budget or human resources impact on the current judicial system.

However, we note that, further to taking on, under this title, most of the provisions in Law No.213/1998, such special law should be abrogated so as not to overlap NCC’s regulations. Nonetheless, we would like to underline that the provisions of Law No.213/1998 on the individualization of assets which are part of the public property of the State, respectively of the administrative-territorial units should be either kept or transposed in another enactment; this approach is also in line with the provisions of NCC (Art.859 para.(1)), according to which the other assets which are public property, except for those itemized at Art.136 para.(4) of the Constitution, respectively Art.859 para.(1) NCC, are determined by organic law, as well as in line with Art.860 para. (2) NCC, according to which the law (our note: the special law) shall provide for the conditions to distinguish between the national, the county and the local public property.

Also, we deem that it will be necessary to keep/transpose in a special enactment the provisions governing the right of concession, because NCC's provisions are general and do not regulate, for instance, the procedure which must be followed in view of concluding a concession contract, the conditions in which the right of concession ceases, etc. We also note that, unlike Law No.213/1998 which includes provisions on all the ways in which the right of public property may be used, NCC does not regulate the lease of assets which are public property; since so far no unitary regulation on this type of lease contracts has been achieved, we recommend a review on the possibility to introduce in a special enactment or even in NCC provisions on the lease of the assets which are public property.

The issuance of a special enactment is also necessary in order to detail the legal regime applicable to the right of management, by taking into account the provisions of Art.868 para.(2).

(i). Chapter I "General Provisions"

[Art.858-865] This chapter includes provisions on the definition of the right of public property, the object, features and method to acquire, respectively to extinguish this right.

Art.858, on the definition of the right of public property, transposes the provisions of Art.1 of Law No.213/1998. We note that NCC's lawmaker stresses the necessity to have legally acquired the public property assets; although this approach is, in its turn, a transposition of Art.2 of Law No.213/1998, it must be mentioned, because it answers the doctrinal opinions and especially the case law solutions according to which the restitution claims concerning immovable assets which are apparently public property are not admissible and the courts of law must analyze whether the State/administrative-territorial units legally acquired the assets whose restitution is claimed.

Defining the object of the public property, Art.859 resumes the provisions of Art.136 para.(4) of the Constitution, as well as the doctrinal opinions on the public, respectively the private property of the State/administrative-territorial units.

As regards the delimitation between the national, the county and the local public property, as well as the way in which the assets which are the public property of the State may be transferred to the public property of the administrative-territorial units and conversely, Art.860 provides that these aspects are to be regulated by the special law. However, we note the express provision of Art.860 para.(3), which solves a doctrinal dispute regarding the possibility to change the owner of a public property by an administrative decision, if the fact that the respective asset is a part of the State's or administrative-territorial units' public property had been determined by organic law; the new express legal provisions provides that it is necessary to issue an enactment with a similar legal power to an organic law, as the administrative decision does not have legal effects.

A novelty is the express regulation under Art.862, concerning the limits in exercising the right of public property. Although both Law No.213/1998 and the doctrine acknowledged the possibility to limit the exercise of the right of public property further to the encumbering of such right by liens, respectively by limitations generated by neighboring relations, Art.862 expressly provides that these limitations are accepted only if they are compatible with the public use or interest for which the relevant assets are meant. In addition, Art.862 para.(3) provides that the person who could have benefited from the limitation in the exercise of the right of ownership, but loses such benefit due to an incompatibility between the respective limitation and the public purpose of the asset, is entitled to

receive a fair indemnification from the holder of the right of public property. Therefore, the intention of NCC's lawmaker has been to make sure that the exercise of the right of public property affects as little as possible the ownership right of other persons.

As regards the cases when the right of public property is acquired, respectively extinguished, Art.863 and Art.864 resume, with small differences, the current provisions of Law No.213/1998. We must note the clarification brought by Art.864 to the case when the right of public property is extinguished by an administrative decision, respectively when the asset is transferred from the public to the private property; NCC resumes the doctrinal opinions and expressly provides that such operation is admissible only if, in prior, the public use or interest on such asset has ceased. This legislative clarification is welcome and will lead, on the one hand, to a limitation of cases when the holders of rights of public property may decide to include a certain asset in their public or private property and, on the other hand, will allow the courts to analyze the legality of such administrative decision.

We recommend the amendment, by employing a correct terminology, of Art.865 concerning the defense of the right of public property. Thus, Art.865 para.(2) uses the concept of "holders of the rights corresponding to the public property", a concept which in practice may raise divergent interpretations. We note, on the one hand, that NCC uses a similar concept, i.e. "real rights corresponding to the public property", as a generic name of the right of concession, right of management and right of free use, but also that Art.865 para.(2) does not use the same terminology. To avoid possible divergent interpretations concerning this concept, it is recommendable to use a unitary terminology.

(ii). Chapter II "Real Rights Corresponding to the Public Property"

[Art.866-875] NCC proposes the generic qualification of the right of concession, the right of management and the right of free use as "real rights corresponding to the public property" and includes express provisions on the principles applicable to each of these rights.

The provisions regarding the right of management (Art.867-870), the right of concession (Art.871-873), respectively the right of free use (Art.874-875), are a transposition of the current legal provisions and doctrinal opinions on the content of these rights. However, we note that, despite the express regulation, NCC's provisions are not enough to determine how these rights are established, exercised and extinguished, and it is necessary to maintain/issue special enactments in this respect. In fact, even Art.866 para.(2), which is a part of the section on the right of management, respectively Art.871 and Art.872 para.(2), concerning the right of concession, contain express references to such special legal provisions. As regards the right of concession, we note that, considering NCC's provisions, the provisions of GEO No.54/2006 may also be applied after NCC comes into force.

1.4.(g). Title VII "The Land Book"

[Art.876-915] Faithful to the principle of providing a unitary regulation on the persons' patrimonial and non-patrimonial relations, NCC proposes, as a novelty, to include the principles governing the land book among those regulating the legal regime of the private and public property. The general provisions (Art.876-884), those regarding the registration of land book rights (Art.885-901), notation (Art.902-906), and rectification of land book registrations (Art.907-915), keep, to a great extent, the principles already established by Law No.7/1996, but are subordinated to a new

principle regulated by NCC: the land book registrations have the power to establish rights. From this perspective, it may be said that we are in the presence of one of the most important reforms proposed by NCC, since it is for the first time when the traditional land book system will be applied on the entire Romanian territory.

[Impact] Given the reform proposed by NCC in the land book matter, we deem that the provisions under this title will have a significant impact both at an institutional and a social level. We expect an increase in the workload of cadastre and land book offices, which could render necessary both an increase of resources and a higher number of staff involved in this activity. In addition, one must also take into account the costs generated by the necessity to train the existing land book employees in order to allow them to become acquainted with the new NCC provisions on the operation of the land book system. Furthermore, there will also be costs generated by the information campaigns, meant to acquaint the public with the new principles, i.e. that the land book registrations have the power to establish rights. The organization and development of such information campaign is necessary in order to make sure that the legal subjects know the legal provisions, contributing to an efficient protection of their rights acknowledged by the law.

Adopting the new NCC provisions on the land book also entails the necessity to amend Law No.7/1996 and to supplement such law (or the relevant secondary legislation), with detailed norms on how registrations are to be performed. These future provisions on how to make registrations with the land book must also regulate the registration of land book rights which make the object of trust contracts.

(i). Chapter I “General Provisions”

[Art.876-884] By defining the purpose and object of the land book, the land book rights and their object, as well as the types of registrations with the land book, NCC’s lawmaker takes on, sometimes rephrasing and clarifying them, most of the relevant provisions from Law No.7/1996 on cadastre and land book registration. Most amendments brought by NCC to the provisions taken from the special law have been triggered either by the necessity to clarify these concepts, NCC’s lawmaker taking on the doctrinal opinions in this respect, or by the need to correlate such provisions with the newly inserted principles on the land book matter.

A newly inserted definition, compliant with the doctrinal opinions, is the one on land book rights (Art.877), a concept which had already been used in Law No.7/1996 without being defined.

New principles have also been introduced by the provisions regulating the types of registrations with the land book (Art.881) and the registration of real rights affected by modalities (Art.882). Thus, after bringing clarifications on the object of land book registrations, i.e. final land book registrations, provisional land book registrations and land book notations, Art.881 para.(3) states that provisional land book registrations and land book notations have a legal character and may be made only in the cases expressly provided by the law. An absolute novelty is provided at Art.882 para.(1), according to which real rights which are subject to a condition precedent or to a condition subsequent are not registered with the land book and can only be recorded as provisional land book registrations. Considering the effects of the provisional land book registration (as regulated by Art.899), i.e. to acquire, amend or extinguish a land book right as of the registration date of the application for

provisional land book registration, subject to and to the extent that the respective application is grounded, the solution provided by Art.882 para.(1) seems to be justified as regards the real immovable rights subject to a condition precedent; in fact, this solution is in line with the opinions expressed by the legal doctrine, according to which a right which is subject to a condition precedent should not make the object of a final land book registration, so as not to grant to a right which could be inexistent the color of title that the final land book registration has (i.e. it is deemed to be a “final” registration). For the same arguments, and also considering that the real immovable rights which are subject to extinctive prescription can be recorded both by final land book registration and by provisional land book registration (Art.882 para.(2)), it is difficult to explain why NCC’s lawmaker considered that a right which is subject to a condition subsequent makes the object of a provisional land book registration, and not of a final land book registration. From this perspective, we deem that the solution proposed at Art.882 para.(1) concerning the provision registration with the land book of the real immovable rights which are subject to conditions subsequent should be reviewed by the lawmaker.

Another new provision which should be reviewed is contained in Art.883 para.(2) second thesis, according to which no one may claim that he was not aware of an application for registration, if such application has been registered with the land book office. Although Art.883 para.(1) and para.(2), first thesis, establishes the land book’s role to ensure absolute registration of land book rights, the aforementioned provision from Art.883 para.(2), second thesis, would be justified only if it referred to land book registration which have already made and, implicitly, to the land book applications on which they relied. Alternatively, Art.883 para.(1) should be supplemented so as to provide that the registries of land book registration applications are, for the purpose of this legal provision, “documents by which the land book is completed”, thus regulating the right of the persons concerned to have access to these registries as well. Without such clarifications or new regulations, we deem that the provision of Art.883 para.(2), second thesis, is not substantiated.

(ii). Chapter II “Registration of Land Book Rights”

[Art.885-901] Although, according to Art.884, the procedure for registration with the land book is to make the object of a special law, NCC regulates at this chapter the principles governing the acquisition, amendment and extinguishing of land book rights, as well as the effects of registrations with the land book.

However, before analyzing the new legal provisions, we note that NCC’s lawmaker used an inexact terminology; although, according to Art.891 para.(1), the concept of “land book registration” contains the final land book registration, the provisional land book registration and the land book notation, Chapter II of Title VII uses the generic term of “land book registration” when it makes reference both to the final land book registration and to the provisional land book registration. To ensure a unitary and correct wording, we recommend a review of the terminology.

Art.885 para.(1) states that the land book registration has the power to establish rights; thus, real rights on the immovable assets included in the land book are acquired, both between the parties and against third parties, only by their registration with the land book, under the act or fact which accounted for the registration. The provisions of Art.885 para.(2)-(4) regulate, in line with the

principle provided at Art.885 para.(1), that land book rights are extinguished by de-registration and also provides the deeds on which the de-registration may rely. Thus, we are in the presence of a fundamental reform of the ownership right, which will require, for a correct and unitary implementation, the organization of training programs for the professionals. In addition, to secure an effective protection of the rights of the persons transferring or acquiring real rights on the immovable assets, it is recommendable to develop information programs on the amendments brought by NCC to the land book matter.

Art.887, regulating the exceptions from the principle of acquiring real rights by final registration with the land book, resumes, to a great extent, the provisions of Art.26 of Law No.7/1996. We note that, according to the new provisions, the ownership right is acquired without registration with the land book when it results from natural accession (*accessio*), which corresponds to the new principles on the immovable artificial accession. We also note the novelty brought by Art.887 para.(2), which ensures the correlation of NCC's provisions with NCPC's provisions on enforcement, and which shall contribute to the protection of good-faith third parties who acquire real rights on assets that make the object of an enforcement by sale; thus, according to the new regulations, real rights acquired by enforcement cannot be enforceable against good-faith third party acquirers if the enforcement proceedings have not been first noted in the land book.

We also note the novelty of Art.889 para.(1), regulating the formalities to be performed in order to extinguish a right of ownership by waiver of the owner registered with the land book. As regards the provisions of Art.889 para.(2), according to which the administrative-territorial units (except for the counties) may request the registration of their ownership right on the immovable assets for which the private ownership right has been extinguished by waiver, we would like to underline that, according to Art.553 para.(2), the ownership right is acquired by these administrative-territorial units under an administrative decision, without registration with the land book; therefore, it follows that, in the case of the ownership right acquired by the communes, towns or municipalities on the immovable assets relinquished by their owners, the registration with the land book is made only in order to ensure the enforceability against third parties.

Art.890, setting the rules for determining the date as of which the land book registrations become effective, resumes the principle established at Art.25 of Law No.7/1996, according to which the determinant date in this respect is the date when the registration applications are registered, but also contains new provisions. Thus, according to Art.890 para.(1), in view of setting the order in which the registration applications are registered, the date, hour and minute when the registrations were registered shall be taken into account, if they were submitted in person, by attorney-in-fact or notary public, or communicated by telefax, electronic mail or other means. However, these provisions are contradicted by Art.890 para.(5), according to which the registration applications submitted during the same day, some of them in person, others by mail or courier, shall be registered as having the same provisional rank; by correlating the two texts, it follows that, in case of registration applications received during the same day, the rule according to which the "hour and minute when the application is registered" are taken into account does not actually have effects. To ensure a consistent regulation, we recommend that such provisions be reviewed.

A new rule is also established in view of determining the preferred registration application, where two or more registration application have provisionally acquired an equal rank: according to Art.890 para.(4), irrespective of the certified date of the concurrent titles, the party who has possession of the asset or against whom the debtor first exercised his incumbent obligations shall be preferred. We deem that this solution is debatable and should be reviewed by the lawmaker, as it leads to the protection of the rights held by the subsequent acquirer to whom the initial owner transferred the asset for the purpose of defrauding the interests of the first acquirer of the ownership right over the respective asset.

The principle established by Art.890 para.(1) regarding the date when the land book registrations have effects is resumed by Art.891 which also transposes the unanimous doctrinal opinion that, if there are concurrent titles emanating from the same predecessor in title, the holder of a land book right is deemed to be the first person who registered his right, irrespective of the date of the title on which the land book registration relies.

Art.892 regulates a special case when the granting of a preferential rank or even the de-registration from the land book of a concurrent right may be requested, i.e. when the registration was made by a bad-faith third party, who hindered under duress or by misleading the initial acquirer to register his previously acquired right, or who acknowledged that the initial acquirer was hindered by a third party from registering his right under duress or by being misled. The provisions of Art.892 are different from the case provided at Art.27 of Law No.7/1996, the right to request de-registration or to be granted a preferential rank being subject to a 3-year period of prescription, which starts to run on the date when the third party registers the right in his benefit.

The rules regarding the identification of the persons against whom the land book rights may be registered (Art.893), the registration of land book rights in case of successive legal deeds (Art.894) or the registrations relying on the obligations of the deceased (Art.895) have been taken on, with insignificant amendments, from Art.22-24 of Law No.7/1996.

Novelties are also brought by Art.895 para.(1), second thesis, according to which the right to file action for land book registration is subject to a period of prescription, and Art.897, which, starting from the principle which is currently established at Art.27 para.(5) of Law No.7/1996, regulates the conditions under which the land book registration action may be filed against a bad-faith third party acquirer; in this case as well, the right to file action is subject to a period of prescription which cannot exceed 3 years as of the registration of the third party's right in his benefit.

Although the provisions of Art.898 regarding the cases when the provisional land book registration of certain rights may be requested is not an absolute novelty, we would like to draw attention on the terminology used at Art.898 item 2 as regards the obligation of a party to "relocate" a land book right; considering the absence of a definition on this concept, and the intention of NCC's lawmaker to modernize the terms, we recommend the clarification, respectively the amendment of this provision.

Art.900 keeps the presumptions on the existence, respectively the inexistence of the land book rights instituted by Art.30 of Law No.7/1996, but also limits the possibility to produce evidence to the contrary in the cases when real immovable rights are acquired without registration with the land book, regulated at Art.887, respectively by an action for rectification.

NCC establishes the preferential treatment that, according to certain doctrinal and case law opinions, the good-faith acquirer of real rights should enjoy, when the right of his predecessor in title is de-registered from the land book. Art.901 states this principle and details the conditions which must be met in view of determining the good faith of the third party acquirer. However, it must be determined how the compliance with the conditions provided at Art.901 para.(2) is to be verified in practice, especially as concerns the scope of the concept of “land book content”, which the third party must investigate in order to prove his good faith, considering the provisions of Art.883 regarding the documents which “complete” the land book; according to the last provision, the instruments on which the land book registrations relied “complete” the land book and any person concerned may have access to them.

(iii). Chapter III “Land Book Notation of Certain Rights, Facts and Legal Relations”

[Art.902-906] According to the principle regulated at Art.881 para.(3), which provides that land book registration can be made only in the cases provided by the law, Art.902 para.(2) includes a non-exhaustive itemization of the main rights, facts and legal relations which are subject to land book notation. Unlike the final land book registration and, in accordance with the law, the provisional land book registration, the land book notation does not establish rights, but only ensures the enforceability against third parties of the rights, facts or legal relations which are recorded.

Art.903 also institutes exceptions from the rule of ensuring enforceability against third parties by land book notation, itemizing the categories of acts or facts which are opposable against third parties even if there is no land book notation.

As regards the notation of the intention to transfer or mortgage, Art.904 establishes a limitation of the principle according to which the transfer and mortgage will have the rank of the date when the intention is noted, stipulating that this effect shall occur only if the transfer or mortgage are performed within 3 months as of the notation of the intent. Art.905 brings, in its turn, an amendment to the current provisions of Art.40 of Law No.7/1996, stipulating that the effect of noting the intention to transfer or mortgage ceases 3 months after the registration date of the notation application.

Art.906 regulates the conditions which must be met in order to note the promissory agreements and the option agreements, as well as the cases when such notations may be de-registered, at the request of the parties concerned or *ex officio*.

(iv). Chapter IV “Rectifications of Land Book Registrations”

[Art.907-915] NCC’s provisions on land book rectification resume, to a great extent, the provisions of Art.33-37 of Law No.7/1996, but also include some amendments.

Art.907 defines the concept of rectification and details, at para.(3), the principle according to which the actual legal status of the immovable asset must be acknowledged by the holder of the right under an authentic statement or by a final judgment issued in an action for annulment, rescission or any other action relying on a cause of ineffectiveness of the deed. We deem that this legal provision should be clarified by eliminating the redundant terms (“authentic notarial statement”) and by correctly

stipulating the types of actions which may trigger the rectification, i.e. those caused by or resulting in the ineffectiveness of the deed on which the final or provisional land book registration relied.

In fact, Art.908 lists the cases when the rectification of a final or provisional land book registration may be requested. We note that the NCC's lawmaker draws a distinction between the invalidity of the final land book registration and the invalidity of the resolution under which the land book registration was ordered (Art.908 para.(1) item 1), thus codifying a legal opinion.

Art.909 para.(2) provides for a 5-year term (unlike the 10-year term provided at Art.35 para.(2) of Law No.71996) since the land book registration when, on sanction of forfeiture, a person concerned may file legal action for rectification against a third party who willingly acquired a real right by donation or legacy by particular title. If the action for rectification is filed against a good-faith third party acquirer who paid a certain consideration, the term for filing the action is 3 years as of the registration by the third party of the application for the registration of his right, except for the case when the resolution ordering the performance of the registration which makes the object of the action for rectification was served to the plaintiff during the action for rectification, in which case the term for filing such action is 1 year as of the service of the resolution.

A novelty is brought by Art.912 concerning the radiation of conditional rights. Thus, if the compliance with the condition precedent affecting a land book right is not proved, the respective right shall be de-registered *ex officio* within 5 years as of the date of its registration with the land book. The condition subsequent shall also be de-registered *ex officio* if, for 10 years as of registration of the affected right, the de-registration of such right was not requested on the ground of the condition subsequent.

We would like to underline that Art.915 expressly regulates the obligation of the public servant in charge with maintaining the land book to be liable, jointly with the cadastre and real estate registration office, for the damage caused in keeping and managing the land book. The right to file action for the recovery of the damage is subsidiary to the right to file the actions and means of appeal provided by the law, and may be filed by the party concerned within 1 year as of the date when the injured party became aware of the damage, but not later than 3 years as of the date when the negligence was committed.

1.4.(h). Title VIII "Possession"

[Art.916-952] This title of NCC governs possession as status of fact (Art.916-921), the defects of possession (Art.922-927), the effects of possession (Art.928-948), as well as the type of claims that may be used for defending possession (Art.949-952). Maintaining most of the principles established under the CC with regard to possession, NCC reflects also some of the opinions expressed in practice and jurisprudence with regard to the definitions or the content of certain institutions. Some of the most important changes brought by NCC in this matter are included in the chapter referring to the effects of possession, as the rules applicable to usucapio are fundamentally changed. According to the new rules applicable in respect of land books, NCC regulates with regard to immovable assets both the adverse possession of immovable assets registered with the land book, and the adverse possession in absence of such registration. The principles applicable in this matter are similar to those that had been

enacted under Decree-Law No.115/1938, but it is the first time when these institutions are applicable on the entire Romanian territory.

[Impact] Although the provisions of this NCC title are very important from a theoretical perspective, they are not likely to have a significant **impact** from a financial/budgetary or human resources perspective on the current judicial system. The implementation of new provisions governing the land book is likely to trigger the increase of the workload of cadastral and immovable publicity offices, and given the change of the applicable legal provisions and the complexity of new institutions, it may be necessary that personnel training programs are organized.

(i). Chapter I “General Provisions”

[Art.916-921] In the definition of possession in Art.916 NCC maintains the principle set-forth by Art.1846 para.(2) CC, but includes also the critics raised in the doctrine with regard to the previous wording of such definition. It is therefore clarified the character of the possession of condition of fact, and not as condition of rights. Art.916 para.(2) expressly refers to possession as owner and to possession as holder of any real right, except for guarantee rights. Art.917 reflects the provisions of Art.1846 para.(2) with regard to the exercise of possession directly, or by means of a different person.

Starting from theoretical opinions and jurisprudence solutions, Art.918 lists the cases in which holding of an asset does not qualify as possession, as there is no *animus possidendi*.

The presumptions referring to possession, respectively to simple holding of an asset, listed by Art.919, have been taken over from the provisions of Art.1854 and of Art.1855 CC.

A partial re-enactment of the previous regulations (Art.1858 CC) is represented by the list of cases when the simple holding of an asset is transformed into possession, as such list is included in Art.920. NCC does no longer qualify the transfer of the holder’s rights by means of universal succession as a case that transforms simple holding of an asset into possession; this solution is consistent with the critics that had been raised in practice with regard to the former legal provision, and also with the principle *nemo ad alium transferre potest quam ipse habet*. Art.920 para.(2) defines the bona-fide of a third party acquiring an immovable asset, who obtains possession from a simple holder of the respective asset, on the basis of the rules applicable to land book.

The provisions of Art.921 referring to the case that lead to termination of possession are also new, and these cases include both the situations in which the possessor is deprived of the material element of his right, or his will to exercise possession ceases.

(ii). Chapter II “Defects of possession”

[Art.922-927] The provisions of this chapter referring to defects of possession, namely discontinuity (Art.923), violence (Art.924) and the absence of notorious character (Art.925), reflect the opinions expressed by the legal doctrine with regard to the absolute or relative character of such defects (Art.926).

(iii). Chapter III “Effects of possession”

[Art.928-948] This chapter contains the most important amendments brought by NCC to the rules initially set under CC, both with regard to new rules applicable to usucapio (adverse possession) and to the regulation of occupancy – a method of obtaining ownership title – as an effect of possession.

(a) Section 1 “General provisions”

[Art.928-929] Art.928 provides that possession exercised on movable or immovable assets according to legal provisions may have as effect the acquisition of an ownership title on the respective assets. The assets that, according to legal provisions, are inalienable may not be subject to adverse possession, irrespective whether such inalienability has been defined prior or after the commencement of possession (929).

(b) Section 2 “Usucapio of immovable assets”

[Art.930-934] This chapter establishes new rules applicable to usucapio (adverse possession) of immovable assets. Given the new legal regime applicable with regard to land book, the adverse possession effects will be determined depending on the registration of the immovable asset with the land book. The rules newly provided by the NCC reflect the principles that had been applied in the land book system regulated under Decree-Law No.115/1938, but also provide for shorter terms for adverse possession.

According to Art.930 para.(1), the person who had possession on an immovable asset for at least 10 years may obtain an ownership right thereon (including dismemberments of such ownership right) in the case the following conditions are fulfilled: (a) the owner registered in the land book has deceased or has ceased its existence, (b) a waiver to the ownership right was registered in the land book, or (c) the immovable asset subject to possession had not been registered in the land book. We note the provisions of Art.930 para.(2), according to which the mere possession is not sufficient in order to determine obtaining of the ownership right; the possessor claiming usucapio has to file a request for registration of the adverse possession with the land book; another condition is the absence of a registration request made by a third party. Moreover, a supplementary condition for adverse possession derives from Art.932 para.(2), according to which possession must have been free of any defects for the 10 years period.

Art.932 sets forth the method for calculating the adverse possession term in the case the asset was not registered in the land book. The occurrence of any defects of possession trigger the suspension of the usucapio, according to Art.932 para.(2).

The adverse possession of immovable assets that are registered in the land book is governed by Art.931, according to which the bona fide person who has been registered as owner in the land book, although such registration does not have a legitimate cause, may no longer be deprived of his ownership (or, as the case may be, of other real rights) if he has possessed the immovable asset for a period of 5 years after his registration with the land book, provided that the possession did not have any defects.

The possibility to cumulate possessions is regulated under Art.933, which takes over the provisions of Art.1859 and of Art.1860 CC.

According to Art.934, the provisions referring to adverse possession will be applied together with the rules governing the status of limitations.

(c) Section 3 “Adverse bona fide possession on movable assets”

[Art.935-940] The provisions of the NCC on this subject matter are different from the principles previously enacted by Art.1909 para.(1) and by Art.1910 CC, and clarify, in some cases, part of the rules applicable to this matter, although another part of the terms used are not very clear.

Without using the concept of “instantaneous prescription”, which has been highly criticized, Art.935 provides that any possessor of a movable asset is presumed to hold a legal acquisition title on such asset. Such new presumption is however not linked with the adverse possession of the movable asset, which may lead to the conclusion that an ownership right on a movable asset may be obtained only by a possessor acting according to Art.937 para.(1), or to Art.939.

Reflecting unanimous opinions expressed by the legal doctrine, Art.936 refers to the publicity effects of possession on movable assets, as possession of such assets ensures enforceability against third parties of the legal deeds referring to creation or transfer of real rights on the respective movable assets. We note that, although Art.935 refers to an ownership presumption, Art.936 makes reference also to the enforceability against third parties of other real rights obtained with regard to such assets.

The possession capacity to lead to acquisition of title is explicitly regulated in Art.937 para.(1), according to which the bona-fide acquirer, by means of an onerous deed, of a movable asset, becomes the owner of such asset from the moment when he obtains possession thereon, even if the transferor of the respective asset had not been the owner thereof. Special provisions applicable for the case when the asset had been lost or stolen, set-forth by Art.937 para.(2), represent an exception from the general rule enacted by Art.937 para.(1).

According to the opinions expressed by legal scholars, Art.938 defines bona fide with regard to adverse possession of movable assets, and expressly specifies that such bona fide should have existed upon commencement of possession.

The acquisition of title, as effect of possession, takes place in other cases than those subject to Art.937 according to the conditions set-forth by Art.939, namely after a useful possession for a period of 10 years.

According to Art.940, the provisions of that section of NCC represent a general rule for adverse possession of bearer negotiable titles, unless otherwise provided by express legal provisions.

(d) Section 4 “Occupancy”

[Art.941-947] The regulation of occupancy within the chapter governing the effects of possession represents a novelty, although this approach has been unanimously recommended by Romanian and French doctrine.

Art.941 para.(1) contains general provisions regulating the right of a possessor of a movable asset that does not belong to any other person to become the owner thereof, by means of occupancy, since the date when the respective person has acquired possession of such asset. Although Art.941 para.(1)

makes reference to “things that do not belong to any person”, Art.941 para.(2) defines the assets without an owner, which contain both abandoned movable assets and the assets that, by their nature, do not have an owner. These legal provisions should be amended in order to use consistent terms. Starting from Art.934 para.(2) of CCQ, Art. 941 para.(3) defines the abandoned movable assets.

As Art.941 establishes the rules applicable to occupancy of assets without an owner, special rules have been provided for the case when the assets had been lost. These assets are not deemed as being without an owner for the purpose of Art. 941, and Art.942 para.(1) expressly provides that a lost movable asset continues to belong to its owner.

Special rules for obtaining the ownership title on found assets are enacted by Art.942 para.(2) and the following articles, which settle obligations both with regard to the persons who had found such lost assets, as well as with regard to their owners. In this respect, the founder’s obligation to hand over the found asset to the police, within 10 days after it was found, as well as the obligation of the respective police division to preserve the found asset for a period of 6 months after their delivery, are expressly provided. Special rules for delivery of the found asset are provided for the case when the asset had been found in a public area, which is subject to an additional real right to that of public property (Art.943). According to Art.945 para.(1), the owner of the lost asset must claim it back from its holder within 6 months, failing which he loses his right to claim back the asset. The holder of the found asset is entitled, according to Art.944, to sell the found asset by means of public sale, in the preservation thereof is too expensive. The owner of the lost asset may exercise his rights on the proceeds obtained out of the sale of the lost asset. These provisions of Art.944 have to be read together with Art.937 para.(3), according to which the owner of the lost asset may claim back such asset from the person who acquired it in good-faith, provided that such restitution claim is exercised within 3 years after the asset had been lost.

Art.945 contains special provisions referring to the founder’s obligation to give back the found asset to its owner.

The principles referring to the acquisition by occupancy of the found treasures, except for those treasures that are part of public property, are set-forth by Art.946 that reflects the provisions of Art.649 CC.

(e) Section 5 “Acquisition of fruits by bona-fide possession”

[Art.948] The provisions referring to acquisition of ownership title on fruits of the assets, by the bona-fide possessor thereof, are set forth by Art. 948 para.(1) and (2) and represent a re-enactment of the provisions of Art.485 CC. In addition, Art.948 para.(4) takes over the definition of bona-fide from Art.486 CC, and Art.948 para.(3) defines the special rules applicable with regard to determining bona-fide in the case of fruits of an immovable asset that is registered in the land book.

(iv). Chapter IV “Possessory claims”

[Art.949-952] Art.949 details the requirements for the exercise of possessory claims, being expressly provided that such a claim may be used even by the holder of an asset. In order to prevent different interpretations, Art.950 provides that possessory claims may be filed against any persons,

including against the owner of the asset, except for the case when the possessor or the holder of such asset have the obligation to give back the respective asset to its owner.

The term of 1 year in which the possessory claim may be exercised is expressly defined (Art.951). Reflecting the provisions of Art.674 para.(2) CPC (which are no longer included in the NCPC), Art.951 provides that, in case of violence against the holder/possessor of the asset, the possessory claim may be used even by the holder of the asset.

The provisions of Art.952, which reflect the rules applicable to injunctions, are an innovation for this procedure. If there are sustainable reasons to consider that the possessed asset may be destroyed, the court may order, by means of injunction, that certain urgent measures are taken in order to avoid the perils; the court may also order that a bail is deposited prior to such actions being taken.

1.5. Book IV “On Inheritance and Liberalities”

[Art.953-1163] As it also follows from the Statement of Reasons, Book IV of NCC is exclusively dedicated to successions and liberalities, the premise for re-drafting the matter being the necessity to review institutions such as the will, the forced heirship and the restoration of succession. We shall further analyze the main novelties brought by NCC and their impact in the sections below, following the structure of Book IV on titles, chapters and, where necessary, sections and articles.⁵⁶

[Impact] As a general comment, NCC maintains to a great extent the current regulation on inheritance and gifts as interpreted by the doctrine and case law. In many cases, the new texts are codifications of the doctrine and practice. The noteworthy changes brought by NCC to the regime of inheritance and gifts are as follows:

- Introducing a new regulation on the concept of forfeiture of succession rights, extended to testamentary succession as well, including provisions on the absolute judicial forfeiture, the effects of judicial forfeiture and the possibility to eliminate the effects thereof by the deceased’s express manifestation of volition;
- Amending the institution of representation in succession matters by introducing the representation of the heir who forfeits his rights (and the heir who waives his rights, according to the NCC Draft IL);
- Eliminating the prohibition to constitute a trust, and providing for sets of rules applicable to trusts and residuary liberalities;
- Regulating a unitary rule to calculate the portion of forced heirship applicable to each forced heir;

⁵⁶ Book IV has 4 titles, reflecting a different structuring of the matter as compared to CCR, which contains only 2 titles (“On Successions”, “On *Inter Vivos* Donations and On Wills”). Thus, after Title I, which contains general provisions applicable both to the legal inheritance and to testamentary inheritance, NCC proposes the following division of the matter: Title II “Legal Inheritance” (containing the inheritance rights of the surviving spouse, currently regulated by Law No. 319/1944), Title III “Gifts” and Title IV “Transfer and Partition of Inheritance” (containing general rules on the transfer, acceptance and partition of legal and testamentary inheritance).

- Changing the term of the option for inheritance by extending it from 6 months to 1 year, as well as introducing the possibility to ask for a decrease of the term;
- Eliminating a pure and simple acceptance of inheritance, which is to be made, in all cases, only under what the doctrine calls a “benefit of inventory” (*beneficium inventarii*);
- Amending the scope of seised heirs (by introducing terminological changes to the matter of seisin);
- Finally, establishing special prescription terms in the matter of succession and liberalities.

Due to the purely theoretical nature of the changes, we did not identify any significant institutional, human resources or finance/budget-related impact of these norms upon the implementation; nevertheless, a professional improvement of the judges may be necessary, in order to ensure proper knowledge of the new regulations, especially in the cases where provisions are implemented which may represent the ground for completely new claims for the Romanian practice⁵⁷.

We note, however, that the new regulation brings quite significant legislative amendments. First, the new regulation takes over as such, or amends a quite large number of provisions from Law No.36/1995 on notaries public and notarial activity, which entails the necessity to amend the special law so as to reflect the amendments, as well as the implied repeal of certain articles.

Also, special regulations must be issued, or the existing regulations must be amended as regards the national notarial registry. Book IV of NCC provides for the obligation to register with the “national notarial registry, kept in electronic format, according to the law” the authentic deeds relevant in the matter succession, *i.e.*, the donation contract (Art.1092 NCC), the will (Art.1046 NCC), the revocation and the retraction of will revocation (Art.1051,1053 NCC), the statement on the acceptance of the inheritance (Art.1109 NCC), the statement on the waiver of inheritance and the revocation of the waiver (Art.1120,1123 NCC). Moreover, the revocation of powers of attorney must be registered with the national notarial registry, as per Art.2033 NCC of Book V – “On Obligations”. The regulation of a national notarial registry is not new. Currently there are four special national notarial registries for successions, authentic wills, options for inheritance, and revocation of powers of attorney, which have been established by the National Union of Notaries Public of Romania under the Order No.710/1995,⁵⁸ plus the National Notarial Registry of divorce petitions, created by Order No.81/2011 of the Minister

⁵⁷ For instance, the new procedure for the revision of the conditions and duties of a gift mat involve efforts for the specialization of judges.

⁵⁸ Thus, according to Art.56¹ of the Order No.710/1995, “*The following registries are established by the National Union of Notaries Public of Romania: a) the National Registry of Successions, where the causes of succession concerning Romanian, foreign citizens or stateless persons with their last domicile abroad, who left real property in Romania must be registered (RNES); b) the National Registry of Authentic Wills (RNTA), where all clauses of a will and their revocation must be registered; c) the National Registry of Options for Inheritance (RNOS), where all notarial deeds concerning the clean acceptance, the acceptance under benefit of inventory and the waiver of succession must be registered; d) the National Registry on the Revocation of Powers of Attorney (RNPR), where all deeds of express revocation of the powers of attorney given for the purpose of executing deeds and fulfilling notarial proceedings must be registered*”.

of Justice, further to the coming into force of Law No.202/2010.⁵⁹ According to Art. 56² para.(1) of the Order No.710/1995, as amended, the 5 national notarial registries “*are kept in hard copy and in electronic format*”.

As a first comment, in relation to the reference to a national notarial registry, “*kept in electronic format, according to the law*” (e.g., Art.1046 NCC) we deem that the enforcement law should clarify whether this “national notarial registry” is one of the existing registries or, as the case may be, a new national registry to be established by special provisions which will replace the current ones. Such clarification could take the form of a provision amending Law No.36/1995 (as the NCC Draft IL does with the National Notarial Registry of marital regimes), if the creation of a new registry is envisaged or, if keeping the existing registries is intended, by NCC using the full name already given to these registries in the special laws (we note that, for instance, the National Notarial Registry of marital regimes is quoted with its full name in Art.334 para.(1). Therefore, for reasons of legislative technique, the concepts of National Notarial Registry of authentic wills, the National Notarial Registry of successions, etc. should be used.).

At any rate, we deem that there is another reason to amend the current special laws, i.e. that the NCC brings amendments to the current provisions on the national notarial registries. For instance, the current laws do not require registration of the retraction of testament revocation or the revocation of the waiver of inheritance but, unlike the NCC, provide that it is mandatory to register the cases of succession; another reason is that the provisions of Order No.710/1995 on the pure and simple registration/registration under the benefit of inventory will be outdated by the new regulation. In addition to the amendments meant to solve all these discrepancies, the special norm which should be issued for the enforcement of NCC’s provisions on the national notarial registry could require the registration of additional deeds as compared to those provided by NCC (e.g., elimination of the effects of judicial forfeiture by authentic testament or notarial deed, according to Art.961 NCC) and could maintain the mandatory registration of successions.

Also, in order to increase the efficiency and accuracy of the information registered with the national notarial registry, the obligation of the Romanian diplomatic offices and consular missions or other institutions authorized, under the law, to perform notarial activities in accordance with Art.5 of Law No.36/1995 to register the respective notarial deeds should be expressly provided. On this last aspect, mention should be made that, from all NCC’s norms regulating the obligation to register the notarial authentic deed with the national notarial registry, only Art.1120 para.(2) expressly provides that, in addition to notaries public, the statement on the waiver of inheritance may also be authenticated by the Romanian diplomatic missions or consular offices, under the conditions and within the boundaries provided by the law, the obligation of these entities to also register the statement of waiver with the national notarial registry being implied. Starting from the premise that the Romanian diplomatic missions or consular offices have the competence to draft any notarial deeds, it is not clear why the

⁵⁹ Art.5 of Order No.81/2011 of the Ministry of Justice provides for the supplementation of Art.56¹ of Order No. 710/1995 by a new let.e), which shall read as follows: “[The following registries are established by the National Union of Notaries Public of Romania: ...] e) the National Registry for divorce petitions (RNECD), where the petitions for divorce by notarial procedure shall be registered”.

registration of this particular deed is singled out in NCC, which may raise an interpretation that the Romanian diplomatic missions or consular offices do not have the obligation to request the registration with the national notarial registry of any other notarial deeds (for example, the authentic will), while the notaries have such registration obligations in all cases. As noted above, we deem that it is necessary to clarify the registration regime of the relevant notarial deeds, in the sense of providing that the entities envisaged by Art.5 of Law No.36/1995 also have the obligation to request registration with the national notarial registry. To the extent that the supplementation of relevant texts from NCC in this respect is not deemed opportune, such clarification should be made by amending Law No.36/1995, or the special regulation on the national notarial registry⁶⁰.

As regards the same apparently special case, Art.1120 para.(3) provides that the statement of waiver shall be registered with the national notarial registry on the waiving party's expense. This is also the only provision in the matter of inheritance that indicates the person who has the obligation to pay the charges for the registration with the national notarial registry. It seems unlikely that the lawmaker intended to regulate an exception in this article. The topic of expenses must also be addressed in the special enactment on the national notarial registry.

Adopting special norms for the establishment of the sole national notarial registry or for altering the configuration of the existing notarial registries will have a financial and human resources-related impact, as well as increased staffing needs in order to manage such registries, both at the level of National Union of Notaries Public of Romania.

Also, the new regulation on successions implicitly repeals Law No.319/1944 on the inheritance right of the surviving spouse, further to the regulation of this matter in NCC. The NCC Draft IL expressly provides that this special law shall be repealed.

1.5.(a). Title I “General Provisions on Inheritance”

[Title I, Art.953-962] Title I of Book IV of NCC regroups, under the title of “General Provisions”, the aspects which are shared by all types of succession (Art.953-956) and the general conditions of the right to inherit (Art.957-962).

(i). Chapter I “General Provisions”

[Art.953-956] As novelty, NCC codifies the doctrinal definition of the concept of “succession” (Art.953). The current regulation on the types of succession is resumed, establishing that legal succession applies if no testamentary succession exists (Art.955).

As regards the rules on the opening of succession, NCC resumes the current regulation (Art.651 of the CC and Art.68 of Law No.36/1995) on the place where succession is to be opened, usually the last domicile of the deceased. As a novelty, the notary public competent to open the succession of a deceased without a known domicile or domiciled abroad shall be, unlike the current regulation that

⁶⁰ However, in this last case, regulating for the first time the obligation of the entities envisaged by Art.5 of Law No.36/1995 to request the registration with the national notarial registry in an enactment issued for the enforcement of a law could be deemed as exceeding the framework of the respective law.

gives priority to the notary public from the place where the deceased had his most valuable property, the notary from the place where the deceased had real property and, absent such property, the notary from the place where the deceased had personal property. NCC also provides for the competence of the first notary public before whom succession is opened when the deceased did not have property in Romania, a case which is not covered by the current regulation (para.(3)). Please note that the new rules on the territorial competence of notaries public in the opening of successions amend Art.68 para.2 of Law No.36/1995, which means that such law must be amended, as also envisaged by the NCC Draft IL.

Art.954 para.(4) provides that the same rules of territorial competence shall appropriately apply to the courts, when the first body before which the opening of succession is requested is the court of law. The provision is in the spirit of the current practice and doctrine, which agree that, as regards the place where succession is opened, one cannot apply concurrently two different rules for the adversarial and the non-adversarial procedure, both of them being subject to the same rules of territorial competence.

NCC establishes in a unitary manner the rule that the legal acts concerning contingent rights on an unopened succession, or the exercise of the option for inheritance before the opening of succession, as well as the deeds transferring or promising to transfer rights which could be acquired upon the opening of succession, are null and void (Art.956).

(ii). Chapter II “General Conditions of the Right to Inherit”

[Art.957-962] The provisions on the capacity to inherit, currently regulated both by the CC and by Decree No.31/1954, are established in a unitary manner in this chapter. Art.957 contains general provisions on the capacity to inherit, Art.958-961 regulate the cases and conditions for the forfeiture of succession rights, with the amendments to be detailed below, while Art.962 codifies the concept of the “title to inheritance” which has been defined so far only by the doctrine.

We also note that the regime of the legal entity’s capacity to receive gifts, provided at Art.33 of Decree No.31/1954, has been amended by Art.208 NCC, to which reference is made at Art.957 para.(1), in the sense that usually (“if not otherwise provided by the law”), the legal entity may receive liberalities as of the date of its establishment deed or, in the case of testamentary foundations, as of the date when the testator’s succession is opened, even if such liberalities are not necessary for the legal entity to be duly established. Art.957 para.(2) solves one of the issues which raised many debates in the doctrine, *i.e.* the capacity to inherit of the persons who died concurrently, but do not fall under the definition of persons who died under the same circumstances given by Art.21 of Decree No.31/1954. NCC provides that, in all cases when it cannot be determined that a person survived the other, there is no capacity to inherit (mutual or unilateral, legal or testamentary capacity); thus, the text eliminates the distinction between the persons who died under the same circumstances and the co-deceased, which was drawn by the doctrine further to the said regulatory limitations. Please note that the NCC Draft IL provides that Decree No.31/1954 is to be fully repealed.

The new regulation brings noteworthy novelties on the forfeiture of the succession rights, which, under the current regulation (Art.655 of the CC) was provided only for legal succession, while in NCC also covers testamentary succession, thus changing this negative condition into a general condition of the right to inherit. Also, in addition to the legal forfeiture, operating *de jure*, NCC, inspired by FCC

and QCC, also regulates judicial forfeiture, which is ascertained by the court. We note from the outset that this extension in the scope of the forfeiture of succession rights, as regards the cases of forfeiture, the nature (*de jure* or judicial) and the effects thereof (to forfeit both legal and testamentary succession), also implies a lessening of the sanction, as the person leaving the inheritance is allowed to expressly eliminate it, by testament or notarial deed (Art.961 para.(1)).

As regards the *de jure* forfeiture, a new case of forfeiture is introduced for the person convicted under criminal law for having committed a crime with the intention to kill another successor (Art.958 para.(1) let.b)). NCC regulates the case when conviction no longer occurs, but the forfeiture of the succession rights continues to operate, and expressly establishes that the *de jure* forfeiture of succession rights may be found anytime (Art.958 para.(2)-(3)). Libeling capital accusation and non-denunciation are no longer reiterated by the new regulation as cases of *de jure* forfeiture of succession rights, their obsolescence already being claimed by the doctrine.

The newly introduced regulation on judicial forfeiture of succession rights establishes the cases when such forfeiture may operate,⁶¹ the term within which the claim may be filed, the conditions for the occurrence of some of the forfeiture cases. The parties with the capacity to sue are the successors (holding the right to an option for inheritance), as well as the local public administrative authorities, if the alleged forfeiter is the only successor (Art.959). NCC regulates the effects that the forfeiture of succession rights has on the possession of the property of the succession by the forfeiter, as well as on the conservatory, administration and disposition acts concluded by the forfeiter (Art.960 para.(2) and (3)).

1.5.(b). Title II “Legal Succession”

[Art.963-983] Title II of Book IV of NCC regulates the general provisions applicable to the legal succession (Art.963-964); the representation in succession matters (Art.965-969) and the legal heirs (Art.970-983).

(i). Chapter I “General Provisions”

[Art.963-964] NCC defines the scope of persons who have the capacity of legal heirs, by integrating the provisions on the surviving spouse’s inheritance rights, currently regulated by Law No.319/1944. The four traditional classes of heirs are maintained, *i.e.* the descendants (class I), the privileged ascendants and collaterals (class II), the ordinary ascendants (class III) and the ordinary collaterals (class IV), and the order in which they appear to succession is predetermined by law, as also provided in the Statement of Reasons.

⁶¹ The cases of forfeiture provided at Art.959 para.(1) let.b)-c), inspiring from QCC, *i.e.* the forfeiture of the person who in bad faith hid, altered or falsified the will, or of the person who by fraud or under duress hindered the testator from drafting, amending or revoking the will, may set the ground for speculative legal actions.

(ii). Chapter II “Representation in Succession Matters”

[Art.965-969] This chapter expressly establishes rules that so far have been inferred from doctrinal and case law interpretations, and some novelties are brought, drawing from FCC.

From the definition of representation in succession matters, as provided at Art.965, it follows that NCC changes the scope of represented persons, thus amending the institution of representation. According to Art.967 para.(1), not only the persons who died before the opening of succession and who met all necessary conditions to inherit the property left by the deceased (with actual title to inheritance and capacity to inherit) may be represented, but also the forfeiters, including if they are alive on the date of the inheritance, and even if they waive the inheritance. Thus, the new regulation changes the substance of representation in succession matters by introducing the representation of the forfeiter. Currently, the children of the forfeiter are expressly excluded from inheritance by representation, keeping the right to appear to succession on their own behalf (Art.658 of the CC).

Art.966 lists more accurately the categories of heirs who may benefit from representation in succession matters, as well as the conditions of this representation. Art.967 para.(2) expressly provides that the representative must meet all necessary conditions in order to inherit the deceased (to have capacity, title to inheritance, not to be a forfeiter, a waiving party or not to have been disinherited by the deceased), while Art.967 para.(3) codifies the doctrine according to which the representative may be a forfeiter towards the represented person, a waiving party towards the inheritance left by the represented party, or disinherited by the latter, because the inheritance left by the represented party is not at stake.

The substance of the general effect of representation in succession matters, regulated at Art.968 NCC, has not been changed as compared to the current regulation. By Art.969, NCC also codifies a particular effect of representation in succession matters, inspired by Art.755 para.(2) FCC, *i.e.* the obligation of the forfeiter’s children, conceived before the opening of the succession from which the forfeiter was eliminated, to restore to the forfeiter’s succession the property they inherited by representing the forfeiter. Therefore, exceptionally, in order to remedy all inequities between the forfeiter’s children, Art.969 NCC regulates a situation when the restoration, specific to the matter of donations, is made for the property received as legal heir by the child of the forfeiter, in representing the latter. Under the French regulation, the same provisions also apply to the heirs of the forfeiter (Art.754 para.(2) FCC), therefore we suggest that, if the amendment proposed by the NCC Draft IL is proposed and the waiving parties may also be represented, the provisions of Art.969 NCC should also apply to them.

(iii). Chapter III “Legal Heirs”

[Art.970-983] This chapter defines the classes of legal heirs, also incorporating the provisions of Law No. 319/1944 on the inheritance right of the surviving spouse.

(a) Section 1 “Surviving Spouse”

[Art.970-974] Art. 970 NCC clarifies the notion of “surviving spouse” by reference to the time when the marriage was ended by divorce, providing that the reference date for the cessation of the capacity of surviving spouse is the date when the divorce judgment remains final. The current

doctrine claims that the capacity of surviving spouse should be kept until the date of an irrevocable divorce judgment, but the new solution is in line with the amendments brought to the civil procedure by NCPC. Art.971 and 972 para.(1) incorporate the current provisions of Law No. 319/1944 on the surviving spouse's title to inheritance and his quota when his rights are concurrent with the rights of other classes of legal heirs.

La Art.971 para.(2) codifies the doctrine on the concurrent rights of the surviving spouse with the rights of the heirs from different classes, setting the quota of the surviving spouse as if it were concurrent with the nearest of these classes. It also regulates the way in which the surviving spouse's quota is divided in case of putative marriage, *i.e.* equal parts, a matter to which the doctrine found the same solution.

Art.973 integrates and details the regulation on the right of habitation of the surviving spouse provided by Law No.319/1944. As a novelty, it is expressly regulated that the partition court is competent to settle the disputes concerning the surviving spouse's right of habitation.

Unlike the new regulation, the surviving spouse no longer has a special right to inherit the wedding gifts.

(b) Section 2 "Descendants of the deceased"

[Art.975] It regulates in a unitary manner the matter of the inheritance rights of the descendants and it integrates the provisions on their concurrent rights with the surviving spouse, currently provided by Law No.319/1944.

(c) Section 3 "Privileged Ascendants and Collaterals"

[Art.976-981] Apart from uniting the subject-matter and rendering it linguistically up-to-date, this section adds no noteworthy elements as compared to the current regulation of the inheritance rights of privileged ascendants and privileged collaterals. It is worth noting that Art.977 incorporates the provisions of Law No.319/1944 on the partition of inheritance between the surviving spouse, the privileged ascendants and the privileged collaterals.

(d) Section 4 "Ordinary Ascendants"

[Art.982] The inheritance rights of ordinary ascendants are systematized and, in their turn, correlated with the inheritance rights of the surviving spouse, as laid down in Law No.319/1944.

(e) Section 5 "Ordinary Collaterals"

[Art.983] The section dedicated to this class of heirs incorporates, for a unified regulation, the provisions laying down the partition of inheritance between the surviving spouse and the ordinary collaterals.

1.5.(c). Title III “Liberalties”

(i). Chapter I “Common Provision”

(a) Section 1 “Preliminary Provisions”

[Art.984-986] Art.984 provides an express definition of liberalities, as including donations and legacies. Art.985, 986 lay down distinct definitions for both donation and legacy.

(b) Section 2 “Capacity in the Matter of Liberalities”

[Art.987-992] Art.987 regulates the capacity to offer or receive liberalities and the moment when the condition of capacity should be fulfilled, by giving implementation to the general principles in the field of capacity of use, interpreted in the same manner by the Romanian doctrine.

An item of novelty is that NCC has discarded the regulation of Art.807 of the CC which entitles minors of 16-18 years of age to dispose by testament of half of their property, being set forth that persons with limited capacity to act cannot dispose of their property by way of testament, save for the cases provided by law.

Art.989 codifies the Romanian doctrine and case law and institutes the sanction of nullity with respect to gifts made in favor of an undetermined or undeterminable person, as well as in the case where the beneficiary of such gift is designated by a third party appointed by the donor. The text also includes an express enactment of the conditional donation and the stipulation for another made in favor of a person who does not exist when the liberality is made, both notions previously acknowledged in the doctrine of inheritance (para.(2), para.(4)).

NCC settles, at Art.990, the controversy surrounding the sanction applicable for liberalities made to doctors, pharmacists and other persons, during the period when the former were, directly or indirectly, providing specialized care to the devisor for an illness that caused his death, by opting for the relative nullity of the contract. The exceptions to this rule also include liberalities made to the spouse who is a doctor, pharmacist etc., which is practically a codification of the doctrine. In contemplation of a unified regulation, new norms are added to the current text (Art.810 of the CC) in what regards the prescription term for the action seeking the annulment of the relevant liberality. Furthermore, distinct regulation is given to the effects of the reinstatement of the devisor, in the cases the testament and donation.

In the field of legacies, a series of new cases of incapacity to receive have been introduced for the following categories of persons: the notary public, the interpreter, the witnesses having been actively involved in the authentication of the testament, as well as the officers having drawn up privileged testaments and the persons having provided legal assistance in the drafting of the testament (Art.991). Legacies made in disregard of the incapacities set forth at Art.991 shall be subject to relative nullity.

The novelty in the field of simulation, *i.e.* liberalities disguised in the form of an onerous contract or made to an intermediary, is that the sanction of absolute nullity, as established by the Romanian doctrine, has been replaced by relative nullity (Art.992).

(c) Section 3 “Trust”

[Art.993-1000] This section, - which regulates the trust, its effects, the rights of the beneficiary, the securities and insurance that may be imposed upon the trustee, applying the burden to the disposable portion of the estate, acceptance of donation after the death of the devisor and the ineffectiveness of trust – constitutes a novelty, as it overturns the solution existing in the CC (Art.803), practice and doctrine, according to which any disposition incorporating a trust is entirely null and void, as it breaches the principle of free movement of goods (inalienability clauses being prohibited as a rule) and the interdiction to dispose for the case of another person’s death. It should be noted on this point that NCC allows inalienability clauses, subject to certain conditions (Art.627 *et seq.* NCC), the provisions in this section requiring an interpretation in conjunction with such general provisions referring to the conventional limits that parties may put on the private property right.

Art.993 NCC introduces the notion of “trust”, defining it as the disposition by which the trustee is bound to preserve the property representing the liberality and transfer it to a third party designated by the devisor, which disposition, as the text sets forth, shall have no effects “unless the law so permits”. In its turn, Art.994 also defines the trust (the one apparently allowed), by reiterating a well established definition: the trust is a burden that encumbers a liberality, consisting in the obligation on the part of the trustee (instituted by donation or legacy) to preserve the property given to him by liberality, and to transfer it, upon his death, to the beneficiary designated by the devisor.

We note that, although it is the first article of the section called “Trusts”, and it is entitled “Notion”, thus announcing a definition of the related institution, Art.933 fails to include an essential condition of the trust, which shapes it into the legal concept as known, namely that the transfer of the property from the trustee to the beneficiary must be *mortis causa*. This condition is however found at Art.994, called “Trust” – which according to its title would presumably also provide a definition of this institution. One might infer from existence of two definitions with a substantive difference between them that the lawmaker’s intention was to lay down two types of “trusts”: one contemplating both *mortis causa* and *inter vivos* transfers, and which is not to produce effects except when the law so provides (Art.993), and another one, which only contemplates *mortis causa* transfers, and which is allowed (Art.994). Since it is of the essence of the trust that the transfer from trustee to the beneficiary be *mortis causa*, one may conclude either that the wording of Art.993 is incomplete (however, in such case, Art.993 and 994 would be concurring and mutually contradicting at the same time), or that it does not regulate a trust *per se*, but the regime of inalienability clauses in the matter of liberality deeds (already regulated at Art.627-629 NCC).

Besides, further to an analysis of the related FCC section, *i.e.* Title II of Book IIIa, entitled “Des Libéralités”, which was a source of inspiration for the NCC lawmaker, it should be noted that it includes a particular chapter dedicated to gradual and residuary liberalities (Chapter VI-Art.1048-1061), divided into two sections, entitled: “Des libéralités graduelles” and “Des libéralités résiduelles” respectively. They apparently correspond to the sections “Trust” and respectively “Residuary Liberalities” under Title III, Chapter I, of the NCC analyzed hereunder. Note should be made that in the section dedicated to gradual liberalities (“*libéralités graduelles*”), FCC does not contain a similar text to Art.993 of NCC, but it contains however a text (Art.1048 FCC) which is substantially identical to the one under Art.994 of the NCC. Art.993 of the NCC actually corresponds to Art.896 under the

FCC, which is included by the French lawmaker in the general section of the chapter dedicated to liberalities (which should be related in the NCC to Section I of Chapter I under Title III, "Liberalities", entitled "Preliminary Provisions"). In our opinion, the French lawmaker's solution of dealing with gradual liberalities, as a general matter, in a preliminary section, is preferable because it limits the risk of interpretations such as those we have pointed out as regards the provisions of Arts.993 and 994 of the NCC.

Art.995 regulates the effects of encumbering the property given by way of liberality with the burden arising under the trust. The burden shall produce effects only in respect of the property that made the object of the liberality and that, upon the death of the trustee, can be identified and is found in his patrimony (para.(1)). Para.(2) provides that, when the liberality consists in personal property, the burden shall also produce effects over the personal property replacing it. Where the liberality contemplates rights that are subject to registration formalities, they must be fulfilled in relation to the burden of the trust; in the case of real property, the burden must be registered with the land book.⁶²

As a first comment, we consider that the nature of a right transferred by way of liberality bearing a burden remains unclear, insofar as Art.994, which lays down the trustee's obligation to "transfer" upon his death the property that the gift consists of to the beneficiary designated by the devisor, it being understood that the liberality burdened by the trust consisted in ownership, while Art.996 para.(2) provides that the beneficiary shall acquire the property "from the devisor", thereby leading to the conclusion that the ownership to the property remains in the devisor's patrimony. It is worth noting that the NCC Draft IL amends Art.996, stating at its para.(2) that the beneficiary shall receive the property as a result of the "devisor's volition", thus remedying the inconsistency between the current texts, and stating more clearly that the object of the liberality encumbered by trust is the ownership to that property, which is passed on to the trustee, as an effect of the liberality, and then it is further passed to the beneficiary, as an effect of the devisor' volition.

As regards the content of the burden (trustee's obligations), NCC provides that the trustee is bound to preserve the property (Art.994), that the devisor may request for securities and insurance agreements to be put in place for ensuring performance of the obligation (Art.997) and also that the burden may not be in breach of the forced heirship, where the trustee is a forced heir (Art.998).

It is to be noted that the NCC Draft IL amends Art.994 in that the burden shall consist in the trustee's obligation of managing, but not preserving the property that represent the liberality.

Furthermore, the NCC Draft IL introduces Art.944 para.(2), according to which the trustee shall be "accordingly" subject to the provisions concerning the fiduciary (namely the provisions under Title V of Book III "On Property"). The ambiguity of the texts in this section on trust-related matters renders extremely complicated, in our view, the mission of determining which of the rights and obligations of the fiduciary are to apply to the trustee. To illustrate, it does not clearly follow, from corroborating the

⁶² In our opinion, when it bears on personal property, the encumbrance should be registered with the Electronic Archive of Security Interests in Personal Property, so as to equally protect the rights of the third parties that may acquire in good faith the personal property representing the gift and also the subsequent inheritance right of the beneficiary.

texts, whether or not the trustee shall be subject to the same obligation to report as the fiduciary is according to Art.783. We note that Art.1004 concerning residuary liberalities, a form of trust without inalienability, expressly sets forth that, in this case, the trustee is under no obligation to report to the devisor or his heir; *per a contrario*, one might infer that the trustee in a trust that does not involve inalienability does have this obligation. Practice and doctrine are the ones to establish which of the provisions related to the fiduciary that are to apply to the trustee.

As regards the beneficiary, NCC provides in its Art.996 para.(1), that his rights over the property representing the liberality take effect upon the trustee's death, while in Art.999 it establishes that the beneficiary can also accept the donation offer after the death of the devisor, a necessary exception to the rule according to which donations must be accepted during the beneficiary's lifetime. The NCC Draft IL modifies para.(2) and para.(3) of Art.996, establishing, as stated above, that the beneficiary shall receive the property representing the liberality as an effect of the devisor's volition, rather than from the latter, as NCC provides in its current form (para.(2)), and, equally, that the beneficiary may, in his turn, be bound to manage and transfer the property (para.(3)). The NCC Draft IL thus restricts the number of unconditional successive liberalities to two, which is not apparent from the current text.

Art.1000 NCC lays down the effects in case of trust's ineffectiveness, defined implicitly as the situation when the beneficiary dies before the trustee. According to the text, in such case, the property shall "pass to" the trustee. The final thesis at Art.1000 provides, by way of exception, that the property shall not pass to the trustee if "it was established that the property shall be appropriated by the beneficiary's heirs, or if a second beneficiary was designated". The text allows the devisor to duly designate multiple beneficiaries, in a pre-determined order of preference, the rights of the subsequent beneficiaries taking effect when the trust becomes inefficient in respect of the beneficiary that is preferred by the devisor.

The introduction at Art.1000 of an express mention to the heirs of the beneficiary may lead one to the interpretation that NCC allows for gradual or perpetual trusts to be in place (when the devisor establishes the order of succession not only in the event of the trustee's death but also in the case of the beneficiary's death), introducing an exception from the rule set out at Art.996 para.(1), according to which the rights of the beneficiary take effect upon the trustee's death. In addition, if given a different interpretation, Art.1000 could also conflict with Art.996 para.(3), as amended by the NCC Draft IL, which states that the beneficiary may, in his turn, be bound by the obligation to transfer the property to certain beneficiaries designated by the devisor.

Further to a compared analysis with the FCC, the source of inspiration of the NCC lawmaker on this matter, note should be made that although Art.1000 under the NCC is similar to Art.1056 of the FCC as regards wording, the French lawmaker preferred, for the sake of clarity, to include a supplementary mention in Art.1051 of the FCC (corresponding to Art.996 para.(2) of the NCC), pursuant to which "The beneficiary is deemed to acquire the rights from the devisor. *This provision is also applied for his heirs, in case they obtain the liberality under the conditions provided by Art.1056*". Therefore, we suggest that Art.996 of the NCC be supplemented by a similar text to the aforementioned FCC text, expressly stating that upon the prior death of the beneficiary, if it was provided that his heirs or a second beneficiary should get the asset, they are to acquire the right by virtue of the devisor's volition,

and not by direct inheritance from the beneficiary, as it might be derived, in the absence of an express provision to this effect.

(d) Section 4 “Residuary Liberalities”

[Art.1001-1005] Residuary liberalities are a form of trust that does not entail the trustee’s obligation to preserve the property given to him by way of liberality. Referred to by the doctrine as the “legacy of remnants”, this form of burden was regarded as a *fideicommissum* that does not entail inalienability; the trustee may dispose of a property, but the portion remaining upon the trustee’s death shall pass on to the beneficiary.

Art.1003 establishes the limits of the trustee’s right of disposal in connection with the object given to him by way of liberality: a statutory limit, prohibiting the trustee to dispose by testament of the property that is the residuary liberality (para.(1)), and a conventional limit, which enables the devisor to prohibit the trustee to dispose of the property by way of donation (para.(2)). These limitations do not apply however to the trustee who is a forced heir of the devisor if the property contemplated by the donations is set off against his portion of forced heirship. For a better legislative technique, we consider that the second thesis at para.(2) should be laid down in a separate paragraph, as it not only refers to the provisions in the first thesis of para.(2), but also to that from para.(1) of the text.

According to Art.1004, the trustee does not have the obligation to report to the devisor or his heirs. An exception to this rule should however be established for the situation when the trustee breaks the prohibition of making the disposition free of charge, set out at Art.1003 NCC.

According to Art.1005, Art.995, Art.996 para.(2), Art.997, Art.999, Art.1000 on trust-related matters shall also apply to residuary liberalities.

(e) Section 5 “Reassessment of Conditions and Burdens”

[Art.1006-1008] As a novelty, NCC establishes the right of the liberality’s beneficiary to request reassessment of the conditions and burdens that have become too difficult or too burdensome to carry out. Reassessment may be requested in court, which may order the amendment of such conditions or burdens; in other words, the court may amend the contract between the parties, seeking not to steer away from the devisor’s volition. The effects of reassessment may be removed, at the request of the interested party, if the grounds that justified the reassessment of the conditions and burdens have ceased to exist.

(f) Section 6 “Special Provisions”

[Art.1.009-1010] A new element, instituted for the purpose of safeguarding the donation and testament, is the partial nullity of the clause compelling the beneficiary not to contest the validity of an inalienability clause, or not to request the reassessment of conditions or burdens failing which, the liberality shall be cancelled or its object returned (para.(1)) or he shall be disinherited (para.(2)). According to para.(2), equally null are those clauses stipulating the disinheritance of a beneficiary who is contesting the testamentary provisions that affect the rights of forced heirs, or are made against the rule of law or good mores.

Equally new in the liberality matters is the fact that acknowledgment of a liberality by the universal heirs or the heirs by universal title of the devisor automatically stand as a waiver of their right to assert the nullity of such liberality, without any prejudice to the right of third parties (Art.1010). The text fails to mention the form such acknowledgment should take in order to have the stipulated effects; doctrine and practice shall determine the manner in which this implicit waiver can be performed. As we note, NCC contains rules on the acknowledgment of contracts (Art.1262 *et seq.*), but these rules could only apply to the donation contract, and not to the testament, which calls for an express regulation as to the form of such acknowledgment.

(ii). Chapter II “Donation”

(a) Section I “Execution of the Contract”

[Art.1011] As regards the form of the donation contract, NCC maintains the provision regarding its authentic form (para.(1)). As a novelty, it expressly regiments the exceptions to the requirement of authentic form that scholars had already pointed out, namely: indirect donations, disguised donations and manual gifts (para.(2)). The manual gift is regulated as consisting only of tangible personal property of small value; in appraising their value, consideration is given to the donor’s financial situation (para.(4)).⁶³ In addition, donation shall be deemed null and void without the newly stipulated authentic or private inventory, which has to contain and itemize the personal property envisaged by the donation and an assessment thereof.

[Art.1012] NCC expressly lays down the obligation of the notary authenticating a donation contract to have the contract immediately recorded with the national notarial registry. For comments on the impact that the implementation of these NCC provisions may have in relation to this registry, please refer to the introductory section dedicated to the implementation of Book IV.

[Art.1013] As to the formation of the donation contract, the existing rules are reiterated in what regards the offer and acceptance of the donation offer (the text omitting to provide that they need to be in authentic form) and, as a new element, doctrinal and case law opinions are codified as regards the revocation of donation by the donor prior to acceptance. Moreover, a set of rules is laid down concerning the capacity requirements to be met by both the donor and the donee upon the formation of contract.

[Art.1014] As a novelty, a special form of promissory agreement is established with regard to donations, which needs to be authentic. The promisee shall be entitled, in case of non-performance, to damages only in amount of the expenses he incurred and of the advantages he offered to third parties in contemplation of the promise.

[Art.1015] This article condenses the current provisions, as interpreted by doctrine, concerning the principle upholding the irrevocability of donations, including the clauses infringing this principle, which result in the total or partial nullity of the donation. Para.(2) let.a) repeats the current regulation

⁶³ We anticipate a number of practical difficulties in determining the validity of the manual gift based on this criterion, as Art.1011 NCC fails to specify if the donor’s financial status is assessed by reference to the date delivery, or to such other subsequent date of relevance, such as, the date the donor’s succession is opened.

regarding the invalidity of the donation which is subject to a purely potestative condition (condition the performance of which depends exclusively on the donor's volition), but overlooks the predominant opinion from the Romanian doctrine according to which, the simple potestative condition (the performance of which depends on the donor's volition as well as on external circumstances) also triggers the nullity of the donation.

[Art.1016] Similarly with the current regulation (Art.825 of the CC), NCC allows the donation contract to incorporate a clause providing for the return of the offered property, in the event when the donee predeceases the donor or when both the donee and his descendants predecease the donor. An element of novelty is the setting aside of the condition according to which the return can only be stipulated in favor of the donor, set forth by the CC in consideration of the interdiction of trusts, as these are now permitted under NCC. Consequently, the beneficiary of such return may also be a third party, not only the donor. The right to the return of the offered property shall be subject to registration formalities if the law so requires in connection with the donated property, a condition already acknowledged by doctrine with respect to real property.

(b) Section 2 “Effects of Donation”

[Art.1017-1019] The new regulation governing the donor's liability, including the warranty against eviction and the warranty for defects, reformulates the current provisions of the CC drawing inspiration from the conclusions drawn by the doctrine, but brings no major modifications to the current regulation. With regard to eviction, it introduces the donor's liability for the eviction which results from circumstances that have been known to him (a version of *dolus*) (Art.1018). A similar provision is laid down in relation to hidden defects, the donor being bound to provide warranty, even if such warranty is not stipulated in the donation contract, if he was aware of the defects (Art.1019).

As regards both types of warranties, *i.e.* against eviction and hidden defects, NCC institutes the rule that the donor as well as the seller are liable, where there is an conditional donation, up to the corresponding value of such burdens (Art.1018,1019).

(c) Section 3 “Revocation of Donation”

1. General Provisions

[Art.1020-1022] As regards the cases of revocation of donations and the operation thereof, NCC does not alter significantly the current regulation. We note that the *de jure* revocation of donation for child birth has been eliminated, being considered useless and inappropriate in the current society, pursuant to the Statement of Reasons. Furthermore, we would like to point out that the NCC Draft IL proposes the amendment of Art.1020 by replacing the “culpable non-performance” of burdens with “unjustified non-performance”, and thus references to the provisions of Art.1555-1557 NCC establishing the justified causes for non-performance of contracts.

For the envisaged introduction of donation promise, rules are provided on the revocation thereof, as well (Art.1022) . The promise of donation shall be revoked *de jure* if its performance is preceded by one of the cases of revocation for ingratitude (established by Art.1023 NCC), or if the financial

standing of the promissory party deteriorates to such degree, that it renders the performance of promise excessively onerous to the latter, or if the promissory party became insolvent.

2. Revocation for Ingratitude

[Art.1023 -1026] Concerning the cases of ingratitude, as well as the general and specific effects of revocation, NCC resumes and details the current provisions, under the influence of doctrine and case law.

In regard to the revocation claim, the filing term remains unchanged, but certain additional clarifications are made on the trial-related standing of plaintiff or defendant – in the action for revocation. Thus, under Art.1024, the action for revocation shall only be filed against the donee, but proceedings may be continued against his heirs (para.(2)). The text details a current provision (Art.833 CC), providing that donor’s heirs may file the action only if the latter dies during the action filing term, without having been aware of the case of ingratitude or, even if he was aware of it, he did not pardon the donee (para.(3)). The donor’s heirs may continue the proceedings initiated by the latter (para.(4)).

3. Revocation for Non-performance of Burden

[Art.1027-1029] Art.1027 NCC resumes the current provisions and codifies the doctrine on the legal standing of plaintiff of the donor and his successors for the revocation of donation or, alternatively, for non-performance of burden, as well as of the third party beneficiary of the burden, only in relation to the performance thereof. For a unitary regulation, it is expressly established the moment when the prescription term of the action starts to run (3 years): the date when the burden should have been performed.

The donee shall fulfill the burden up to the amount of donated asset, updated upon the date when the burden should have been fulfilled, in accordance to the principle upholding that the burden shall not absorb the gratuitous benefits and annihilate the gift (Art.1028).

The provisions on the effects of donation revocation for non-performance of burdens are similar to the current regulation, stating that the asset shall enter the donor’s patrimony free of all burdens, subject to the provisions of Art.1648 NCC establishing the action for restitution against the third party acquiring the succession patrimony` (Art.1029).

(d) Section 4 “Donations between Future Spouses for Marriage Purposes and Donations between Spouses”

[Art.1030-1033] Donations made to future spouses or to one of the future spouses, subject to their contracting the marriage, shall not be effective unless the marriage is contracted (Art.1030). The text is a mere application, without elements of novelty, of the donation agreement subject to condition precedent.

Art.1031 reiterates the current provisions on the revocation of donation between spouses, mention being made that such revocation may be requested only during marriage. According to the current regulation, the revocability of donation is not restricted to the marriage duration and, under Art.937 CC, as it was read by doctrine, the donor may also revoke the donation after the cessation of marriage

and even after the death of donee spouse, against the heirs of the aforementioned. The new regulation ensures a greater civil stability in this matter.

Art.1032 establishes the relative nullity of the donation made to the spouse acting in bad faith, in the event of marriage nullity.

Art.1033 NCC takes on the provisions regarding the nullity of simulations where donation is the secret contract concluded between spouses to elude the revocability of donations between spouses (para.(1)) and institutes a legal relative presumption as to the existence of simulation by intermediaries, if one of the contracting parties is in any way related to the donee, if such party had a title to inheritance in connection to the estate of the aforementioned upon donation and was not born from the marriage with the donor.

(iii). Chapter III “Testament”

[Art.1034-1085] According to the Statement of Reasons, the amendments brought to the inheritance matter are designed to provide for a suppletive character only for legal inheritance as opposed to testamentary inheritance, which amends the current legal status of the two forms of inheritance, where legal inheritance is the rule and the general law in the matter of transfer of patrimony *mortis causa*.

(a) Section 1 “General Provisions”

[Art.1034-1039] The definition provided by NCC to the testament is superior to the one contained at Art.802 CC), as it expressly states the unilateral, personal and revocable nature of the testament, that can only be found currently in the doctrine. As a legislative novelty, the definition provided by Art.1034 NCC no longer restricts the testament to provisions on testator’s estate, allowing last volition expressions unrelated to patrimonial rights to be considered testamentary provisions, as well.

The extension of the testamentary scope over non-patrimonial provisions also results from Art.1035, which reiterates some of the current provisions regarding the patrimonial character of the testament, mentioning, however, that the testament shall also be valid in the absence of patrimonial provisions, and itemizes in a non-limitative manner the potential non-patrimonial testamentary clauses (for example, provisions on partition, revocation of previous testamentary provisions, disinheritance, appointment of executors, burdens incumbent on legatees or legal heirs). Mention should be made that, in this respect, NCC codifies the relevant doctrine, which states that Art.802 CC actually provides for a definition of legacy, rather than of the entire testament, and recognized that the testament may contain provisions that are not directly related to the transfer of the estate.

Art.1036 NCC provides for an express prohibition of the mutual testament, meaning the testament whereby two individuals include stipulations to their mutual benefit, or to the benefit of a third party.

Art.1037 provides for the evidentiary means specific to the testament, similarly to the general provisions on evidence of deeds. Thus, if the testament disappeared due to a cause beyond the will of the parties concerned, or after the testator’s death, or while the latter was still alive, but unaware of such disappearance, the validity of the testament form and content may be proven by any evidentiary means.

Further to doctrine codification, Art.1038 NCC establishes the validity requirements of the testament in relation to the testator's discernment and unvitiated consent, currently governed by general law rules. In regard to fraud (*dolus*), an opinion unanimously embraced by the doctrine was taken on, which states that fraud (*dolus*) entails testament voidability even when the fraudulent operations were not performed by the beneficiary of testamentary provisions, or they were unknown to the latter.

Under Art.1039, testament interpretation shall be based on the rule for the interpretation of the contract, a rule that is being applied even now in the absence of an express legal provision. As a novelty, Art.1039 para.(3) expressly provides that the gift to the creditor shall not be presumed to be made for the offset of his receivable, such solution being the application of the general rules governing the cause of legal deeds.

(b) Section 2 "Testament Forms"

[Art.1040-1050] From among the testament forms originally provided by the CC, NCC eliminated the mystic testament, rarely used in practice.

As regards the holographic testament, NCC emphasizes that it shall be entirely handwritten by the testator, on penalty of absolute nullity thereof (Art.1041). New provisions are introduced at Art.1042 in regard to the opening of holographic testament during the notarial succession procedure, *i.e.* the endorsement as such, the ascertaining of its state, issue of notarized copies, as well as provisions on keeping the original testament after the completion of succession procedures. The text innovates based on the current provisions of the CC (Art.892) and Law No.36/1995 (Art.71 para.(5)).

As regards the definition of the authentic testament (Art.1043 CC), certain provisions of Law No.36/1995 are introduced in regard to the possibility of the latter being authenticated not only by notaries, but also by other individuals who were empowered by the State with the public authority to do so, under the law. As a novelty element, it is provided that, upon authentication, the testator may be assisted by 1-2 witnesses. Providing for the drafting of the authentic testament, Art.1044 circumscribes to testaments the general provisions of Law No.36/1995 on the authentication of notarial deeds, which provisions are supplemented by new elements as to drafting, consent, signing of the testament and the authentication resolution, etc.

NCC expressly provides for testament authentication in specific cases: individuals unable to sign for various reasons (para.(1) and para.(2)), individuals with speech and/or hearing impairments (para.(2)), a combination of the two (para.(3)), blind persons (para.(4)). The regulation is new in the matter of testaments, but not in regard to the authentication of notarial instruments concluded by people in the special situations envisaged by the text (stated under Art.61, 62, 63 of Law No.36/1995). Besides the general provisions, the text states the mandatory presence of witnesses upon authentication of the testament drafted by persons unable to sign (para.(1) and (3)).

The notary public shall register the authentic testament with the national notarial registry, with the proviso that information on the existence of a testament shall only be given after the testator's death (Art.1046).

In the matter of privileged testaments, the current legal provisions are resumed and updated, excluding anachronisms and instituting the rule of witness presence in all cases (Art.1047). Although privileged

testaments are a type of authentic testaments, NCC establishes the rule that they must be opened under the holographic testament procedure. Art. 1048 introduces a new lapsing term for privileged testaments (15 days from the date when the testator might have testated by one of the ordinary forms), which is shorter than the current terms (3 to 6 months). According to para.(2) of Art.1048, the testamentary provision relating to the recognition of a child shall remain valid, even if the testament lapses.

Finally, besides ordinary and privileged testaments, NCC also provides for the testament of monies, currently mentioned by the special legislation only (for example, CEC's Bylaws approved by GD No.1602/2002) stipulating the depositor's possibility to indicate to the bank the identity of the person who shall benefit from the deposited monies, in case of his death. Under Art.1049 NCC, the testamentary provisions on monies, securities or credit securities deposited to specialized institutions shall be valid subject to the compliance with the formal requirements of the special laws establishing these institutions. NCC thus answers a *de lege ferenda* proposition of the doctrine.

Mention should be made that the NCC Draft IL has already proposed the amendment of the special law, in order to comply with NCC, by means of inserting a new article (Art.117¹) in GEO No.99/2006, according to which the credit institutions may issue regulations on the formal conditions of banking testament.

NCC also codifies the doctrine in that a testament null for a formal defect shall become effective if it meets the requirements provided under the law for another testamentary form (Art.1050).

(c) Section 3 "Voluntary Revocation of the Testament"

[Art.1051-1053] In regard to testament revocation by another testament or a revocation notarial deed, the new regulation (Art.1051) resumes the doctrinal conclusion stating that the testament revoking a previous testament may be drafted in a form distinct from the revoked testament. Furthermore, para.(3) provides for the notary public's obligation to register the revocation deed (notarial authentic deed or authentic testament) with the national notarial registry provided at Art.1046.

The destruction, tearing or redaction of the testament or of a testamentary provision, performed by, or known to the testator (in this last case, provided that the latter were able to restore the testament) shall be regarded as revocation (Art.1052 para.(1),para.(2)).

Art.1053 introduces a new provision regarding the retraction of testament revocation, which can be made by a notarial authentic deed or testament. The text thus ends this practical and doctrinal controversy regarding the retraction effects, as it expressly states that retraction removes the effects of revocation, unless the testator expresses his volition to the contrary, without the drafting of another testament being required. Under para.(3), the notary public shall register the revocation deed (notarial authentic deed or authentic testament) into the national notarial registry.⁶⁴

⁶⁴ The last part of para.(2) which makes reference to Art.1051 para.(3), as well as para.(3), are redundant, both texts instituting the mandatory registration of the retraction deed with the national notarial registry.

(d) Section 4 “Legacy”

1. Legacy Categories

[Art.1054-1057] As regards legacies, NCC provides a more complete, thorough regulation, better systemized than the current one, determined, among others, by the introduction of theoretic qualifications taken on from the doctrine. Thus, Art.1054 codifies the classification of legacies, according to their object, into universal legacies, legacies by general title and legacies by particular title, names given by the doctrine (para.(1)) and, according to the modalities which qualify them, into unconditional legacies, legacies subject to a term, legacies subject to a condition or legacies subject to an encumbrance (para.(2)).

Art.1055, 1056 and 1057 contain the definitions of the three types of legacies by reference to their object, and rectifies the definitions existing in the CC, to clarify, as established in the doctrine, that they confer title to the inheritance: to the entire inheritance (universal legacy, Art.1055), to a portion of the inheritance (legacy under universal title, Art.1056) and to one or several specific assets (legacy under particular title, Art.1067). Moreover, we welcome the clarification of the concept of “portion of inheritance” at Art.1056 para.(2); we note that the enumeration also includes the dismemberments of ownership over the entire inheritance or over a quota of the inheritance, thus clarifying the issue of the legacy of the usufruct, which generated dissenting opinions in the doctrine. According to NCC, the legacy of the usufruct shall be considered legacy under universal title, in compliance with the prevailing opinion in recent French case law (according to another opinion, the legacy of the usufruct is a legacy under particular title, even if its object is the universality of assets or a share of the universality).⁶⁵

2. Effects of Legacies

[Art.1058-1067] NCC’s sub-section dealing with the effects of legacies includes general rules and details a few specific types of legacy, providing solutions compliant with the conclusions established by legal doctrine.

[Art.1058] As regards the ownership over the fruits of the asset as object of the legacy, regardless of its type, a unitary rule is established for all kinds of legacies, upholding that the fruits shall become the legatee’s asset upon the opening of succession or as of the day when the legacy becomes effective towards him (Art.1058 thesis I). An exception is established relating to the case where the holder of the fruits acted in good faith, under the general law (Art.1058 thesis II).

[Art.1059] Art.1059 provides for the effects of the legacy under particular title, depending on whether the asset is a determined individual asset or *res genera*. According to this regulation, the ownership in a determined individual asset shall be transferred at the opening of succession (para.(1)); the solution is similar to the existing one, but, unlike Art.899 of CC, Art.1059 para.(1) NCC strictly refers to the ownership right, although the legacy having as object a determined individual asset may

⁶⁵ In our opinion, negative definitions are to be avoided, for the sake of legislative technique and accuracy. However, this type of definition was preferred in order to cover other types of legacies, besides the legacy of one or several individual determined assets (inspiring from Art.734 QCC, Art.1010(2) FCC).

also confer other real rights (usufruct, right of habitation). In our opinion, the solution shall be similar in these cases as well, and the legatee shall acquire the real right over the determined individual asset as of the opening of the succession, pursuant to an extensive interpretation of the text. Para.(2) provides that the legatee under particular title of certain *res genera* shall have a right of receivable over the succession and, unless otherwise provided, the person in charge with executing the legacy shall deliver average quality assets. The text resumes the provisions of Art.968 CC and refers to the legacy of *res genera* of an undetermined quality.

[Art.1060] As regards the legacy under particular title encumbered by an excessive burden, it is provided for the legatee's right to be discharged after delivering to the beneficiary of the burden the assets left to him by legacy, or the amount thereof (para.(1)), the value of the assets and of the burden being assessed upon opening of succession (para.(2)). The hypothesis provided by the text refers to the legacy encumbered by a burden established in favor of a third party, on which the rules on double legacy shall apply, pursuant to the doctrine.

[Art.1061] Art.1061 para.(1) reiterates the provisions of Art.903 CC regarding the accessories of the asset subject to legacy under particular title. The accessories of the asset which is a legacy under particular title include, as a novelty, as opposed to the current laws, the right to file action for compensation of the damage caused to the asset by a third party, after the testament was made (para. (2)). Art.1061 para.(3) introduces a relative legal presumption whereby improvements to quality, quantity or value, which were brought to the asset subject to legacy by adjoining of assets, or by independent or additional works, or by purchase of other assets into the totality of assets shall also be part of the legacy. The solution differs from the current one (Art.904 CC), which states that legacy shall only include the improvements and new constructions made on the legated fund, as well as additions by extension of enclosures, while the new acquisitions increasing the legated real asset shall not be part of the legacy.

[Art.1062] It generalizes the principle stating that the due date of the legacy having as object a life annuity or an obligation of support, is the day when the succession was opened, which is less explicitly provided by the current legislation, and only for the legacy under particular title.

[Art.1063] It provides for the alternate legacy, which is a legacy under particular title having as object two assets of choice. Under Art.1063, the right to choose belongs to the legacy executor, unless it was granted by the testator to the legatee or to a third party.

[Art.1064] As regards the particular case of legacy of another person's asset, which the current regulation summarily provides under Art.907 CC, Art.1064 NCC contains a clearer and more qualified regulation. Thus (in compliance with the doctrine), the issue of legacy of another person's asset may only be raised in the case of legacy under particular title having as object a determined individual asset, that, upon the opening of succession, belonged to a person other than the testator (para.(1)), and the applicable sanction differs depending on whether or not the testator was aware that the asset was not his own. If he knew the asset was not his own upon drafting the testament, the legacy shall be sanctioned by relative nullity (para.(2)); it should be noted that, in this case, the doctrine generally opted for the absolute nullity sanction for *error in corpore*, but with the possibility that the legacy be ratified, confirmed or performed voluntarily and willingly by the person charged with the fulfillment

thereof (by applying the donation rules). If the testator knew that the asset was not his, NCC's solution is similar to the one provided by Art.906 CC (para.(3)).

[Art.1065] It establishes the co-legacy and the presumption that when, in the same testament, the testator left a determined individual asset or a *res genera* or, according to para.(3), an ownership right dismemberment, to several legatees under particular title and failed to state their individual share, the legacy shall be considered co-legacy (para.(1)), with the effect that the share of the individual who does not want, or is unable to receive the legacy, shall inure to the other legatees (para.(2)).

[Art.1066] It reiterates and generalizes the rule stating that the expenses relating to the delivery of a legacy shall be borne out of the succession, without the forced heirship being breached, a rule was used to be expressly provided only in the section on the legacy under particular title (Art.901 CC).

[Art.1067] NCC establishes a right of preference for the creditors of the succession, who shall receive the monies before the execution of legacies (Art.1067 para.(1)) and shall benefit (upon their own request or at the request of the person executing the legacies) from a reduction of legacies under particular title that exceed the net asset of the succession, up to the excessive amount (Art.1067 para.(2)). If the legacy to be allegedly decreased has already been executed, the testamentary or legal heirs, creditors or any other party concerned may request restitution (Art.1067 para.(3)).

3. *Ineffectiveness of Legacies*

[Art.1068-1073] NCC codifies the concept of “ineffectiveness of legacies”, which is missing from the CC, but is used in the legal doctrine, by grouping under the same sub-section, based on the pattern used in the CC, the (voluntary or judicial) revocation or obsolescence. Nullity and reduction, as hypotheses of legacy ineffectiveness, are provided under the sections and articles dealing with the validity requirements of the testament and reduction of excessive liberalities.

[Art.1068] Voluntary revocation of legacies is governed by the same rules as voluntary revocation of the testament (para.(1)). Similarly to the CC (Art.921 and 923), NCC provides two cases of tacit revocation: the subsequent testament that contains provisions that are contrary to, or incompatible with, the previous one (provided by Art.1052 on tacit voluntary revocation of the testament, and applicable to legacy as well) and the voluntary transfer deed relating to the asset which is the object of a legacy under particular title (Art.1068 para.(2)) to which the voluntary destruction by the testator of the asset subject to legacy is also assimilated (Art.1068 para.(4)). Two exceptions are established to the rule upholding that the ineffectiveness of transfer shall not affect revocation (which rule is implicitly maintained by NCC): a) ineffectiveness determined by the testator's incapacity or by his vitiated volition and b) the transfer is a donation in favor of the legacy's beneficiary and is not subject to conditions or burdens substantively distinct from those affecting the legacy (para.(3)).

[Art.1069,1070] The judicial revocation of legacies is unitarily established, without reference norms provided by Art.930 CC, but maintaining the grounds for revocation stated under the current law: (culpable) non-performance of the burden and ingratitude (having the content defined at para.(2)). As a novelty, the text took on from the doctrine the opinion according to which the non-performance of the burden must be culpable in order to entail revocation, except when the legacy's effectiveness is expressly conditional upon fulfillment of the burden (para.(1)). Mention should be

made that the NCC Draft IL proposes the change of the terminology used by para.(1), by replacing “culpable non-performance” with “unjustified non-performance”, implicit reference being made to NCC’s provisions regarding justified causes for the non-performance of contractual obligations.

In regard to the right to file action for the judicial revocation of legacy, NCC has established the general prescription term of one year following the date when the heir became aware of the act of ingratitude, or from the date when the burden should have been fulfilled, as the case may be. Art.1070 NCC alters the current regulation as regards the duration of the prescription term related to the action for legacy annulment, which shall be 1 year, regardless of the ground for revocation (ingratitude or non-fulfillment of the burden), as opposed to the existing regulation which only allows for such decreased term in cases of ingratitude. The term shall be calculated from the date when the ingratitude became known, or from the date when the burden should have been fulfilled; nCC fails to provide for the case of perpetual burdens, in which case we consider that the relevant rule shall apply, according to which the term shall run from the opening of succession.

[Art.1071] The current norms concerning the grounds for the obsolescence of legacies (Art.924, 925, 927, 928 of the CC) are grouped into a single article. As a new element, the legatee’s forfeiture of succession is regulated as one of the grounds for the obsolescence of legacy (further to extending the effects of the forfeiture of succession right to the testamentary succession).

[Art.1072,1073] As regards the effects of legacy ineffectiveness, Art.1073 of NCC expressly regulates *jus accrescendi* (absent from the CC, but recognized by doctrine), defined as the right of the heirs whose rights of succession would have been reduced or, as the case may be, eliminated due to the existence of the legacy, or who had the obligation to enforce the legacy, to benefit from the legacy’s ineffectiveness on grounds of nullity, revocation, obsolescence or termination for failure to fulfill the condition precedent or for the fulfillment of the condition subsequent.⁶⁶

Art.1073 codifies a conclusion which was not contested by doctrine, pursuant to which *jus accrescendi* is subject to certain liens. Heirs benefitting from *jus accrescendi*⁶⁷ shall enforce the conditional legacy established in favor of a third party, when the main legacy was rendered ineffective further to judicial revocation or obsolescence. The text establishes an exception to this obligation of executing the conditional legacy, in cases where the asset bequeathed by specific title was lost in whole due to reasons beyond the legator’s will, during his lifetime, or prior to the fulfillment of the condition precedent which qualifies the legacy. Note should be made that doctrine provided for yet another exception to the heirs' obligation of performing the lien, *i.e.* if such lien had been established *intuitu personae* for the initial legatee; Art.1073 does not provide for this situation, but the solution may arise from the general principles regarding the performance of *intuitu personae* obligations.

⁶⁶ We note that the NCC Draft IL proposes to change the side heading of Art.1072 (“*Jus accrescendi*”) by “Purpose of the property which makes the object of an ineffective legacy. Thus, the legal definition of *jus accrescendi* is discarded and it also seems that the lawmaker embraces the doctrinal opinion that *jus accrescendi* refers only to conjunctive legacies.

⁶⁷ Further to the proposed amendment of Art.1072, the NCC Draft IL proposes the elimination of the reference to “*jus accrescendi*” from Art.1073, the heirs who have the obligation to enforce the conditional legacy being those heirs who benefit from the ineffectiveness of the legacy.

(e) Section 5 “Disinheritance”

[Art.1074-1076] NCC remedies the lack of regulation in the CC, defining the concept of disinheritance. Art.1074 includes the definition given by doctrine, pursuant to which disinheritance is a testamentary clause by which the testator deprives one or several of his legal heirs of the inheritance, in whole or in part; a distinction is made between direct disinheritance (when the testator orders by will that one or more legal heirs be deprived of the estate) and indirect disinheritance (when the testator establishes one or more legatees).

Art.1075 regulates the effects of disinheritance in situations of concurrent interests of various categories of heirs, *i.e.*: in case the surviving spouse is disinherited (para.(1)), if another heir is disinherited who acts in concurrence with the surviving spouse and the beneficiary of such disinheritance (para.(2)), partial disinheritance (para.(3)), and total disinheritance (para.(4)). The provisions under para.(1)-(4) may not benefit persons incapable of receiving legacies (para.(5)). The rules established by the text are compliant with the current doctrine.

The nullity of the testamentary provision of disinheritance is subject to absolute or relative nullity rules as provided by law, the prescription term of the action for annulment starts to run as of the date when the disinherited party is informed of the provision establishing the disinheritance, however no sooner than the opening date of the succession (Art.1076).

(f) Section 6 “Testamentary Execution”

[Art.1077-1085] As regards the appointment and mission of the succession executor, NCC implements, as a novelty, the possibility that the executor be a third party established under the will, stipulating as well the executor’s obligation to accept the assignment by an authentic affidavit (Art.1077). Considering that the acceptance affidavit must be signed by the executor in an authentic form, we deem that it would be useful, albeit not critical, to supplement Law No. 36/1995, so as to ensure the unitary regulation of the notarial succession procedure. As the CC, NCC (Art.1077 para.(2)) establishes the rule of joint mandate in case of several executors, and the condition that the executor should have full capacity to act (Art.1078). Another clarification brought by NCC, in codifying the dominant doctrine, is the express provision, under Art.1082 para.(2), of the legal nature of executor’s liability, which is equal to the liability of the attorney-in-fact, and of the free enforcement of will, which relates not to the essence, but merely to the nature of the execution, since it allows that a remuneration be charged on account of the inheritance (Art.1083). The enforcement expenses are also on account of the inheritance (Art.1084).

Another novelty implemented by NCC is the replacement of the concept of “possession of inheritance” (seisin of the executor) provided under Art.911 of the CC, by the concept of “*de jure* administration of the estate” by the executor (Art.1079). The differentiation between the executor’s seisin and the heirs’ seisin, which was always outlined by the specialized literature, justifies this terminological adjustment. Just like the executor’s seisin currently regulated by law, the right of administration arises from the law and according to NCC, it lasts for 2 years at the most. The testator may limit the substance and duration of such right, but he may not extend or remove it. An extension of the term of administration may be obtained in court.

The testamentary executor's duties are similar to the current ones, with a few significant exceptions (Art.1080): unlike the current provision, the executor may request the court the approval for the sale of immovable assets, if there are no forced heirs (para.(1) let.c)), the executor may pay the debts and may collect the receivables related to the succession (para.(1) let.e)-f), the executor may distribute the assets related to the inheritance, provided that said partition is accepted by all heirs.

As regards the transfer of testamentary execution, the rule pursuant to which the executor's powers cannot be transferred is maintained (Art.1081 para.(1)). Para.(2) codifies the doctrine, in the sense that the mission of the executor appointed in consideration of a determined position, may be continued by the person taking over such position.

Art.1082 regulates the executor's obligation to report, with amendments as compared to the current regulation, in relation to the term established for the performance of such obligation. Pursuant to the new regulation, the obligation to report is performed at the end of each year, and at the end of the executor's assignment, notwithstanding whether there are forced heirs or not. The final thesis of the article expressly provides that the obligation to report is transferred onto the executor's heirs.

Art.1085 provides the cases of cessation of testamentary execution, according to the current regulation and doctrine, *i.e.*: the fulfillment or the impossibility to fulfill the assignment, waiver of the mandate by notarized affidavit,⁶⁸ death or adjudication of the executor's incapacity, executor's revocation by judicial sanction, and expiry of the term within which the right of administration is to be exercised.

(iv). Chapter IV "Forced Heirship, Disposable Portion of the Estate and Reduction of Gifts in Excess of the Freely Disposable Portion of the Estate"

(a) Section 1 "Forced Heirship and Disposable Portion of the Estate"

[Art.1086-1090] NCC contains a more accurate and detailed regulation on the forced heirship, the disposable portion of the estate and the reduction of gifts in excess of the freely disposable portion of the estate, as compared to the CC, generally codifying the doctrine applied with regard to this matter.

First, NCC defines the concept of forced heirship, which currently is inferred from the provisions regarding the disposable portion of the estate. Pursuant to Art.1086, the portion subject to forced heirship is a share of the property of the succession, to which the forced heirs are entitled pursuant to the law, even if the deceased does not wish so and expresses such wish by liberalities or disinheritance. The insertion of the express provision that the disinheritance of a forced heir cannot affect forced heirship is welcome, thus codifying the doctrine and case law solution.

⁶⁸ Absent express provisions, it may follow from Art.1085 let. b), read in the light of Art.1082 para.(2), that the NCC lawmaker opted against the doctrinal opinion that once the assignment is accepted, the executor can no longer waive unless he proves that continuing to enforce the mandate would cause him significant damage (Art.1556 of the CC) or he invokes fortuitous case/force majeure, since the testamentary mandate produces effects *post mortem* and the principal can no longer replace the attorney-in-fact.

The same types of forced heirs are maintained, as provided by the current legislation (surviving spouse, privileged descendants and ascendants of the deceased) (Art.1087). The regulation concerning the surviving spouse is not currently included in the CC, but in Law No.319/1944, and its inclusion in the body of the civil code is more than welcome. We note that the NCC Draft IL provides that Law No.319/1944 is to be repealed.

A significant amendment is the unitary rule on the calculation of the portion of the forced heirship applicable to each forced heir, which is equal to half of the share of the estate which, absent liberalities or disinheritance, would be due to same as legal heir (Art.1088). The direct establishment of the forced heirship portion corresponds to an indirect definition of the available portion of the estate, as a share of the property of the succession not reserved by law, that the deceased may dispose of freely, "including" by liberalities (Art.1089). The NCC Draft IL corrects the text, eliminating the term "including".

As regards the special portion available to the surviving spouse, provided in the current regulation as well, Art.1090 para.(2) changes the recipients of the share representing the difference between the ordinary and special portion, assigning it entirely to the descendants (unlike the interpretation given to the current provisions, pursuant to which the remaining share is divided, according to the assignment of legal share of the estate, among the spouse and the descendants). Para.(3) expressly establishes the rule that the provisions regarding the special available portion of the surviving spouse shall be applied in case of direct disinheritance of the descendant, and such disinheritance would be for the benefit of the surviving spouse (para.(3)).⁶⁹

(b) Section 2 "Reducing Excessive Liberalities"

[Art.1091-1099] The NCC regulation regarding liberalities in excess of the freely disposable portion of the estate is superior to the current one, since it is more accurate and more detailed, bearing the influence of doctrine and practice.

Art.1091 para.(1) establishes the manner of determining the value of the estate according to which the forced heirship portion and the disposable portion shall be calculated, as established by doctrine, and para.(2) details the current rules on the value of the assets taken into account in order to assess the estate, *i.e.* the date when the property value is determined; it also provides new rules to this effect, on the indexation of the amounts of money, according to the inflation rate and the depreciation of assets.

Art.1091 para.(4) resumes the (relative) legal presumption that the transfer for valuable consideration to a privileged descendant or ascendant or to the surviving spouse is donation, if the transfer was made subject to usufruct, right of use or right of habitation, or in exchange for life support or life annuity

⁶⁹ We deem that the wording of Art.1090 para.(1) could raise interpretation issues, since it refers expressly to "non-restorable gifts" made to the surviving spouse, a phrase that is not defined in NCC (which refers strictly to non-restorable donations), and which replaces the "gifts" provided under Art.939 of the CC. According to Art.984 NCC, donations and legacies are liberalities; however, the concept of restoration is specific only to donations, not to legacies. This is why the text of Art.1090 para.(1) NCC can be interpreted in the sense that the concept of "non-restorable gifts" refers only to donations. The text should be clarified by express reference to non-restorable donations and legacies, so as to avoid any possible confusion.

(Art.845 of the CC). In addition, the text states that this presumption does not operate in favor of persons entitled to inherit who have agreed to the transfer.

Finally, para.(5) second thesis of Art.1091 establishes the new rule that when determining the portion of forced heirship, parties who waived the inheritance are not taken into account, except for those who have the obligation of restoration, pursuant to Art.1146 para.(2). The text seems to contain an incorrect reference,⁷⁰ since the norm that it should refer to is established under Art.1147 para.(2), regarding the waiving party's obligation to report the assets making the object of donation, if there is an express stipulation to this effect in the donation agreement. We deem that this clerical error should be corrected, possibly under the implementation law. According to the information provided by the Beneficiary, an amendment to the NCC Draft IL was drafted to remedy such error.

Art.1092 of NCC directly and expressly provides the rule currently arising from Art.848 of the CC, that reduction does not operate *de jure*, but upon the request of the persons provided under Art.1093. Unlike the current regulation, such persons also include the "successors" of the forced heirs (and not of the "heirs" thereof, as specified in the current wording of Art.848 of the CC); the concept of successor includes as well the assignees of rights of succession by acts *inter vivos* and the heirs' unsecured creditors, both categories being accepted by the doctrine.

As regards the means of performing the reduction, Art.1094 integrates the procedural provisions of Law No.36/1995 on the performance of reduction by mutual agreement or, in the alternative, by court judgment (para.(1), para.(2)). Para.(3) of the text codifies the severability of the action in abatement, recognized by the doctrine, the reduction operating only within the limits of the forced heirship portion due to the person requesting same and only for the benefit thereof.

Pursuant to Art.1095, the prescription term of the action in abatement as regards excessive liberalities is of 3 years, which complies with the doctrinal opinion, in the absence of express provisions to this effect in the CC. The doctrine is also codified as regards the moment when the prescription term starts to run, and the imprescriptibility of the plea for reduction (which may be claimed by the forced heir possessing the property making the object of the liberality, against the beneficiary of the liberality).

As regards the order of reduction, Art.1096 of NCC introduces new rules, already enshrined by doctrine: simultaneous donations are reduced at the same time and *pro rata* if not provided otherwise (para.(4)), and if the beneficiary of the donation to be reduced is insolvent, the reduction of the prior donation shall be initiated (para.(5)).

As regards the effects of reduction, Art.1097 introduces a new element: reduction can be performed by equivalent not only in the case of property transfer by the donee, but also if the asset were lost due to causes imputable to the donee, or real rights were established in relation thereto (para.(3)). In case the

⁷⁰ Persons who have the obligation of restoration, pursuant to Art.1146 para.(2) NCC (also a novelty) are the surviving spouse and the deceased's descendants "who actually appear jointly to participate to the legal inheritance" (Art.1146 para.(1) of NCC) only if they had actual title to the deceased's inheritance in case same had been opened on the donation date. Therefore, persons who have the obligation of restoration pursuant to Art.1146 para.(2) are not waiving parties, since they actually appear for the inheritance.

donation subject to reduction was made to a forced heir who does not have the obligation to restore the donation, the provided solution is that he shall be able to keep the part in excess of the disposable portion on account of his forced heirship portion (para.(4)). Para.(5) provides the situation of the person entitled to inherit, who has the obligation to restore a real property, and the part subject to reduction represents less than half of the real property value, stating that the donee may keep the real property, and the reduction shall be made by equivalent. Note should be made that the NCC Draft IL proposes the extension of such provision to cases when the donated asset is a moveable one.

Art.1098 regarding the reduction of special liberalities resumes the situation regulated under Art.844 of the CC, specifying that if the object of the donation or legacy is usufruct, use or habitation or life support or annuity, the forced heirs have the option, in addition to the execution of the liberality or the waiver of possession of the available portion, to also request reduction thereof, pursuant to general law.

NCC codifies the doctrine solution in relation to imputation of liberalities, by Art.1099, which includes the full regulation of such situations, differentiating them by reference to the quality of forced/non-forced heir of the party subject to imputation, and according to the restorable/non-restorable nature of the liberality.

1.5.(d). Title IV “Transfer and partition of the estate”

(i). Chapter I “Transfer of the estate”

(a) Section 1 “General provisions”

[Art.1100-1105] As regards the transfer of the estate, NCC includes stricter regulations that are better systematized, making use of the interpretations given in practice and doctrine to the current provisions. The chapter starts with a section including general provisions governing this aspect, which also provides definitions of the concepts of option of inheritance, *i.e.* acceptance or waiver of the inheritance, and of the person entitled to succession, *i.e.* the person entitled to inherit, who has not exercised the right of succession.

Art.1101 expressly provides the rule of indivisible unconditional option, inspired by Art.475 of ICC but also accepted in the Romanian practice and specialized literature, the related sanction being absolute nullity.

Art.1102 provides the solutions for the hypothesis of multiple titles to inheritance; the rule states that the heir accruing, pursuant to law or will, several titles to inheritance, shall have a separate right of option for each of them. The solution already arises from the interpretation of Art.752 of the CC, and presumes the possibility of exercising different options as to legal and testamentary inheritance, of which one may be accepted while the is not; the same solution is currently applied for the legatee of several legacies that are not indivisible. Para.(2) - second thesis regulates the special case of the legatee who also has the legal title to succession, and whose legal heir share was reduced by the deceased, without affecting the forced heirship portion; pursuant to the text, he shall be able to exercise the option only as legatee.

As regards the term for the option of inheritance, currently of 6 months, this is replaced by a longer 1-year term (Art.1103 para.(1)). In addition, para.(3) of the text provides in all fairness that such term

shall be subject to the provisions on the stay and reinstatement provided for prescription terms, detailing the various interpretations given by doctrine further to the clarification of the term of option of inheritance as a term of forfeiture.⁷¹ Para.(2) lists other dates when the option term may start to run, in addition to those established by rule (inheritance opening date), such as, for instance, the date of birth of the person called to participate to the inheritance, if the birth occurred after the opening of the inheritance, when the legatee was aware or should have been aware of the legacy, etc. Besides, the text provides the extension of the term of the option of inheritance, for the situation in which the successor requires the inventory to be drafted prior to exercising the right of option of inheritance, where the option term does not expire sooner than 2 months as of the date when the inventory report is notified (Art.1104). Thus, the current 40 day prorogation term (provided under Art.706 para.(2) of the CC) is changed, without establishing a maximum term for drafting of the inventory (3 months according to the current regulation), since in practice, the drafting of the inventory may last longer than 1 year.

Finally, as regards the final provisions on the option of inheritance, the premise under Art.692 of the CC is resumed, *i.e.* the situation of the person entitled to inherit who dies without having exercised the option of inheritance (Art.1105), establishing other solution than the one provided under Art.693 of the CC, *i.e.* the non-unitary exercise of the option by the heirs of the deceased entitled to inherit, “each for his own share” (para.(1)) and redistribution of the waiving party's share.

(b) Section 2 "Acceptance of the inheritance"

[Art.1106-1119] The NCC provisions regarding the acceptance of the inheritance generally resume the current regulation, codifying the prevailing solutions in the doctrine and adding a few amendments.

An important amendment is the elimination of the unconditional acceptance of the inheritance. Pursuant to Art.1114, the inheritance can be accepted only under the “benefit of inventory”, as it is called by doctrine, with the effect that legal heirs and universal legatees or legatees under universal title shall be liable for the estate debts and encumbrances only with the property belonging to the estate (para.(2)), while the legatee under particular title shall not be liable for the estate debts and encumbrances, and by exception, as provided by law, he shall be liable only within the limits of the bequeathed assets (para.(3)).

Furthermore, NCC establishes the acceptance of the inheritance by the creditors of the person entitled to inherit, by derivative means, within the limits necessary to ensure the satisfaction of their receivable, a possibility accepted by the doctrine (Art.1107).

Art.1108 para.(1) provides the types of acceptance: express or tacit. As regards tacit acceptance, NCC amends, at least at the level of terminology, the condition in the current regulation that the intention to accept the inheritance should arise unequivocally from the tacit acceptance act; tacit acceptance is

⁷¹ It is necessary to amend Art.78 let.a) under Law No.36/1995 regulating the stay of the notarial succession procedure if 6 months have lapsed as of the date when the inheritance is opened, by extending it to a term of 1 year. As per the information provided by the Beneficiary, NCC Draft IL was amended in order to remedy this issue.

defined as the act or deed that the person entitled to inherit could only perform as a heir (Art.1108 para.(3)) and provides by way of example acts considered in practice and doctrine as tacit acceptance acts (Art.1110). We would like to note that the doctrine and practice have pointed out that unequivocalness is the most important condition of the tacit acceptance act, of which the intention to accept the inheritance should arise without allowing any other interpretation.⁷² The new text seems to be a mere rephrasing of this rule, although we deem that maintaining the term “unequivocalness” would be beneficial, ensuring the unitary and coherent interpretation of such institution.

Art.1110 establishes the rule pursuant to which the acts of disposition, final administration or use of the property of succession may operate as tacit acceptance (para.(2)), while the temporary preservation, supervision and administration acts do not imply acceptance unless it arises from the circumstances that the person entitled to inherit thereby partakes in his quality of heir (para.(3)). New regulations are provided on the non-acceptance affidavit, by which the person entitled to inherit who intends to carry out an act that might operate as an acceptance, but does not want to accept the inheritance, declares that he does not accept the inheritance so as to avoid that his act be interpreted as acceptance (Art.1111).

Express acceptance is made by private or authenticated instrument (Art.1108 para.(2)); if made by authenticated instrument, the notary has the obligation to record it in the national notarial registry.

NCC introduces the concept of tacit waiver of the inheritance as a relative presumption operating in the situations where the person entitled to inherit, although aware of the opening of the succession, and of being entitled to inherit, and although duly “notified” pursuant to the law, fails to exercise his option in due time (Art.1112). First of all, this solution comes against the opinions provided by the doctrine, although it is accepted that the failure to exercise the right of option produces effects similar to waiver.⁷³ Moreover, the text seems to come against the rule specified under Art.1120 para.(1) of NCC, pursuant to which waiver of inheritance cannot be presumed. The inadvertence has already been noticed, as the NCC Draft IL proposes that Art.1120 para.(1) be supplemented by two exceptions, one of which is, by reference, the presumption provided under Art.1112. Secondly, the use of the concept of “notification” as well as the lack of a delaying term should be pointed out, both discrepancies being noted and corrected by the NCC Draft IL, which proposes the amendment of Art.1112 by replacing the term of “notification” with “summons”, and respectively the introduction of a new paragraph (2), providing that the presumption shall operate only if the person entitled to inherit received the summons at least three months prior to the expiry of the term related to the right of option.

Another significant novelty is the possibility granted to any person concerned to request by way of injunction, for solid grounds, the reduction of the term for exercising his option of inheritance

⁷² See also Decision No. 2193/1990 of the Supreme Court of Justice, Civil Division.

⁷³ The problem of tacit waiver was solved differently under various legislations. Art.784 of FCC provides that the waiver of inheritance cannot be presumed (text resumed under Art.1120 para.(1) of NCC). Art.633 of QCC provides the tacit acceptance presumption upon the expiry of the general term of option, and the tacit waiver if the person entitled to inherit is bound by the court to exercise his option but he fails to do so (text resumed by NCC under Art.1113 para.(2)).

(Art.1113 para.(1)). We deem that, in practice, the text must be applied in correlation with the provision of Art.1104 which allows the prorogation of the term of option if the person entitled to inherit requests that an inventory be made, in the sense that the right to prorogation of the person entitled to inherit will also apply as regards the new term for exercising the option of inheritance, decreased by injunction under Art.1113 para.(1) and, also, in the sense that the party concerned cannot request the decrease of the term for exercising his option of inheritance by infringing the right of the person entitled to inherit to the prorogation thereof.

Art.1113 para.(2) introduces the second presumption of tacit waiver of the inheritance, inspired by QCC, for the situation where the person entitled to inherit fails to make his option within the term established by the court.

As regards the effects of acceptance, as mentioned above, Art.1114 implicitly eliminates the possibility of the unconditional acceptance of the inheritance. In all cases, acceptance shall be made under the “benefit of inventory” (para.(2) and para.(3)). The inventory drafting procedure, the inventory minutes, the special measures for the preservation of assets, amounts of money and other valuables, are all regulated under Art.1115-1118, resuming the provisions of Art.70, Art.71, Art.72, Art.73 para.(1) and para.(2) of Law No.36/1995, with slight amendments.

Another new aspect is the regulation of doctrinal solutions which provide for exceptions to the rule that the legatee under particular title shall not incur the liabilities of the estate (para.(3) second thesis).

According to Art.1114 para.(4), should the parts of the estate be alienated subsequent to the opening of succession, the property which entered the succession patrimony by effect of subrogation may be assigned for paying off the debts and encumbrances of the inheritance.

(c) Section 3 “Waiver of inheritance”

[Art.1120-1124] As mentioned above, Art.1120 para.(1) provides the rule that the waiver of inheritance shall not be presumed, although the previous section includes two legal texts instituting legal presumptions for waiving inheritance (Art.1112 and Art.1113 para.(2)). The NCC Draft IL proposes a correction of this shortcoming by the amendment of Art.1120.

Except for the two cases when waiver is presumed, waiver shall be express and authenticated (Art.1120 para.(1), para.(2)). Art.1120 para.(2) expressly provides that, in addition to the notaries, the waiver statement may also be authenticated by Romania’s diplomatic missions or consular offices, under the conditions and within the limits provided by law. The waiver statement shall be registered with the national notarial registry, on the expense of the waiving party (Art.1120 para.(3)). Same registration formalities shall apply to the revocation of the waiver (Art.1123). Please note that these are the only provisions in matters of inheritance which provide that the signatory of the deed bears the costs required for registration with the national notarial registry, although, most likely, the regulation of an exceptional case was not intended. This issue shall also have to be clarified in the special regulation on the national notarial registry.

Art.1112 introduces a 3-month term in which the creditor may file an action to revoke fraudulent waiver (the current regulation sets no term; nevertheless, doctrine refers to the 3-year general prescription term). Admission of the action to revoke shall be deemed as acceptance of inheritance by

the succession debtor, but only with respect to the claimant creditor and within the limits of his receivable.

NCC includes more explicit provisions on the revocation of the waiver as compared to the current regulation. Art.1123 provides, as constantly decided under the current regulation, as well, that the revocation of the waiver shall be permitted subject to the observance of two conditions: it has to occur within the option term, and the inheritance should not have been already accepted by other successors with title to inheritance for their part (para.(1)). As a novelty, NCC clarifies the formal requirements of the revocation of the waiver, which are not to be found in the CC, but, nevertheless, addressed by the legal literature, the last thesis of para.(1) of the legal text providing, by way of reference to Art.1120, that the revocation of the waiver shall be performed under the same conditions as the waiver (express, authenticated, subject to the observance of the registration formalities). The tacit or forced revocation of the waiver's revocation is, thus, consequentially eliminated. According to para.(2) of the text, further to the retraction of the waiver, the successor becomes accepting heir. The elimination of the pure and simple acceptance in NCC also removes the issue of classifying the acceptance arising out of the revocation of the waiver, since acceptance under NCC can only occur under a benefit of inventory (*beneficium inventarii*). The final sentence of para.(2) provides that the property of inheritance thus accepted shall be taken over as is, and subject to the rights acquired by third parties thereto. The adopted solution is partially different from the one accepted by doctrine, according to which acceptance by revocation of the waiver generates retroactive effects starting from the opening of succession (on the contrary, NCC provides that the property shall be taken over as is), however, in compliance with the rights acquired by third parties (a solution which is also kept by NCC).

Finally, Art.1124 provides a special 6-month term of prescription for the cancellation of the deed of option to inheritance, a term running from the termination of the cause of vitiation of consent under duress, and, in all other cases, from the time when the holder of the right to action became aware of the cause for relative nullity.

(d) Section 4 “Seisin”

[Art.1125-1129] As to seisin, NCC brings a few amendments to the current regime, some arising out of apparent inconsistencies between the texts, other clearly arising from the regulation.

First, there is a certain inconsistency in terms of terminology likely to create confusion, in our opinion. With the current regulation (Art.653 para.(1) CC), as with the literature and practice developed thereunder, seisin means not taking possession of the inheritance per se, with the rights granted thereby, but a benefit of the law pursuant to which only certain heirs, referred to as “seised heirs”, shall have the right of possession over the succession starting from the demise of the deceased, without a prior certification of the capacity as heir.

This being the current definition of seisin, the definition under Art.1125 of NCC (which fails to specify its nature of benefit provided for certain heirs only) and side heading of Art.1127 of NCC (“Acquirement of Seisin by Non-Seised Heirs”) may lead to the conclusion that NCC would no longer consider seisin as a benefit granted by law to certain heirs only, but the very “possession of inheritance” (in its established meaning of *de facto* possession, right of administration and right to exercise the actions of the deceased) to be obtained by the seised and non-seised heirs, but under

different rules. Pursuant to the information provided by the Beneficiary, an amendment was drafted to the NCC Draft IL, meant to remedy this aspect, having a great influence on the entire section dedicated to seisin, and therefore the analysis we made below shall continue to be valid to the extent that the said amendment does not clarify all mentioned aspects.

As to the universal legatee or legatee by universal title, Art.1128 of NCC uses the same concept of “taking the *de facto* possession over inheritance”, and not the concept of “seisin”, which may lead to the idea that, further on, under the NCC regime, seisin would no longer mean to take possession over the inheritance per se by any class of heirs, but only taking possession of the inheritance by the legal heirs, be them seised or not. In fact, according to a possible new definition of seisin which we could infer from the texts, the use of the terms “seised” and “non-seised” would no longer be justified. Another terminological inconsistency may be seen at Art.1127, which, despite its side heading, uses the concept of “taking the *de facto* possession over inheritance”, and not the concept of “acquiring the seisin”, which, read in connection with other texts of the section, may lead to the conclusion that an error slipped in the article’s side heading, which should read “Taking Possession of Inheritance by the Lawful Non-Seised Heirs”, instead of “Acquirement of Seisin by the Lawful Non-Seised Heirs”. Please note that the NCC Draft IL proposes an amendment of para.(1) of Art.1127, consisting of the following text: “Lawful non-seised heirs shall acquire the seisin only after the issuance of the heir certificate, which shall, nevertheless, have a retroactive effect starting from the opening of the inheritance”; or, by definition, non-seised heirs cannot acquire seisin as such, but they may merely obtain “possession over the inheritance”.

Another inconsistency in the new regulation concerns the rights granted by seisin, and by taking possession over inheritance, respectively. First, as revealed by literature, seisin is “possession of inheritance”, where the concept of “possession” has a special meaning, independent of the *de facto* possession over the succession’s property, which may also be held by a third party (subject to the right of the seised heir to file a petition or possessory claim against him), and includes the right of administration over the estate and the patrimonial rights and actions acquired under the inheritance. Following such solution, NCC expressly establishes a definition of seisin which, “in addition to the *de facto* possession exercised over the succession’s patrimony”, grants the heirs the right of administration and the right to exercise the rights and actions of the deceased (Art.1125). (As stated above, this is the definition currently given to the taking of possession over inheritance, or acquirement of possession over inheritance, while the seisin is the anticipated acquirement of possession over inheritance, under the conditions of law, by certain categories of lawful heirs, expressly provided by law.) In addition to this apparent amendment/inconsistency, as a second comment, we notice that NCC’s lawmaker provided under Art.1126 para.(2) that seised heirs shall *de jure* acquire, prior to the notarial or judicial certification of their capacity as heirs, only the “*de facto* possession over the inheritance”, without stipulating expressly that they also acquire the right of administration and the right to exercise the actions of the deceased which, according to the definition under Art.1125, are cumulatively provided and do not include one another. In our opinion, to avoid misunderstandings, Art.1126 para.(2) should be supplemented. In any case, we deem necessary a harmonization of the section’s legal texts so as to settle without equivocation the contents of the concept of seisin and the manner in which seisin operates.

Besides the aforementioned aspects, NCC also amends the classes of seised heirs, which currently include descendants and ascendants, limiting them, on the one hand, to only privileged ascendants and descendants and, on the other hand, extending them to include the surviving spouse and, absent such categories and, thus, as an alternative option, to include privileged collateral heirs (Art.1126). As to non-seised heirs, Art.1127 para.(1) codifies the solution adopted in practice that they shall take the *de facto* possession over the inheritance on a retroactive basis, starting from the issuance of the heir certificate. Nevertheless, no legal actions may be initiated against the non-seised heir with respect to his capacity of heir until the *de facto* taking of possession over the inheritance (para.(2)).

Art.1128 regulates the taking of possession over the inheritance by the universal legatee, and the legatee by universal title, keeping the solutions issued under the current regulation (Law No.36/1995). Art.1129 regulates the delivery of legacy under a particular title, by keeping the same current solution.

(e) Section 5 “Petition of Inheritance”

[Art.1130,1131] NCC establishes in terms of terminology the concept of petition of inheritance, which is not to be found as such in the CC, but is accepted by doctrine and practice, without providing a definition thereon. However, Art.1130 and 1131 show that the new regulation maintains the petition of inheritance’s legal form already established in the doctrine, which is that of an action whereby a person claiming to be a universal heir or a heir under universal title may be acknowledged the capacity as heir against any other person which, claiming to have grounds on the heir title, possesses all, or part of the estate (Art.1130). According to Art.1131 para.(1), the effect of acknowledgment of the capacity as heir consists in the defendant being compelled to return the property held without a title, which restitution shall be performed in accordance with the provisions regulating the restitution of considerations (Art.1035-1049 of NCC). The deeds of preservation or administration concluded by the holder without a title with third parties shall be deemed valid inasmuch as they are profitable to the heir, as well as the deeds of disposal concluded for valuable consideration with good-faith third parties, subject to the observance of the land book formalities (Art.1131 para.(2)).

(f) Section 6 “Heir Certificate”

[Art.1132-1134] NCC provides the definition of the heir certificate regulated under Art.83 of Law No.36/1995. This article reiterates the provision of the special law by taking it out of the context of the notarial succession procedure regulated thereunder (Art.83 of Law No.36/1995 also provides the term set for the issuance of the heir certificate, in relation to the time of the final notarial conclusion).

As to the effects of the heir certificate, Art.88 para.(1) sentence II of Law No.36/1995 is resumed (Art.1133 para.(1)). As a novelty, para.(2) of the legal text regulates the notary’s obligation to liquidate the marital regime prior to establishing the structure of the succession patrimony.

The action to declare the nullity of the heir certificate is also regulated by taking over Art.88 para.(1), first thesis of Law No.36/1995 in NCC (Art.1134).

(ii). Chapter II “Vacant Succession”

[Art.1135-1140] NCC includes a much more detailed regulation on the vacant succession than the current regulation, and, at the same time, settles certain issues raised by the legal literature on cases of vacancy. Art.1135 defines the vacant succession covering the two hypotheses addressed by doctrine: both the case of a total lack of legal and testamentary heirs (para.(1)), and the case when there are no legal heirs and the deceased established a legacy for a portion of his inheritance only (para.(2)).

Art.1136 of NCC takes over the provisions of Art.73 para.(3) of Law No.36/1995 on the provisional administration of the succession property, with the amendment that the curator shall be appointed, according to the new regulation, by the representative of the local authority, and not by the notary public. In terms of terminology, “the territorial administrative authority” was replaced by “the body representing the commune, town or city, as the case may be”.

NCC establishes a procedure preliminary to the establishment of the succession’s vacancy. According to Art.1137, should no heir appear within one year and 6 months from the opening of the succession, the notary shall proceed to summon all those entitled to succession, through publicity (para.(1), para.(2)). Succession’s vacancy shall be established, should no person entitled to succession appear within the term set (para.(3)). By setting a term longer by 6 months than the term set for inheritance option for the heirs to come forth and take over the inheritance which would otherwise remain vacant, NCC’s lawmaker institutes special protection for potential heirs in such situation. On the other hand, one may claim that the protection was already ensured since the term set to opt for the inheritance option is subject to suspension/reinstatement similarly with the terms of extinctive prescription, and the provision of such special term is unjustified. Art.1137 may be construed in the sense that in all cases when a heir failed to appear within the one-year term set for the exercise of the inheritance option, or when the titles of the heirs that came forth fail to claim the entire estate, the notary shall have to wait for the lapse of a 6-month term, and then to proceed to summon the heirs.

Moreover, the text establishes expressly the mandatory nature of the provisions on the State’s right to collect the vacant succession, any testamentary clause to the contrary being null and void.

Taking possession of the vacant succession by the commune, town or city shall occur, subject to a retroactive effect valid from the opening thereof, as soon as all known heirs waived the succession, or on the expiry of the term provided under Art.1137 (Art.1139 para.(1)). Please note that the wording appears to address the issue of the State’s seisin, disputed in doctrine, providing that the taking of the *de facto* possession over the succession depends on no other formality (such as, obtaining a vacancy certificate from the relevant notary, or another document attesting to the vacancy and/or the right of the commune, town or city to acquire the property of the succession). Nevertheless, one may understand from the joint reading of the texts, that the notary public shall first have to establish all heirs’ waiver, or the expiry of the term provided under Art.1137. The procedure of establishing the vacancy and the taking of *de facto* possession over the succession shall have to be regulated under a special law.

Para.(2) expressly establishes the principle that the State shall be liable for the estate liabilities within the limits of the estate, as are, in fact, all the legal and testamentary heirs, according to the new regulation.

According to Art.1140, the vacancy of succession may be cancelled, and the heirs may exercise the petition of inheritance against the commune, town or city. Thus, NCC appears to support the doctrinal theory (supported by case law, as well) according to which the State collects the vacant succession in the capacity as heir, because, in other conditions, the petition of inheritance could not be exercised. Nevertheless, there are indications that the lawmaker opted, on the contrary, for the opposed theory, that the State acquire succession on the grounds of sovereignty, since, on the one hand, no right of inheritance option is instituted in favor of the commune, town or city, as they automatically collect the vacant succession upon the expiry of the terms and in observance of the conditions provided by law, and the State may not be disinherited (Art.1139). Moreover, we note that Art.1137 establishes the capacity as successor for the territorial administrative unit where the property is located, which, once more, suggests that the acquirement of succession shall be achieved on the grounds of sovereignty, not of a right to succession. To the same effect, Art.553 para.(3) of the NCC provides that vacant successions located abroad are due to the Romanian State.

(iii). Chapter III “Family Memories”

[Art.1141,1142] NCC establishes the concept of family memory, as property that belonged to the family members and evidences the family history, as well as family correspondence and records, decorations, collector’s arms, family portraits, documents and any other property of a major importance for such family (Art.1141). Art.1142 establishes the legal regime of such property, the rule to apply being joint ownership, subject to a special regime, as the heirs are given only the possibility of voluntary partition to end the joint ownership with respect to the property which represents family memories (para.(1), which rule is reiterated under para.(2)). If the voluntary partition is not agreed, and the heirs remain in joint ownership, the property shall be consigned to one or several heirs or to the place agreed or established by the court (para.(3)). The consignee heir shall have the capacity to initiate legal proceedings for restitution of the property which is a family memory against the person that unlawfully holds it (para.(4)). Deeds of alienation, loan or lease concerning such a property may be concluded only with the consent of all joint owners (para.(4)).

(iv). Chapter I “Testamentary Partition and Restoration”

(a) Section 1 “General Provisions on Testamentary Partition”

[Art.1143-1145] As to the joint ownership state, NCC reiterates the current provisions (Art.728 CC), and, at the same time, applies the general law rules in matters of co-ownership. Moreover, the current regulation of the voluntary partition is kept without notable amendments, but with a better systematization and inclusion of doctrinal conclusions (Art.1144). As a novelty, the mandatory nature of the authentic form of the partition convention concerning real property is codified, thus ending a doctrinal controversy.

Art.1145 provides the principle that the property of the succession may be subject to certain conservatory measures.

(b) Section 2 “Restoration of Donations”

[Art.1146-1154] NCC reiterates the concept of restoration of donations existing in the current regulation, adding, besides the obligation of the descendants to restore, the obligation of the surviving spouse to restore, currently regulated under Law No.319/1944. As a novelty, Art.1146 para.(2) adopts a solution differing from the current regulation (Art.753 CC, which provides that the donee shall have the obligation to restore even if he had no capacity to inherit upon the conclusion of the donation contract, but only upon the opening of succession)⁷⁴ establishing the rule that heirs are compelled to restore (if not exempted by the testator), only if they had an actual title to the inheritance of the deceased, in case that such inheritance was opened on the date of donation.

As to the exemption of the waiving party from restoring, Art.1147 maintains the current regime, instituting under para.(1), the rule that the party waiving inheritance is not compelled to restore, and shall keep the donated property within the disposable portion, and, under para.(2), the exception that: if the deed of donation compels to restoration, even if the debtor waives the inheritance, restoration shall be due for the portion the donee would have been entitled to, as lawful heir, to prevent discriminations between descendants.

Art.1148 codifies doctrine in respect of the persons entitled to request the restoration of donations, *i.e.* descendants and surviving spouse, and creditors thereof.

NCC maintains the current provision on the personal nature of the obligation to restore, which is expressly provided. It is instituted the rule that the heir shall have to provide restoration only for the donations personally received from the donor (Art.1149 para.(1)). As currently in practice (Art.755 CC), the rule applies to the descendant of the donor that personally appears to the succession of the donor, which has no obligation to restore the donation made to his ascendant (para.(2)). Nevertheless, as established in doctrine and practice, by way of exception, restoration shall be due when the descendant appears to the succession by way of representation (para.(3)). Differences between the new and the current regulation consist in additions to the parties that may be represented, supplemented as explained above with the forfeiters and, according to the NCC Draft IL, waiving parties.

Exceptions from the obligations to restore, expressly provided under Art.1150 of NCC, are similar to the current provisions (Art.759,760,762 of CC). Disguised donations or donations through intermediaries shall be presumed as exempted from the obligation to restore, if no evidence to the contrary is produced (Art.1150 para.(1) let.b)). Para.(2) regulates the fortuitous loss of the property of any kind (not only real property as with the current regulation – Art.760 of CC), and the obligation to restore the insurance allowance, which are not regulated under the CC.

As a novelty, NCC replaces the rule of in-kind restoration, established under Art.764 of CC, by the principle of indirect restoration, as per the pattern laid down by CCQ (Art.1151 para.(1), para.(2)), to

⁷⁴ Which provides that the donor is compelled to restoration even if he had no capacity to inherit upon the conclusion of the donation contract, but only upon the opening of the succession.

secure the stability of the civil legal circuit. Para.(3)-(6) of the same article codify and unify the indirect restoration categories missing from the CC, but established under Romanian doctrine.

Also, NCC codifies the means to perform the restoration identified under doctrine, *i.e.* by agreement or in court; the latter option is available by main or incidental claim during partition (Art.1152 para.(1)). Please note that the NCC Draft IL proposes amendments to this text, indicating that restoration shall be performed during partition and eliminating references to the types of claims (main or incidental) to achieve restoration, which are present in the published text. Restoration claimed by one of heirs shall inure to the other heirs, as well (Art.1152 para.(2)). As to the term of prescription of the restoration claim, such term is the general term acknowledged by doctrine of 3 years from the date when the person entitled to claim restoration became aware of the donation, however, not sooner than the opening of the succession or property delivery date, should such date occur after the opening of the inheritance.

As to the property assessment rules in case of indirect restoration, we notice the reference to the value of the property “upon judgment” (Art.1153 para.(1)). As the term is established only by reference to a stage of the trial, the text does not address the situation of achieving the restoration by agreement, which deficiency should be corrected.⁷⁵ Para.(2) of the text, inspired from FCC, establishes rules for assessing the property in case of alienation, replacement of the property prior to the restoration claim, and in case of an inevitable depreciation of the property due to its nature. Para.(3) regulates the indexation of the amounts of money subject to restoration, by the inflation index.

Art.1154 lays down provisions concerning improvements and degradations of the donated property in case of in-kind restoration.

(c) Section 3 “Payment of Debts”

[Art.1155-1159] In this section, generically called “Payment of Debts”, NCC unifies both provision on the *de jure* division of liabilities of the succession between heirs (the texts restate the provisions of Art.774,775,777,893,896,902,1060 of the CC), and the provisions on the restoration of debts (Art.738 of the CC).

Art.1155 provides the rule of the *pro rata* contribution of universal heirs and heirs under universal title to the payment of the inheritance’s debts and burdens (para.(1)), and the exceptions from such rule (para.(3)). In addition, it is provided that, prior to partition, the creditors whose receivables arise out of the preservation or administration of the estate, or occurred prior to the opening of succession may claim payment from the jointly owned property, including by way of enforcement proceedings on such property (para.(3)).

The current regulation is reiterated (Art.785 of the CC) with respect to the revocatory action and the right of the heirs’ personal creditors to attend the partition; nevertheless, their right to oppose is eliminated (Art.1156). It is expressly established the right of preference of the succession’s creditors

⁷⁵ “Upon judgment” is intended to be the time when restoration is achieved (CDEP Table). We deem that the text would better read as follows: “upon achievement of restoration”, to cover the situation when the restoration is achieved by agreement during the succession proceedings.

over the personal creditors of the heirs, which article shall also apply to the legatees by particular title, if the object of the legacy is not a determined individual property (Art.1156 para.(5)). Art.1157 includes express provisions on the recourse between heirs and regulates the case of insolvency of one of the heirs.

As to the restoration of debts, which is given a rather laconic regulation under the CC (Art.738), the new regulation is more detailed, codifying the doctrine concerning situations in which the heir has one or several uncontested and fixed-amount debts to the succession, which debts are liquidated by taking a smaller amount or by way of restoration within the limits of his share of the succession (Art.1158 para.(1), para.(2)). Restoration shall not operate with respect to the heir's receivable; nevertheless, should the heir have dual capacity of creditor and debtor of the succession, the legal offset may operate, even if the requirements thereof are not met (para.(3)). Restoration of debts may also be achieved prior to the succession partition, by mutual agreement (para.(4)).

Finally, according to Art.1159 of NCC, the creditors of the deceased may claim enforcement against the heirs, based on an enforcement order, according to NCPC.

(d) Section 4 "Partition by Ascendant"

[Art.1160-1163] NCC restates in a better wording and systematization the legal provisions on the partition by ascendant, *i.e.* the right of ascendants to perform the partition of their estate among descendants. As to the ineffectiveness of the partition by ascendants, a novelty of doctrinal inspiration is introduced, which is an exception from the rule of the absolute nullity of the partition which fails to include all descendants fulfilling the requirements to come to succession, either personally, or by way of a representative: if it fails to include the representative, but it includes the represented person, the partition shall remain valid (Art.1163 para.(2)).

1.6. Book V "On Obligations"

[Art.1164-1649] The first eight titles of Book V—"On Obligations" contain a series of provisions which are essential for the future groundwork of the Romanian private law system. They contain the principles of all obligation-related matters, *i.e.* general provisions, the sources of obligations (including, *inter alia*, the very important chapters on contracts and civil liability), the modalities of obligations, the complex obligations, the performance of obligations, the transfer and transformation thereof, the extinguishing of obligations and the restitution of performances.

These NCC provisions are the outcome of a major effort to synthesize the solutions included in the current CC, the Commercial Code and the special legislation currently in force and to regulate relevant doctrinal and case law conclusions. Last but not least, the NCC wisely turned to good account the experience gained from the civil codes issued more recently (for example, the QCC) or a longer time ago (for example, the ICC), but also certain projects for the unification of private law (for example, the PECL or the Unidroit Principles).

[Impact] Considering that the general provisions mainly refer to issues of substantive law, the finance/budget or human resources impact thereof will not be very direct, immediate or significant.

Some of the significant novelties brought by the current regulation are as follows:



- pre-contractual liability has been regulated, especially for bad-faith negotiation, disclosure or unauthorized use of confidential information, sudden withdrawal of the offer;
- a more detailed regulation has been provided on the mechanism for the conclusion of the contract by making an offer followed by the acceptance thereof;
- the standard clauses have been regulated and their effects have been limited;
- the regime of the vices of consent has been amended in several respects (for example, only the essential error will allow the filing of an action for the annulment of the contract, while the error on the nature or object of the contract is treated as a cause for relative nullity, and not a cause for absolute nullity as it has been so far; the regulation of the error of law; the express regulation of fraud (*dolus*) by reluctance; the possibility to request the annulment of the contract for any type of fraud (*dolus*), including *dolus incidens*; the possibility to qualify as duress, under certain circumstances, the acts of threatening with the exercise of a right; the extension of the scope of application of lesion so as to protect any person who concluded a contract in distress, lacking experience or knowledge, etc.);
- the provisions concerning the object of the contract have been amended (the initial impossibility of the contractual object will not entail, in principle, the invalidity of the contract; the possibility to also conclude contracts for assets belonging to a third party, etc.);
- as regards the matter of nullity, relative nullity is now the rule; absolute nullity will be applied only if this sanction results without a doubt from the law; the retroactive effect of nullity has been extended to the contracts with successive performance as well; the parties may agree to declare the nullity of the contract (amicable nullity), etc.;
- the rule on bearing the risk in ownership transfer contracts has been amended (the risk will always be borne by the debtor of the obligation to deliver, unless he was formally notified);
- detailed regulations have been implemented on the representation, the option agreement, the promise to contract, the stipulation for another, the promise for another and the simulation;
- in tort liability, the NCC has included doctrinal and case law solutions, such as: liability for damaging an interest, and not only a subjective right, liability in case of failure to comply with an activity required by the law or ordered by the superior, extension of principal's liability for the act of the agent, definition of legal guardianship, etc.;
- the NCC provided for the obligation of the ministry of public finance to file action of recourse against the person who caused the damage for which the state is to be held liable;
- the rules on the rescission of the contract (in french, "résolution *du contrat*") and termination of the contract (in french, "résiliation *du contrat*") have been amended (by setting the ways in which the contract may be cancelled without the intervention of the courts);
- the regulations on the formal notice have been changed (the cases of the *de jure* formal notification have been extended; the creditor's obligation to grant a fulfillment term once the formal notice has been established, etc.);

- the performance of the obligation to do something is rendered easier, by discarding the requirement to request in prior the consent of the court in case of debtor's nonperformance;
- the court's possibility to reduce the penalty clause is acknowledged;
- the regime on the transmission and transformation of obligations has changed (the regulation of contract assignment has been introduced; the formalities for the receivable assignment to be enforceable against the assigned debtor have been simplified; the debt takeover has been regulated, etc.).

There are significant provisions in the NCC showing the lawmaker's concern with establishing rules as flexible as possible to allow the parties to solve various contractual issues directly, without the intervention of the courts, as it happens now (for example, as showed above, the NCC provides for the admissibility of amicable nullity, the possibility to issue unilateral statements of rescission or termination of the contract, it simplifies the enforcement formalities in relation to the obligations to do something, etc.).

Nevertheless, on the whole, the entry into force of the NCC is expected to increase the court caseload. This estimate relies, in the first place, on the fact that there are more legal norms in the NCC than in the current CC. Secondly, there are many provisions in the NCC which allow the courts to intervene in the parties' contractual relations, which were not provided in the current CC or the Commercial Code or existed in a subdued form (for example, the court's possibility to determine the price or any other contractual element - Art.1232-1234, the replacement of void clauses with the applicable legal provisions - Art.1255 (in this respect, the law provides that it occurs *de jure*, but the court must however intervene in case of disputes between the parties), the reduction of performances owed by the victim of duress or fraud (*dolus*) - Art.1257, the adjustment or cessation of the contract in case of hardship-Art.1271, the setting by injunction of a term for the acceptance or refusal of an irrevocable offer or option agreement - Art.1278, determining the probable will of the parties if no clear stipulations are made to assess the fulfillment of the condition, as a modality of the legal deed-Art.1404, the judicial setting of the term, as a modality of the obligations - Art.1415, Art.1495 etc.).

Thirdly, besides the situations listed above, we note that the mandatory power of the contract has been undermined by the mechanisms mentioned above, i.e. the adjustment or cessation of the contract in case of hardship-Art.1271, the reduction of performances in case of minor nonperformance of the contract - Art.1516, Art.1551, creditor's obligation to grant a reasonable term for the performance of the obligation when the debtor is formally notified, a term which must also take into account the nature of the obligation and the circumstances-Art.1522, the reduction of excessive penalties-Art.1541, the impossibility to prohibit the assignment of a pecuniary receivable - Art.1570, etc.

The process of getting acquainted with the new provisions on obligations will be very demanding for all parties involved in the law enforcement process, i.e. magistrates, lawyers and legal subjects alike. We deem that it is essential to organize future training programs for the magistrates and lawyers, focusing on the presentation and explanation of the new rules, so as to limit possible divergent solutions after the entry into force of the NCC. In this context, as we already showed, it must be mentioned that a large part of the legal texts on obligations were inspired by foreign laws (the QCC, the ICC, the SCO, etc.) or are the outcome of projects for the unification of private law. Therefore, we

deem that it is fundamental to ensure the access of the persons involved in the enforcement of the NCC to proper documentation (doctrine and legal practice) to explain the interpretations of the provisions taken by the NCC's lawmakers from other jurisdictions. Last but not least, it would be extremely useful, from the perspective of the future work of interpretation of the new legislation, to issue an official edition of the NCC to indicate, for each article, the sources from which it inspired.

Besides its indubitable merits, a detailed analysis on the NCC provisions concerning the general matter of obligations has identified the existence of areas on which a legislative intervention is required before the entry into force of the NCC. Thus, we hereby found, as we will detail below, that (i) there are some issues of incompatibility between some of the NCC provisions; (ii) it is necessary to clarify certain provisions with an obscure meaning; (iii) certain provisions may be found more than once in various sections of the NCC; (iv) eliminating certain traditional solutions under Romanian civil law.

1.6.(a). Title I “General Provisions”

[Art.1164-1165] Art.1164 provides a legislative definition of the concept of “obligation”, and Art.1165 lists the sources of obligations. Unlike the regulation in the current CC, both the quasi-contract, and the quasi-offense are dropped. Nevertheless, we note the relatively inconsistent terminology on unilateral legal deeds, which are sometimes referred to by the simplified term of “unilateral deeds” (see, for instance, Art.1165, the side heading of Art.1193, Art.1325, Art.1326, name of Section 2 of Chapter II, Title II, Book V of the NCC, Art.1355).

1.6.(b). Title II “Sources of Obligations”

(i). Chapter I “The Contract”

(a) Section 1 “General Provisions”

[Art.1166–1170] This section includes a few rules of major importance to the legal institution of the contract.

We must point out the provisions under Art.1169, establishing the principle of contractual freedom in a fashion similar to the current CC in terms of substance. Nevertheless, unlike the current regulation, where the contractual freedom and limits thereof come from the combination of at least three texts (*i.e.* Art.5, Art.966 and Art.968 CC), the NCC's lawmaker chose, for good reasons, a simpler and clearer solution.

Art.1170 expressly establishes the requirement that the contracting parties act in good faith both in the negotiation and in the execution of the contract, and throughout the fulfillment thereof. The wording is not sufficiently correlated with other provisions of the NCC, revealing partial or total overlaps with Art.14 of the NCC (according to which, individuals and legal entities involved in civil legal relationships have to exercise their rights and meet their obligations in good faith), Art.1270 para.(3) of the NCC (according to which the contract has to be performed in good faith), Art.1183 para.(2) of the NCC (which provides that the party bound by a negotiation must comply with the good-faith requirements). Although we fully agree with the NCC lawmaker's concept on the fundamental nature of observing the good-faith principle at any time relevant to the occurrence, existence and termination of civil legal relationships, we, nevertheless, deem that quantitatively and repeatedly insisting on the

requirement of observing good faith is not likely to strengthen in any way whatsoever the mandatory nature of such principle. On the contrary, we deem that such legislative technique is likely to generate inconsistencies between the texts including references to the requirement of observing good faith, and issues on the establishment of potential hierarchies addressed by NCC as mandatory, but lacking the abundance of declarative repetitions as with the principle of good faith.

(b) Section 2 “Various Categories of Contracts”

[Art.1171-1177] This section includes definitions of the main types of contracts addressed by the NCC. As compared to the corresponding provisions of Art.942-947 of the CC, the NCC’s provisions are a step forward in terms of legal consistency underlying the definitions of different types of contracts. *Inter alia*, one may notice a set of new definitions, which are not to be found in the current CC and which turn to good account the comments of a prominent legal literature on obligations.

In this respect, the adhesion contract is an example, which, although mentioned by the legal doctrine and case law, was not benefiting from a legal regime in the general regulation of obligations. Nevertheless, we notice something which appears to be a slight terminological clumsiness: the adhesion contract is defined as such contract whose “[...] essential clauses are imposed or drafted by one of the parties [...]” (Art.1175 of the NCC; emphasis added). As regards the principle of contractual freedom, which, as regards this matter, entails at least the possibility to choose between concluding or not concluding a contract, and taking into account the requirement that any consent given to enter into a contract must not be vitiated, we deem that the idea that certain contractual clauses may be “imposed” by one of the parties should not be accepted.

Similarly, we may deal with a slip in Art.1176 para.(2) of the NCC, which refers to the framework contract. Widely used in business relationships (or, using the NCC’s terminology, “between professionals”), the framework contract is defined as the arrangement whereby the parties agree to negotiate, conclude or maintain contractual relations whose essential elements are created by such arrangement – Art.1176 para.(1) of the NCC. Para.(2) of this article provides that “the framework contract’s fulfillment fashion, particularly the term and amount of performances [...] shall be provided in subsequent agreements”. In fact, we deem that there is no “fulfillment fashion” in a framework contract, whereas we are dealing with an agreement which, in principle, cannot be “fulfilled” as long as the parties’ agreement, in order to be perfected, has to be expressed again in subsequent contracts.

The contracts concluded with the consumers, are, according to Art.1177 of the NCC, subject to the relevant special laws and are supplemented by the NCC.

(c) Section 3 “Conclusion of the Contract”

1. Preliminary Provisions

[Art.1178-1179] Art.1178 of the NCC establishes the principle of consensuality, providing that a contract is executed by the mere consensus of the parties (*solo consensu*), should the law provide no particular formalities for the valid execution thereof. However, from a legislative technique standpoint, we find the insertion of the condition that the contracting parties be “capable of entering into a contract” in the wording of Art.1178 of the NCC questionable, as the capacity is only

one requirement to conclude a valid contract, and the full list of conditions essential to the contract's validity (including capacity) is provided under Art.1179 of the NCC.

3. Consent

I. Formation of the Contract

[Art.1182-1203] Art.1182 of the NCC includes certain novelties in terms of contract drafting technique. Consequently, the parties agreeing to the essential elements of the contract shall be sufficient, even if certain secondary elements are left to be agreed at a later time or established by a third party – para.(2). However, if the secondary elements are not agreed by the parties or established by a third party, the court may order, upon request of either party, that the contract be supplemented, in consideration of the nature thereof and parties' will.

Although this regulation has been inspired by Art.2 CEO, respectively Art. 2.1.14 and 4.8 of the Unidroit Principles, we deem that it is likely to have a negative impact on both the court workload and on the safety of the civil circuit. Thus, taking into account that a trial in commercial matters is rarely completed sooner than one year (in an optimistic scenario), we cannot see how the parties to a contract could actually benefit from the legal effects generated by the admission of a claim to supplement the contract, which, in many cases, will be irrevocably settled after the contract in question has been performed at least to a major extent, if not in full.

In addition, we cannot see, for instance, how the court can impartially consider an element such as the "parties' intention", as long as the argument for which the claim to supplement the contract was filed is the very existence of certain contrary intentions of the parties, which were unable to agree on the so-called secondary clauses in their contract. Another practical issue concerns the enforcement in time of a potential court ruling ordering the contract to be supplemented. In principle, all contractual clauses, either essential or secondary, should be inserted in the contract and applied from the very conclusion thereof. This entails a retroactive effect of the court ruling, which is, nevertheless, likely to generate unfair effects, as this may be equaled to placing at least one of the parties in the position of having breached the contract. Another alternative, *i.e.* accepting an *ex nunc* effect of the court ruling supplementing the contract, also has inconveniences, as means that the existence of a "two-speed contract" is established, *i.e.* a contract which has a certain form upon its execution and when the court ruling is issued, and another form after this point.

Art.1183-1185 of the NCC provide for a set of novelties as compared to the CC. Thus, Art.1183 establishes that there must be good faith in the pre-contractual negotiations. Although this regulation is welcome *per se*, such as we pointed out above, in our comments to Arts.1166-1170, this provision is reiterated a few times throughout the NCC, which does not comply with the legislative technique norms (to this effect, please refer to Art.16 of Law No.24/2000 concerning the legislative technique for drafting enactments, republished). Another legislative novelty is to be found under Art.1184 of the NCC, which establishes the confidentiality obligation with respect to the confidential information disclosed to one of the parties during negotiations. Finally, Art.1185 refers to such issues in a contract structure which, as per the will of the party concerned, may be deemed as elements underlying the

conclusion of the contract. If no agreement on such elements is reached, or the contract is not concluded in the form requested by one of the parties, the contract shall not be deemed concluded.

Art.1186-1200 regulate in a much more comprehensive fashion as compared to the current legislation (*i.e.*, mainly Art.35-39 of the Commercial Code), the formation of the contract through the offer-acceptance mechanism, envisaging, with the notable exception of Art.1194, the distance contracts.

According to the standpoints expressed in the legal literature, Art.1186 of the NCC establishes the so called “receipt system”, by connecting the contract to the time and place in which acceptance reaches the offeror, even if the latter is not aware of it for reasons which cannot be imputed to the same.

One of the most daring innovation of the new legislation may be found under Art.1202-1203 of the NCC, according to which the standard clauses (*i.e.* such provisions established by a party in advance to be used on a general and repetitive basis), which provide, in the interest of the person proposing them, issues such as limitation of liability, the right to unilaterally terminate the contract, to suspend the fulfillment of obligations, or which provide, to the detriment of the other party, forfeiture of rights or of the benefit of the term, limitation of the right to plead defenses, limitation of the freedom to enter into contracts with other parties, tacit renewal of the contract, applicable law, arbitration clauses or clauses derogating from the norms on the courts’ jurisdiction, have effects only if they are expressly accepted by the other party.

Nevertheless, one surprising issue related to this regulation is the stipulation under Art.1202 para.(2) final thesis, which includes, as a defining element for standard clauses, the requirement that they be inserted in the contract “further to negotiations between the parties”. This wording is in contradiction with the source of inspiration used for Art.1202 of the NCC, *i.e.* Art.2.1.19 of the Unidroit Principles, according to which the standard clauses “are, in fact, used without negotiations with the other party”. Also, we cannot see how may one reasonably harmonize this wording with the provisions of Art.1203 final thesis, which provides that even sensitive standard clauses are legal, if expressly accepted in writing by the other party (which entails going through a process of negotiations, or at least adequate notification on the contents and effects of such clauses).

II. Validity of Consent

[Art.1204-1205] Art.1204 and 1205 of the NCC regulate in a fashion similar to the current regulation, the general requirements on the consent to enter into a contract (which consent has to be serious, free and expressed in full knowledge of the facts), and consequences of the lack of discernment.

III. Vitiations of Consent

[Art.1206-1224] Vitiations of consent are regulated under Art.1206-1224 of the NCC. Basically, the regulations are similar to the current legislation, and the error, fraud (*dolus*), duress and lesion are still considered vices of consent. Nevertheless, there is a set of welcome legislative qualifications, and certain novelties on particular vices of consent, which are briefly presented below.

In the matter of error, only the essential error entitles the affected party to request the annulment of the contract, if the other party was aware that the fact on which the error bore was essential for the conclusion of the contract. According to Art.1207 para.(2) of the NCC, the error shall be deemed

essential when bearing (i) on the nature or object of the contract; (ii) on the identity of the object of the performance or on a quality thereof or on another circumstance deemed essential by the parties in whose absence the contract would have not been concluded; or (iii) on the identity of the person or on a quality thereof in whose absence the contract would not have been concluded.

The listing above repeals the current CC's distinction between the so-called error-obstacle (in French, "*l'erreur obstacle*") (which bears on the nature of the legal deed to be concluded or on the actual object contemplated by the legal deed) and the gross error, also called error-vice of consent, which means that false representation falls on either the substantial qualities of the object of the contract, or on the person who is the counterparty or beneficiary under the contract. Currently, such distinction is important because the error-obstacle results in the absolute nullity of the legal deed, while the gross error is a reason for relative nullity. According to NCC, should the consent of a party be vitiated by error, the contract shall be voidable (Art.1251 of the NCC, as envisaged to be amended by the NCC Draft IL).

At the same time, we are dealing in the NCC with a major reference to the possibility that a error of law be deemed as a vitiation of consent. Thus, Art.1207 para.(3) of the NCC provides that the error of law is essential (thus capable of rendering the contract voidable) if it refers to a legal norm decisive, according to the parties' will, to the conclusion of the contract. However, the error of law may not be pleaded as a defense in the case of accessible and foreseeable legal provisions – Art.1208 para.(2) of the NCC.

In addition, it is expressly provided that the person concerned may not plead, as a defense, the error when the latter is inexcusable, *i.e.* the fact on which the error bore could be found out by reasonable care – Art.1208 para.(1) of the NCC.

Similarly, according to Art.1209 of the NCC, the assumed error, *i.e.* boring on an element with respect to which the risk of error was assumed or should have been assumed, depending on the circumstances, by the person pleading it, does not give rise to the possibility of claiming the annulment of the contract. A mere calculation error shall not trigger the annulment of the contract, but rather a correction thereof, which may be performed upon the request of either party – Art.1210 of the NCC.

Art.1213 ("Contract Adjustment") provides for an interesting novelty, giving the party which is not in error the possibility to accept the fulfillment of the contract in the fashion understood by the party in error. According to the form given by this article through the NCC Draft IL, this statement shall have to be issued within 3 months from the notification of the grounds for annulment, and from the statement of claim, respectively. The proposal of amending Art.1213 of the NCC by the NCC Draft IL is welcome, as the current wording is confusing; neither the fashion in which the contract is to be adjusted, nor the possible result of such amendment is clear.

The regulation on fraud (*dolus*), as a vice of consent, is provided under Art.1214 and Art.1215 of the NCC. Fraud (*dolus*) is defined as an error caused by the fraudulent acts of the other party or as the circumstance where such party would fraudulently omit to inform the counterparty on certain circumstances which he should have disclosed. Should the consent be vitiated by way of fraud (*dolus*), the victim may request the annulment of the contract, even if the error he made was not essential – Art.1214 para.(2) of the NCC.

According to the current CC, the fraud (*dolus*) has to be decisive for the conclusion of the legal deed, an aspect which is revealed by the following wording of Art.960 of the CC: “misleading means are of such nature which makes it obvious that, in the absence of such dealings, the other party would not have entered into the respective contract”. However, the criterion of the meaning of fraud (*dolus*) is not taken over in the NCC, and, in the light thereof, it appears that the annulment of a contract is possible even for *dolus incidens*, *i.e.* for a fraud (*dolus*) bearing on an element which is not decisive for taking the decision of entering the contract. We deem that this solution, which facilitates the questioning of the validity of certain legal deeds which, according to the current legislation, would be valid, is debatable, to say the least, and should be reconsidered.

Art.1216-1220 of the NCC regulate duress, as a vice of consent. According to Art.1216 of the NCC, the party which entered into a contract as a result of justified fear induced, without the right to do so, by the counterparty or by a third party, is entitled to request the annulment of the respective contract.

Another novelty brought by the NCC is reflected in Art.1217 of the NCC, according to which “the fear induced by threatening to exercise a right so as to obtain unjustified advantages shall be also deemed to be duress”. Although there are scholarly opinions which support, based on the current CC, the above solution, the utility of this new text is questionable. Usually, the Romanian civil law doctrine held that duress has to be, *inter alia*, unjust, *i.e.* unlawful or illicit. In the light of the new regulation, we deem that the concept of “unjustified advantages” is unclear. If a creditor threatens a debtor to initiate legal proceedings should the latter fail to fulfill his obligation, basically we should not be dealing with a case of duress as a vice of consent. What if a debtor agrees to change his debt into one which is more burdensome than the initial debt to avoid legal proceedings (for instance, paying additional interest or providing additional considerations to the creditor)? Would these additional sacrifices of the debtor be considered “unjustified advantages”? We believe that a potential positive answer would excessively encourage bad-faith debtors which would seek to delay the fulfillment of their obligations, allowing them to play a double game in relation with their creditors (for instance, agreeing to excessive advantages for their creditors to avoid immediate legal proceedings, and then challenging the validity of the commitments undertaken on the grounds provided under Art.1217 of the NCC).

In addition to the above, we have to add that the NCC already provides at least two alternative grounds for action to the debtors which may pretend themselves as victims of the creditors’ abusive conduct. Consequently, first of all, Art.15 of the NCC already sanctions the abusive exercise of a right, and the injured party may file, for instance, a claim for compensation. Second, the debtor could take advantage of the provisions on lesion, which shall be discussed in the paragraphs to follow.

Another novelty in these matters is to be found under Art.1218 of the NCC, according to which one may also request the annulment of a contract concluded by a party in distress, if the other party took advantage of this circumstance. Generally speaking, this regulation is in accord with certain doctrinal solutions relying on the current civil legislation.

Finally, the last vitiation of consent, *i.e.* the lesion, is given a new regulation which has major differences as compared to the current CC. Currently, the lesion’s scope of application is limited to the acts of administration concluded alone by the minor aged 14 to 18, and which are causing injury to

the minor, *i.e.* there is an obvious disproportion between the two performances provided under the contract to the detriment of the minor.

According to Art.1221 para.(1) of the NCC, lesion may now concern contracts concluded by any person who is in distress, lacks experience or knowledge. Also, the criterion of obvious disproportions between the performances is replaced by the criterion of the “considerably higher” value of the performance enjoyed by the party causing the lesion.

Minors still enjoy special protection which is no longer analyzed only in connection with the concluded contract, but also with their full patrimony. Thus, Art.1221 para.(3) of the NCC provides that the lesion may also occur when the minor undertakes an excessive obligation as compared to his patrimonial condition, the advantages he derives from the contract or the general circumstances.

Except for the provision under Art.1221 para.(3) of the NCC, the annulment of the contract shall be possible only when the lesion exceeds half of the value it had upon the conclusion of the contract, the performance promised or delivered by the injured party, and the disproportion continues to exist until the date of the annulment request. However, the party whose consent was vitiated by lesion may choose to decrease the amount of his obligations by the amount of damages he would have been entitled to receive. Also, for contract maintenance purposes, the other party may fairly offer a decrease in his receivable or an increase in his obligation, as the case may be (in which case the court shall choose between maintaining or annulling the contract) – Art.1222 of the NCC.

Art.1223 of the NCC, as amended by the NCC Draft IL, includes certain special regulations on the statute of limitation concerning the legal action filed in connection with lesion. The right to file legal action for the annulment or the decrease in obligations shall be statute-barred within 2 years from the conclusion of the contract, and the voidability of the contract may not be pleaded as a defense when the right to file legal action is statute-barred.

At a level of principle, should duress or fraud (*dolus*) occur, the person whose consent is vitiated shall be entitled to claim annulment of the contract and compensation. Should such person choose to maintain the contract, the party concerned may only claim a decrease in his performance by the amount of compensation it would be entitled to receive – Art.1257 of the NCC.

4. Object of the Contract

[Art.1225-1234] From a terminology standpoint, the new regulation draws a distinction between the “object of the contract” (defined as the legal operation agreed by the parties, such as the sale, lease, loan, etc.) and the “object of the obligation” (represented by the performance undertaken by the debtor).

The object of the contract shall have to be determined (determinable, in case of the object of the obligation) and lawful. One of the other requirements which have to be currently fulfilled by the object of the contract, based on the current CC, is for such object to be possible. NCC no longer provides such requirement; on the contrary, Art.1227 of the NCC provides that a contract is valid even if, upon its conclusion, one of the parties cannot fulfill his obligation, except as otherwise provided by law.

NCC includes new provisions intending to cover certain shortcomings occurring in the drafting of a contract or to clarify certain issues related to the object of the obligation when the provisions agreed by the parties are insufficient. Thus, if no clear conclusion may be reached on the basis of the contract, the quality of the performance or the object of such performance shall have to be reasonable or at least at an average level, depending on the circumstances. When the price or any other element of the contract is to be established by a third party, the latter shall have to act in a correct, diligent and fair manner. If the third party cannot or wishes not to act, or his assessment is obviously unreasonable, the court may establish, upon request of the party concerned, the price or the contractual element which the parties failed to establish – Art.1231 and 1232 of the NCC.

If a contract between professionals neither establishes the price, nor indicates a fashion for its determination, the parties shall be deemed to have taken into account the price usually charged in such business area in exchange for the same performances, rendered in similar conditions or, in case such information is not available, a reasonable price has to be considered by the respective parties. When, according to the contract, the price is determined by linking it to a reference factor, and such factor does not exist, ceased to exist or is no longer available, the factor shall be replaced, in the absence of a contrary arrangement, by the nearest reference factor – Art.1233 and 1234 of the NCC. Such new regulations are a necessary amendment of the principle currently provided under Art.40 of the Commercial Code, according to which, in the absence of a clear contractual calculation, the price shall be established based on the “stock exchange lists or market price lists where the contract was concluded or, in their absence, on the lists of the nearest place, or on any other means of evidence”.

5. Cause

[Art.1235-1239] The cause of the contract is regulated under Art.1235-1239 of the NCC. We note at least two major novelties in the regulation of this subject matter. First, it is expressly established, from a legislative standpoint, the concept of fraud against the laws, which is assimilated with the unlawful cause, and occurs when the contract is used solely to avoid the observance of a mandatory legal provision – Art.1237 of the NCC.

Secondly, NCC provides certain nuances and clarifications on the sanctions applicable in relation to the cause of the contract. In the absence of a cause, the contract shall be affected by relative nullity (unlike the current situation, when absolute nullity is held as a rule), except for the case when the contract was mistakenly classified and may generate other legal effects. Nevertheless, should the cause be unlawful or immoral, the sanction shall be absolute nullity of the contract, if the same is common or, otherwise, if the other party was aware of it, or should have been aware of it–Art.1238 NCC.

6. Form of the Contract

[Art.1240-1245] The general rules on the forms of the contract are provided under Art.1240-1245 of the NCC, which include a set of new confirmations, particularizations or provisions as compared to the current legislation. Thus, it is confirmed that a contract may be orally concluded (as a corollary of the principle of consensuality) or in writing – Art.1240 of the NCC. As until now, the lack of an authentic form, when required by law, shall be sanctioned by absolute nullity; however, this requirement must unquestionably result from the applicable legal provisions – Art.1242 para.(1).

As regards land book registrations, contracts transferring or establishing real rights to be registered with the land book shall be concluded in an authentic form. Art.1244 NCC. In accordance with the current legislation, certain contracts of this kind may also be validly concluded as private deeds, for instance, the sale and purchase contract for a building or part thereof.

(d) Section 4 “Contract Nullity”

1. General Provisions

[Art.1246–1249] Basically, the regulations on the contract nullity are similar to the regulations of the current legislation. Thus, the dichotomy of absolute vs. relative nullity is restated; such distinction is made depending upon the (general or particular) interest protected by the legal norm whose breach is ascertained. The absolute nullity is immune from extinctive prescription, while the legal action for relative nullity of a legal deed shall be statute-barred within the general extinctive prescription period. Nevertheless, the party that is required to perform the contract may, at any time, plead for the relative nullity of the contract, even subsequent to the expiry of the extinctive prescription period set for the right to file a legal action for annulment – Art.1249 para.(2), final thesis of the NCC.

The NCC Draft IL inserts two new paragraphs under Art.1246 of the NCC, bringing two extremely useful clarifications. First, if not otherwise provided by law, contract nullity may be established or declared by the parties’ agreement (the so-called “amicable nullity”); also, nullity causes may neither be established, nor repealed by the parties’ agreement. We welcome the introduction of a provision on amicable nullity, which may relieve the courts from judging some legal actions on contract nullity if none of the parties challenges the applicability of this sanction.

2. Causes of Nullity

[Art.1250-1253] In consideration of its much more rigorous legal regime, the contract shall be affected by absolute nullity in the cases expressly provided by law and when the law expressly provides that the protected interest is a general one – Art.1250 of the NCC. Consequently, should there be any doubt on the nature of the interest protected by law, such shall be deemed particular, and the applicable legal regime shall be that of relative nullity – Art.1252 of the NCC.

2. Effects of Nullity

[Art.1254-1260] The effects of nullity are still governed by the principle of retroactivity– Art.1254 para.(1) of the NCC. A new element likely to cause major application problems shall be the extension of the retroactive effect of nullity to the contracts involving successive performances – Art.1254 para.(2) of the NCC, including its form amended by the NCC Draft IL. Usually, such contracts were deemed exceptions from the retroactive effect of nullity, on the ground that performances already rendered under contracts involving successive performances may not form the object of a restitution obligation.

Extending the retroactive effect of nullity to the contracts involving successive performances is, in our opinion, a much too rigid enforcement of the *quod nullum est, nullum producit effectum* principle. Thus, in the case of such a nullity, each party should return to the other the performance received on the basis of the contract declared null. Restitution would occur in accordance with the provisions of

Art.1639-1647 of the NCC. We are positive that this normative solution was carefully considered by NCC’s lawmaker, nevertheless, we have serious doubts that such solution is functional from a practical standpoint, as it is likely to generate increased costs to the legal subjects involved, additional workload to the courts and, finally, a less predictable economic result as compared with the current regulation.

Thus, although in matters of restitution of considerations, the in-kind restitution is given the value of principle in most cases, in the case of a contract involving successive performances, for example those regarding the provision of services or transfer of the right to use an asset, such restitution is impossible. Consequently, the only way to return considerations shall be restitution in pecuniary equivalent value, which shall be established by the court having jurisdiction over settling claims for restitution of performances. Taking into account the underlying hypothesis, *i.e.* contract nullity, we deem that, in many cases, the court shall not be able to use the solution which is apparently the easiest from a practical standpoint (*i.e.* the establishment of the equivalent value at the level of the contractual price, followed by a set-off of mutual claims), since, by proceeding in this way, it would nevertheless give effect to a null contract. Consequently, laborious and costly evidence shall have to be produced in many cases to establish the value of the equivalent pecuniary value of the considerations which have to be returned. Thus, we deem useful a reconsideration of the solution provided under Art.1254 para.(2) of the NCC, as such was reconfirmed by the new wording of this text in the NCC Draft IL (which relocates the above provision to para.(3) of the same article).

The NCC Draft IL is intended to insert an additional provision which shall become the new para.(2) of Art.1254, and shall read as follows: “the termination of the contract shall entail, according to law, the termination of the deeds concluded thereupon”. Although the principle of cancelling deeds subsequent to a contract affected by nullity (*resoluto iure dantis resolvitur ius accipientis*) is, traditionally, an unquestionable effect of nullity, we deem that the regulation thereof is still improvable. The suggested wording above is in contradiction with the current regulation of Art.1648 and 1649 of the NCC, which regulate the effects of returning the rendered performances, including by performing a null contract, on third parties. Finally, if a consistent regulation of the *resoluto iure dantis resolvitur ius accipientis* principle is intended, we deem useful an inclusion of the exceptions already held by the legal doctrine and case law.

In case of contracts concluded in authentic form and affected by nullity, Art.1258 of the NCC gives the injured party the right to request that the public notary be compelled to indemnify the parties for the injuries caused, in case the existence of the ground for nullity arises from the very wording of the contract, which wording particularizes the general liability for causing injuries, already existing for public notaries, in accordance with Art.38 para.(1) of Law No.36/1995.

Another category of legislative novelties confirming the recent doctrinal trend in matters of nullity is the express regulation of several legal alternatives made available to the contracting parties for the purpose of safeguarding, even partially, the validity of the contract. Thus, clauses affected by nullity (other than those deemed unwritten) shall entail the nullity of the contract in its entirety only if they are, by their nature, essential or if, in their absence, the contract would not have been concluded. If the contract is partially maintained, the null clauses shall be *de jure* replaced by legal enforceable provisions – Art.1255 NCC.

Based on a similar standpoint, the regulation under Art.1256 of the NCC provides that, in the case of a contract with several contracting parties, contract nullity as regards one such party shall not entail the cancelation of the entire contract, except for the case when the participation of the respective party is essential to the existence of the contract. Art.1260 of the NCC expressly provides the rule of the null contract's conversion, according to which a contract affected by nullity shall, nevertheless, produce the effects of a legal deed for which the substantive and formal conditions provided by law are fulfilled (except for the case when the parties' intention of excluding the possibility of conversion is established).

Finally, Art.1259 of the NCC acknowledges the possibility of the parties to reinstate a null contract, in full or in part, in observance of all the requirements provided by law upon such reinstating. Taking into account that it is expressly provided that the reinstated contract shall produce effects only in the future, and not in the past, the practical value of such wording shall be quite reduced. Under such circumstances, we would like to underline once again the remarkable utility of the provision under Art.1246 para.(3), as revealed by the NCC Draft IL, according to which the preliminary admissibility of amicable nullity, which is established or declared by parties' agreement, is acknowledged without the intervention of the court.

4. Validation of the Contract

[Art.1261-1265] In addition to the possibility of partially safeguarding the contract affected by a nullity cause, the NCC also provides, in accord with solutions already existing as a principle in the current legislation, a set of norms on what is referred to as “contract validation” – Art.1261-1265.

The contract's main form of validation is the confirmation (*i.e.* the express or tacit will expressed by a person in the sense of waiving the right to assert the nullity of a voidable contract), and other forms of validation may be added, provided that they are specifically provided by law – Art.1261 of the NCC.

An important novelty in matters of contract confirmation is included under Art.1263 para.(6) of the NCC, which gives the party concerned the right to request the party asked to confirm the contract to clearly choose, within a 6-month term, between filing a claim for the annulment of the contract or confirming the same. In the absence of a clear option, the addressee of the notice shall be deemed to have lost the right to request the annulment of the contract – Art.1264 of the NCC.

Art.1265 para.(3) of the NCC chooses to give additional protection to the party making a confirmation of the contract; thus, confirmation by itself shall not be deemed as a waiver of the right to claim compensation.

(e) Section 5 “Interpretation of the Contract”

[Art.1266-1269] As to the interpretation of the contract, Art.1266-1269 of the NCC basically follow the rules already established under the current CC. The fundamental principle of interpretation in the current civil legislation, *i.e.* interpretation as per the actual will of the parties (Art.977 of the CC), receives nevertheless a salutary redefinition in NCC as an interpretation of the “concordant will” of the parties. Upon establishing such concordant will, one shall take into account, *inter alia*, the purpose of

the contract, the negotiations carried out by the parties, the practices established between them and their conduct subsequent to the conclusion of the contract.

Another novelty in this subject matter is the limited establishment of the *contra proferentem* rule of interpretation. Thus, in matters of adhesion contracts, as an alternative rule of interpretation to be used when the contract remains unclear after applying the other rules of interpretation, the contractual provisions shall be interpreted against the person who proposed them.

(f) Section 6 “Effects of the Contract”

1. *Effects on the Parties*

[Art.1270–1279] The fundamental rule in matters of contract effects is unquestionably the principle of the mandatory power of the contract, established under Art.1270 para.(1) of the NCC. We note that, in addition to expressly providing for the principle of the mandatory power of the contract, the lawmaker also significantly circumstantiated it by the much broader possibilities which, as compared to the current legislation, are acknowledged to the parties and to the court in obtaining or ordering the supplementation, amendment or extinguishing of the contractual relationships initially agreed upon by the parties. We refer, for instance, to the adjustment or termination of the contract in case of hardship (Art.1271 NCC), the decrease of penalties if those agreed upon in the contract are excessive (Art.1541 NCC), the determination of certain contractual elements by the court (Art.1232, Art.1233, Art.1234, Art.1404, Art.1415, Art.1495 NCC, etc.), the reduction of either party’s performances in case of duress or fraud (*dolus*) (Art.1257 NCC), the decrease of the creditor’s obligation in case of debtor’s non-fulfillment (Art.1516, Art.1551 NCC), etc.

One of the most impressive novelties brought by NCC is unquestionably the legislative establishment of the principle of hardship. In the form of Art.1271 of the NCC, as envisaged to be amended by the NCC Draft IL, if the contract performance becomes extremely burdensome due to an exceptional change in the circumstances which would make the debtor’s obligation to fulfill its contractual undertaking obviously unjust, the court may order the adjustment of the contract to fairly allocate the losses and benefits arising out of the change in circumstances between the parties or the termination of the contract at the time and under the conditions which it will establish.

The court’s possibility to choose between such solutions shall exist only to the extent that “a) the change in circumstances occurred subsequent to the conclusion of the contract; b) the change in circumstances and the extent of such change were not and could not have been reasonably taken into account by the debtor upon the conclusion of the contract; c) the debtor did not undertake the risk of change in circumstances and could not have been reasonably considered to have undertaken such risk; d) the debtor attempted, within a reasonable time and in good faith, to negotiate a reasonable and fair adjustment of the contract”.

As to the transfer of the risk in the ownership transfer contracts, Art.1274 of the NCC provides that, in the absence of a contrary provision, as long as the asset is not delivered, the contractual risk shall be incumbent upon the debtor of the obligation to deliver, even if the ownership was transferred to the acquirer. Should an accidental loss of the asset occur, the debtor of the obligation to deliver shall lose the right to receive consideration, and if he received it, he has to return it. Nevertheless, the formally notified creditor shall take over the risk of the asset’s accidental loss and may be discharged only if he

may prove that the asset would have been lost anyway if the obligation to deliver would have been fulfilled timely. Thus, the NCC discards the current CC rule which provides that, in the matter of ownership transfer contracts, the risk of the contract is borne by the party who is the owner of the asset at the time of the accidental loss.

In the case of a successive transfer of a movable asset, Art.1275 of the NCC, in the form amended by the NCC Draft IL, basically maintains the ownership conveyance effect of good-faith possession over movable assets. The acquirer of a movable asset shall be deemed a good-faith acquirer if, upon receiving possession, was not aware and could not have been aware of the obligation which the transferor had undertaken. Another novelty is the provision under para.(3), according to which, if neither of the acquirers of the movable asset obtained the actual possession over the movable asset, the acquirer whose title has the earliest certified date will be preferred. The NCC Draft IL proposes the amendment of this wording by replacing the reference to the certified date title by the date when the court is referred the case.

NCC includes two articles on the unilateral termination of the contract which may be deemed innovations as compared to the current legislation. Thus, Art.1276 para.(1) of the NCC provides that, if the right to unilaterally terminate the contract is acknowledged to one of the parties, such right may be exercised as long as fulfillment of the rights and obligations thereunder has not started and, according to Art.1276 para.(3) of the NCC, if a performance was stipulated in the respective contract in exchange for the termination, such would generate effects only when the performance is rendered.

However, if the fulfillment of the rights and obligations (performance) under the contracts was already initiated, matters are, unfortunately, less clear as regards the unilateral termination of contracts involving successive and continuous performance. Thus, Art.1276 para.(2), provides that, in relation to such contracts, the right to unilateral termination may be exercised in observance of a reasonable notice term, even after the commencement of contract fulfillment. On the other hand, as regards contracts executed for an undetermined term (the vast majority of which are successive performance contracts), Art.1277 NCC provides that they may be terminated unilaterally by either party, observing a prior notice term. In this case, any clause stipulating otherwise or imposing a performance in exchange for the unilateral termination of the contract is deemed to be inexistent.

First of all, we should raise the question of the relation between Art.1276 para.(2) of the NCC and para.(1) of the same text. The express premise for applying para.(1) (*“if the right to terminate the contract unilaterally is acknowledged for either party”*) is not resumed under para.(2), which may create the impression that para.(2) should apply notwithstanding the existence or lack of a clause providing the right to terminate the contract unilaterally and notwithstanding the existence of an extinctive term or the lack thereof. Such conclusion would be entirely justified, but only as regards the contracts provided under Art.1277 of the NCC (i.e. contracts concluded for an undetermined term), given that civil law cannot bind a person to be a party to a perpetual contract.

If the parties provided for an extinctive term, the possibility, in principle, to terminate the contract unilaterally should be excluded (of course, the parties cannot be prevented from inserting such clause in the contract, if they wish to do so).

Another problem arises from the drafting and application of Art.1277 of the NCC, final thesis, which, as provided above, prohibits any clause stipulating a performance in exchange for the unilateral termination of the contract. The provision is apparently reasonable, since, given the lawmaker's reluctance to perpetual contracts, it cannot admit that the parties avoid the right of unilateral termination of contracts concluded for an undetermined term by inserting clauses rendering such termination excessively burdensome. On the other hand, the strict interdiction provided by Art.1277, final thesis, is not entirely true to economic reality. Therefore, there are many situations where one party undertakes large investments which may only be recovered within an extended period of time, in reliance upon the contract. In such situations, it could be interpreted that the reasonable notice term should be long enough so as to allow for the recovery of such investments, but this solution cannot be guaranteed to be satisfactory for the legitimate interests of the parties involved. We do not see any reason for which the parties should not be able to establish certain considerations in charge of the person issuing a notice for the unilateral termination of the contract, as long as such clauses do not deny the essence of the right to withdraw from the contract concluded for an undetermined term.

Other new legislative aspects as compared to the current CC are provided under Art.1278 and 1279 of the NCC, regulating the option agreement and the promise to contract. The option agreement is defined as an agreement between the parties, by which they establish that one of them should be bound by its undertaking, while the other should be able to accept or deny it. Said undertaking shall be deemed to be irrevocable and shall have the effects provided under Art.1191 of the NCC.

The promise to contract must contain all those clauses of the promissory agreement in the absence of which the parties could not fulfill their promise. In principle, the failure to fulfill the promise entitles the beneficiary to receive compensation. A provision codifying the current doctrinal and case law experience entitles the court to issue, if the promisor refuses to execute the promissory agreement, a judgment in lieu of contract, but only when the nature of the contract allows it, and the requirements of the law for the validity thereof are met.

2. Effects on the Third Parties

[Art.1280-1294] Art.1280–1294 of the NCC describe the effects of the contracts on third parties, containing provisions on the relativity of contractual effects, the enforceability of the contract against third parties, the transfer of obligations to the successors, the promise for another, the stipulation for another and the simulation, which, in general, are regulated similarly to the current civil legislation, and also implements the doctrinal and case law conclusions in this respect.

I. General Provisions

[Art.1280-1282] This part of the NCC provides for a few general principles which are applicable in this matter, in line with the traditional solutions given by the current CC, as well as by the doctrine and legal practice, i.e. the principle on the relativity of contractual effects, the enforceability of the contract against third parties, as well as the rules on the transfer of contractual rights and obligations to universal successors or successors by universal title (if it does not follow otherwise from the law, the parties' agreement or the nature of the contract).

According to Art.1282 para.(2) NCC, the contractual rights which are accessory to an asset or are closely connected to such asset are transferred together with the asset to the parties' successors by particular title.

II. The Promise for Another

[Art.1283] The regulation, as a principle, of the promise for another is a novelty as compared to the current provisions of the CC, but it does not bring any substantive amendments to the ideas expressed by the doctrine and legal practice in this matter.

III. The Stipulation for Another (in French, "stipulation pour autrui")

[Art.1284-1288] The general regulation of the stipulation for another is a novelty brought by the NCC. In principle, the rules in this respect have been drafted on the basis of the doctrinal and case law opinions, therefore no substantial amendments have been brought as compared to the current legal regime of the stipulation for another. The NCC also clarified some matters which, in the absence of any legal regulations, have not been finally solved by the doctrine.

Thus, in the case when the third-party beneficiary of the stipulation for another does not exist at the time when the promisor must fulfill his obligation, Art.1285, final thesis, of the NCC provides that the stipulation is not extinguished, but shall inure to the benefit of the stipulant, however without aggravating the burden of the promisor.

Art.1287 NCC contains provisions which allow the stipulant (but not his creditors or heirs) to revoke the stipulation. The stipulant will need the promisor's consent if the latter has the interest to perform the stipulation (para.1)). The revocation of a stipulation has effects as of the time when it reaches the promisor. If no other beneficiary has been appointed, the revocation inures to the benefit of the stipulant or his heirs, but without aggravating the burden of the promisor (para.(2)).

IV. The Simulation

[Art.1289-1294] The CC contains minimal regulations on the simulation at Art.1175 CC, but the doctrine and legal practice have developed, on the basis of such regulations, a quite reach doctrine and legal practice. The NCC regulation is much more detailed, inspiring from the provisions of Art.1414-1417 ICC, Art.1145-1147 CC1940, respectively Art.118 of DCC1971, but also from the legal literature and case law.

According to Art.1289 NCC, the secret contract has effects only on the parties thereto and, if it does not follow otherwise from the nature of the contract or the parties' stipulation, on their universal successors or successors by universal title. Nevertheless, the secret contract does not have effects on the parties if the substantive conditions required by the law for its validity are not met. Art.1290 provides that simulation cannot be invoked by the parties, their universal successors, their successors by universal title or particular title and by the creditors of the apparent transferor against the third parties who, relying in good faith on the public contract, acquired rights from the apparent acquirer. Third parties may invoke simulation against the parties, when such simulation negatively affects their rights.

Art.1291 para.(1) NCC brings new useful clarifications on the relationships with the creditors. The simulation cannot be enforced by the parties against the acquirer's creditors who, in good faith, noted the commencement of forced execution proceedings with the land book or obtained a seizure of the assets which made the object of the security interest. According to para.(2), if there is a conflict between the creditors of the apparent transferor and the creditors of the apparent acquirer, the former are preferred, when their receivable was born before the simulation.

The provisions on simulation also appropriately apply to the unilateral legal deeds concluded for the benefit of a determined person and which were simulated by agreement between the author of the deed and the beneficiary thereof (Art.1293 NCC). Finally, the provisions on simulation do not apply to non-patrimonial legal deeds (Art.1294 NCC).

(g) Section 7 "Representation"

[Art.1295–1314] A general regulation of the representation is a novelty brought by the NCC, so far the relevant provisions being found in the agency contract section of the existing CC and in the legislation on legal entities (including corporate law). The norms contained in this section establish, in most cases, a series of principles and rules which were either provided in the current legislation or expressed by the legal doctrine and applied in the case law.

A delicate issue, to which, in our opinion, NCC failed to find an efficient and practical solution, is a part of the regulatory scope of Art.1297 NCC, with the following side heading: "failure to indicate the capacity of representative". According to para.(2), if the representative, when entering into a contract with the third party within the limit of the powers granted to him, on behalf of an enterprise, claims that he is the holder of the enterprise, and the third party subsequently discovers the identity of the true holder, such third party may also exercise against the latter the rights he has against the representative. The text raises several issues concerning its application and correlation with other provisions of the NCC. Thus, the first question is how the representative "claims" to be the "holder" of an enterprise. Is it enough for him to simply allege this? Or is it necessary, as we deem that it would be correct, to refer to Art.17 para.(2) NCC, which regulates the common and unavoidable error ("...when someone, sharing a common and unavoidable belief, deemed that a person has a certain right or a certain legal capacity, the court, taking into account the circumstances, may decide that the act concluded by such mistake shall have, towards the person in error, the same effects as if it were valid, except for the case when the cancellation thereof would not cause any damage" – emphasis added). In such case, we should also take into account the provisions of Art.17 para.(4) NCC, which stipulate that the provisions on the common and unavoidable error do not apply when the law provides for a publicity system in the relevant matter (such as in corporate law, for instance).

Also, the aforementioned text should be correlated with Art.218 NCC, regulating the participation in the civil circuit (and implicitly the representation) of the legal entity.

Another difficulty in applying Art.1297 para.(2) in its current form lies in the use of the concept of "holder of an enterprise", which is not found in any other texts from NCC. The only provisions which are related to this concept may be found in Art.3 and Art.96 NCC, but they refer to the persons who "operate" an enterprise.

Furthermore, the regulation from Art.1301 NCC – “Form of the power of attorney” is different from the current legislation, i.e. Art.70¹ of Law No.31/1990. The latter clarified a case law controversy which had negative effects on the business environment, by stipulating that “the legal representatives of a company may conclude any acts of disposition for any assets of that company on the basis of the power they are granted by law, by the articles of association or by resolutions of the statutory bodies of the company adopted in accordance with the provisions of this law and with the articles of association of the company, and no authentic special power of attorney is necessary for this purpose, even if the acts of disposition must be concluded in an authentic form”.

The solution given by Art.1301 NCC could be justified only in case of contracts concluded by individuals, where applying the principle of symmetrical forms is fully grounded. However, in case of legal entities, it must be taken into account that the issue of representing the legal entities cannot be considered separately, but only in connection with the provisions concerning the operation of the legal entity and the acknowledged competence of its bodies. Thus, prior to being a contractual issue, the representation of the legal entity concerns, first of all, such legal entity’s internal regulations, so that the capacity of representative is to be derived from the articles of association/incorporation of the legal entity, which, most of the times, do not have to be concluded in authentic form.

As a novelty, we note the provisions of Art.1303 NCC which find an elegant solution to the issue of the conflict of interests: the contract entered into by a representative who is in a conflict of interests with the represented party may be annulled at the request of the latter, when the conflict was known or should have been known by the contractor on the execution date of the contract.

Also, Art.1304 NCC (in the form corrected by the NCC Draft IL) expressly regulates for the first time the matter of the contract concluded with oneself and the double representation. The contract concluded by the representative with himself, on his own behalf, is annulable only at the request of the represented party, except for the case when the representative was expressly empowered in this respect or when the content of the contract was so determined as to exclude the existence of a conflict of interests. These provisions will also apply in case of double representation.

Other important provisions from this section of the NCC are included in Art.1309 – “the lack of or exceeding the power of representation or exceeding such power”, according to which “the contract concluded by the person who acts as representative, without being so empowered or by exceeding the powers granted to him, does not have effects between the representative and the third party”. However, if “by his conduct, the representative determined the contracting third party to reasonably believe that the representative has the power to represent him and that he acts within the limits of the powers assigned to him, the representative cannot avail himself of the lack of power of representation before the third party contractor”.

Pursuant to Art.1310 of the NCC, the person executing the contract as representative, without power of attorney or in excess of the powers entrusted to him, is liable for the damages caused to the third party contractor who relied on the valid execution of the contract, without being at fault (or “in good faith”, according to the NCC Draft IL).

The provisions of Art.1311 and Art.1312 of the NCC, acknowledging the representative’s possibility to ratify the deeds executed by the representative who acted without power of attorney or exceeding

the prerogatives granted under the power of attorney, which, in principle, shall have retroactive effect without affecting the rights acquired by third parties in the meantime, are also important.

However, one last issue raised by this section is essential for the self-consistency of NCC's regulations on the matter of representation, functioning of legal entities, administration of the third party's assets, mandate contract and articles of association. Norms in all these various NCC sections refer to extremely similar, often overlapping matters, which leads to unfortunate situations where the law provides different answers for identical or very closely related hypotheses or, even where legal solutions are substantially the same, the wording differs to an extent that leaves room to divergent interpretations. For instance, the director's (or representative's) liability toward third parties may be simultaneously governed by Art.218,816,1296 and 2021 NCC, while conflict of interest is concomitantly regulated by the very different in wording and substance Art.215,804 and 1303 NCC. Therefore, it should be useful, in our view, that the legal texts regulating all these matters be globally reanalyzed, with a view to identifying the sources of potential conflict and providing unitary solutions throughout NCC.

(h) Section 8 "Assignment of the Contract"

[Art.1315–1320] This section of the NCC regulates the assignment of the contract, which is necessary for the business environment to operate properly, but which is missing from the current CC. At present, in order to ensure the effect of the takeover of a contract by a third party, novation is performed by changing the debtor (creditor), which is not entirely consonant with for the transfer of rights and obligations arising from a contractual relation.

Pursuant to Art.1315 para.(1) of the NCC, either party may, in principle, be substituted by a third party as regards the relations arising of the contract, only if the considerations were not fully performed, and the other party agrees to it. The consent to assignment may be also given in advance – Art.1317 para.(1) of the NCC, and in this situation the assignment is enforceable against the assigned contracting party as of the time when the substitution is notified to same.

According to Art.1318 para.(1) of the NCC, the assignor is discharged of his obligations towards the assigned contracting party as of the time when the substitution has effects on him. The NCC Draft IL intends to amend Art.1318 para.(2) as follows: if he has declared that he does not discharge the assignor, the assigned contracting party has a right of recourse against him when the assignee fails to comply with his obligations. In this case, the assigned contracting party must notify him on the assignee's non-fulfillment of obligations within 15 days as of the non-fulfillment date or, as the case may be, as of the date when he became aware of the non-fulfillment, otherwise he loses the right of recourse against the assignor. The assigned contracting party may enforce against the assignee all defenses resulting from the contract. The assigned contracting party cannot claim the vitiation of consent against the assignor, or any defense or plea arising in his relations with the assignor, unless he reserved such right when he agreed to the substitution – Art.1319 of the NCC. Also, the assignor guarantees the validity of the contract – Art.1320 para.(1) of the NCC.

(i) Section 9 “Cessation of the Contract”

[Art.1321–1323] The causes for contract cessation, as listed under Art.1321 of the NCC, are the enforcement, the parties’ agreement, unilateral termination, expiry of the term, fulfillment or, as the case may be, failure to fulfill a condition, fortuitous impossibility to perform, as well as any other causes stipulated under the law.

Art.1322 of the NCC contains a provision which is sure to have pernicious effects, i.e. that, “upon the cessation of the contract, the parties are discharged from the obligations they have undertaken. They may be held however to repair the damages they caused, and, as the case may be, to reimburse, in kind or in equivalent, the performances received further to the execution of the contract”. Actually, it cannot be claimed that only the obligations regarding the repair of the damages and the reimbursement of considerations survive the cessation of the contract. Thus, other contractual obligations which certainly remain valid (or should remain valid) after the cessation of contracts are those concerning, for instance, the fulfillment of obligations that mature prior to or simultaneously with the cessation of the contract (and which cannot overlap the concept of repairing damages or reimbursing considerations), clauses concerning the settlement of disputes between the parties, clauses concerning confidentiality and non-compete obligations, clauses on the manner of transferring rights and obligations arising from the contract, etc. Last but not least, it is only natural that the parties should always have the right to establish the contractual provisions which will survive the cessation thereof.

(ii). Chapter I “The Unilateral Legal Deed”

[Art.1324–1329] This chapter contains, as a novelty, a regulation which is specific to the unilateral legal deed, as well as for some species of unilateral legal deeds.

(a) Section 1 “General Provisions”

[Art.1324-1326] The unilateral legal deed is defined at Art.1324 NCC as the legal deed involving only the consent (understood as exercise of will) of its author. The legal provisions on contracts appropriately apply to unilateral legal deeds – Art.1325 NCC.

However, the provisions of Art.1326 para.(1) are not clear: “the unilateral deed must be served by notice when it establishes, alters or extinguishes a right of the recipient [...]”. The text seems to involve the idea that a unilateral deed may alter or even extinguish a right of the recipient, which seems doubtful to us.

(b) Section 2 “The Unilateral Deed as a Source of Obligations”

[Art.1327-1329] This section regulates the unilateral promise made with the intention to be bound, irrespective of the acceptance (Art.1327 NCC), respectively the public promise to reward (Art.1328–1329 NCC). In our opinion, the regulation on the public promise to reward raises certain issues which will render its practical application extremely difficult. First, Art.1328 para.(3) provides that, when the performance envisaged by the public promise to reward has been fulfilled separately by several persons, the reward is due to the person who first communicated the result. We deem that it would have been useful to have a clearer text as regards the method of communicating the result intended by the author of the promise, respectively whether this communication must be made to the

promisor (in which case the provisions of Art.1326 could apply *mutatis mutandis*) or whether it is enough to communicate so that the information on reaching the envisaged result would become public (which would have the advantage of an informal approach, often justified considering the specificity of the public promise to reward).

A provision which may raise even more problems in terms of its practical application is Art.1329 para.(3) NCC, which refers to the case of revoking, without a just cause, the public promise to reward, in which case the author of the promise owes an equitable indemnification, which cannot be higher than the promised reward, to the persons who, before making the revocation public, incurred expenses in view of fulfilling the performance. The text is unclear in several ways. First, what is “just cause” here? Is the option to revoke, which could be contained in the initial promise, a “just cause”?

The indemnification is limited to the value of the promised reward. It would be logic for the respective limitation to operate by reference to all persons claiming indemnification (so that the value of the indemnification would not be multiplied by the number of the persons who claim to be damaged).

The limitation becomes almost non-operational when several persons independently claim indemnification. There are not enough procedural means to ensure an efficient limitation of liability to the value of the promised reward, as long as the author of the promise may face a wave of claims filed by the third parties concerned (for example, a third party Tertius files legal action after the author of the promise already paid maximum indemnifications to other third parties, Primus and Secundus, followed by the third parties Quartus and Quintus; of course, theoretically Primus and Secundus could be held liable under the provisions on unjust enrichment, but the solution is not the most convenient from the perspective of either party involved, who may be discouraged by the pile of legal procedures building up before their eyes). It is true that the extinctive prescription period for filing the legal action for indemnification in this case is a special one, i.e. one year as of publishing the revocation, but this is not enough to guarantee that the aforementioned situations may be avoided.

Finally, it is not natural that the status of third parties would improve in case the promise of reward is revoked as compared to the case when the result envisaged by the promise would be reached by several persons (when, according to Art.1328 para.(3) NCC, only the third party who first communicates that he reached the result is entitled to the reward, while the other third parties have no right against the author of the promise).

(iii). Chapter III “The Lawful Act”

[Art.1330-1348] As a general comment on the novelties brought by this chapter, we would like to note, in the first place, that the NCC eliminates the much criticized concept of “quasi-agreement” used by the CC, and embraces the wording used by the doctrine and practice, i.e. “lawful act” generating obligations. Secondly, to fill another regulatory void on which the legal doctrine drew the attention, the NCC expressly regulates unjust enrichment as a distinct source of civil law obligations (Section 3, Art.1345-1348).

(a) Section 1 “*Negotiorum gestio*”

[Art.1330-1340] NCC contains express and more detailed provisions than those included in Art.987-991 of the CC on *negotiorum gestio* (in French, “*gestion d’s affaires*”). In this respect, the NCC’s lawmakers were inspired to a great extent by the QCC, but it may be noted that the provisions taken from the QCC are not new as to the existing legal practice. Their essence may already be found in the relevant case law of Romanian courts. These new provisions are mostly a codification of legal doctrine and case law on this topic.

NCC maintains to a great extent the CC provisions on *negotiorum gestio*: continuation of *negotiorum gestio* (Art.1332), the gestor’s duty of care (Art.1334), the principal’s obligations (Art.1337). However, there are some amendments, such as those codifying the *negotiorum gestio* conditions under Art.1330, text which also contains the definition of this concept (para.(1)), as well as those outlining certain governing principles (the gestor must be aware that he takes care of another person’s interests and must not have the intention to reward the principal). The NCC, just as the CC, does not expressly provide for any range of the specific acts of managing the interests of another person. According to current legal doctrine and practice, unlike the agent, which may only conclude legal acts, the gestor may also undertake certain actions of non-legal nature (in French “*actes matériels*”); nCC seems to maintain this distinction, providing at Art.1340 that, as regards legal acts, ratified *negotiorum gestio* has the effects of an agency (mandate).

As a novelty, Art.1330 para.(1), second sentence, provides that a particular type of *negotiorum gestio* is also the circumstance when the principal is aware of the existence of the *negotiorum gestio*, but is unable to appoint an agent or to take care in any other way of his business. Please note that the legal doctrine deems this as a case of tacit agency, and not of *negotiorum gestio* (an interpretation which is also confirmed by Art.987 of the CC, according to which the management of the business (i.e. the *negotiorum gestio*) is made “*without the knowledge of the owner*”). The doctrine enshrines the idea that the principal should be completely unaware of the operations that the gestor performs in his interest, otherwise such operations being equated to a tacit agency. The legal doctrine already noted that *negotiorum gestio*, although a distinct source of civil obligations with distinctive features, resembles more the features of an agency when it includes representation, or the features of unjust enrichment, when it does not include representation. The new regulation enhances the close link between *negotiorum gestio* and agency, hence may lead in practice to conflicting interpretations and confusions between the two legal notions.

Another amendment brought by NCC to *negotiorum gestio* consists in the introduction of the gestor’s obligation to inform the principal on the initiated *negotiorum gestio* as soon as possible (Art.1331).

As regards the gestor’s obligation to continue the *negotiorum gestio* (Art.1332), currently regulated by Art.987 and 988 of the CC, we note that the NCC does not contain the exemption provided by the doctrine and practice in relation to such obligation, according to which the *negotiorum gestio* may be interrupted by the gestor, this not engaging his liability, if the continuation thereof may cause damages to the gestor. The NCC also codifies the doctrinal opinions concerning the continuation of the *negotiorum gestio* by the gestor’s heirs (Art.1333).

The NCC's lawmakers sought to modernize the wording of Art.989 and 990 of the CC concerning the gestor's duty of care (Art.1334). We deem that, for the avoidance of any possible confusions (and for unitary wording, considering that such term has already been used in the definition of this concept under Art.1330 para.(1)), the expression "administration of property" used at Art.1334 para.(1) should be replaced with that of "management of property", since the relevant legal doctrine and practice determined that the gestor performs not only administration acts, but also acts of preservation and certain acts of disposal.

The NCC also codifies the gestor's obligation provided for by the relevant legal doctrine, i.e. to account for his management to the principal and to deliver to such principal all property obtained during the *negotiorum gestio* period (Art.1335). The NCC regulates as well the gestor's obligations towards third parties, distinction being made between the cases when the gestor acts on his own behalf and the cases when he acts on the principal's name (Art.1336).

Another amendment brought by the NCC to the concept of *negotiorum gestio* consists in the supplementation of the existing provisions on the principal's obligations, currently provided by Art.991 of the CC (Art.1337 of the NCC). It is also stipulated that the gestor is entitled to ask the court for the registration of a legal mortgage with the land book⁷⁶. Such registration may be made on the basis of an expert appraisal ordered in prior by the court.

NCC regulates the cases when the principal opposes to the *negotiorum gestio* (Art.1338); the text refers both to the circumstance when the principal finds out about the existence of the management after the commencement thereof, and to the new circumstance foreseen by Art.1330 para.(1), second sentence, when the principal is aware of the *negotiorum gestio*, but is unable to appoint an agent or to manage his businesses in any other way. In such case, the principal may either ratify the *negotiorum gestio* (by applying the provisions of Art.1340 of the NCC) or oppose to it, in which case the gestor is liable under Art.1338 for having commenced or continued the management in disregard of the principal's opposition.

NCC also codifies the doctrine on unseasonable *negotiorum gestio*, providing that the principal must return the acts and expenses made during the *negotiorum gestio* period only to the extent they brought him any advantage (Art.1339).

(b) Section 2 "Undue payment"

[Art.1341-1344] Similarly to the CC (in Art.992-997, included in the Chapter on quasi-agreements, as well as in Art.1092, in the Section on payments), the NCC expressly regulates **undue payment** as a lawful act generating obligations, but within a better regulatory structure. The definition and general conditions of this legal concept are included in a separate section of the Chapter on lawful acts generating obligations. As to the rules governing repayment, reference is made in Art.1344 of the NCC to Art.1635-1649 of the NCC, respectively Title VIII of the NCC, named "Restitution of performances". Thus, the provisions of the CC on the effects of undue payment as

⁷⁶ As regards legal mortgages, please refer to Section II.A.1.6.(k) hereof.

regards the obligations of the payer and the payee (of good or bad faith, as the case may be), as well as the cases when the paid item is an immovable asset, grouped by the CC under the Chapter concerning quasi-agreements, are included by the new regulation under the title on the restitution of performances. While the NCC is silent on the subject matter of the undue payment, the current legal doctrine deems that the delivery of an amount of money, a determined individual asset or an asset determined by generic features may represent the subject matter of undue payment, but not the fulfillment of a so-called “obligation to do something”, which, if undue, entitles to restitution on the ground of unjust enrichment.

A change brought by the NCC to the concept of undue payment is to eliminate the mandatory condition of the payer’s mistake when making the payment, a condition which was expressly provided in the CC. According to the CC, while the payee may receive the undue payment either by mistake or knowingly (and is to be held liable for the restitution depending on his good or bad faith) (Art.992), the payer may act, by definition, only by mistake (Art.993 para.(1) provides that “The person who, by mistake, deemed itself a debtor and paid the respective debt, is entitled to file a *condictio indebiti* against the debtor”). The doctrine determined that the existence of a mistake made by the payer is an essential condition for the admittance, by the relevant courts, of a *condictio indebiti*, because the mistake of the payer results in the absence of the reason on which the performance should have relied; two exceptions from this rule were admitted in principle, i.e. the case when the debtor who lost the discharging receipt makes, at the creditor’s request, a second payment, as well as the payment made under an obligation which is null and void, although the payer was aware of the nullity of the obligation. Art.1341 para.(1) of the NCC, while defining the concept of undue payment in the new regulation, does not address this clarification. Since, where the lawmaker draws no distinction, the interpreter of the law should not draw it either, it may be construed that, according to the NCC, undue payment also means a payment knowingly made by the payer. In addition, according to Art.1472 NCC, an obligation may be validly paid not only by the debtor, but by any person, even if it is a third party by reference to such obligation. We deem that said change may generate contradictory interpretations and a non-unitary legal practice, as well as confusions between the concept of undue payment and that of unjust enrichment (where, unlike undue payment as regulated by the CC, it is admitted that the impoverished person may be in good or bad faith, but it is required that the enriched person be in all cases in good faith).⁷⁷

On the other hand, the NCC brings a few clarifications already stipulated by the doctrine, expressly eliminating, from the scope of undue payment, those payments made as gifts and the *negotiorum*

⁷⁷ Art.1635 NCC, named “Causes of restitution” does not bring the necessary clarifications either. The text provides that restitution takes place whenever someone is bound, by virtue of the law, to restitute the goods received without being entitled to or by mistake or under a legal act subsequently terminated with retroactive effect or whose obligations can no longer be fulfilled due to a Force Majeure case, a fortuitous case or other similar event; at para.(2), Art.1635 provides that the considerations provided on the ground of a future cause which has not occurred must also be restituted, except for the case when the person making the payment made it while being aware that the cause cannot occur or knowingly hindered the occurrence thereof. Thus, Art.1635 covers the case of the payment made by mistake, as well as cases currently qualified by the doctrine as unjust enrichment. However, it does not help with the clarification of a distinction between the two institutions. In addition, Art.1635 para.(2) sanctions the payer’s knowing of the inexistence of the debt only when he made a payment under a future unrealized cause. It follows from the interpretation of the aforementioned that payer’s knowing in the performance of an undue payment in the other causes does not have effect on the obligation of restitution.

gestio (Art.1341 para.(2)) and respectively regulating a relative legal presumption that payment was made with the intention of discharging a personal debt (Art.1341 para.(3)).

We would also like to note that the provisions of para.(2) and (3) seem to replace, in terms of regulatory substance, the condition provided at Art.993 of the CC, i.e. that payment should have been made by mistake. In fact, in addition to the aforementioned aspects, there is another effect that this change could bring to the assignment of the burden of proof. If, under the current regulation of the CC, the payer must prove, *inter alia*, that he was mistaken as to the existence of the debt, under the new regulation, the burden of proof seems to shift to the payee, who, once the payer has proved the absence of a preexistent debt, must prove that the payer intended to make him a gift or, as the case may be, acted on the ground of a *negotiorum gestio*.

Art.1342 NCC provides for more details on the hypothesis when the payee relinquished in any way his debt security in good faith, in which case the payer has a right of recourse against the real debtor. This assumption is currently provided under Art.993 para.(2) of the CC (but under a slightly different wording). The NCC addresses also the hypotheses when the extinctive prescription for the recovery of the debt that the good-faith creditor deemed settled by means of the respective undue payment has expired, as well as when the creditor waived the security created for the payment of his receivable. Art.1343, first sentence, codifies the doctrine developed under the CC on the undue payment made before the expiry of the suspensive term (in French, “*terme suspensif*”), expressly providing that such undue payment shall only be recovered back when it was obtained by fraud (*dolus*) or under duress. With regard to the restitution of an undue payment made before a suspensive condition is met, a circumstance which is laid down by the second sentence of Art.1343, we find the text to be defective because, given the lack of an explicit mention, it is unclear whether the restitution of the payment in such a case still requires the payment to have been obtained by fraud or duress, as in the case of the undue payment made before the expiry of the suspensive term, or whether it applies in all cases (if that suspensive condition was not met).

(c) Section 3 “Unjust enrichment”

[Art.1345-1348] As noted in the recitals to this chapter, unlike the CC, which only contains particular applications of the principle, the NCC expressly lays down the institution of **unjust enrichment** as a lawful act generating obligations, already upheld in doctrine and case law. It should be pointed out that, upon codifying this civil law concept, the lawmaker also considered the provisions of Art.1493-1495 QCC, transposed in their entirety into the NCC.

The NCC actually summarizes the conditions, detailed by doctrine and used in practice, where the person unjustly enriched is obliged to restitution (Art.1345 NCC) as well as the conditions for restitution of the consideration that resulted in the impoverishment of the aggrieved party (Art.1347 NCC).

As with undue payments, the texts in the NCC are defective because not only do they fail to specify the condition, validated in practice and legal doctrine, that the enriched person should act in good faith, but also because they expressly refer instead to the situation where the person enriched is acting in bad faith (Art.1347 para.(3) NCC), which is contrary to the unjust enrichment theory, as developed by legal scholars and practitioners. It is worth noting that, according to most opinions upheld in the

legal doctrine, the bad faith of the enriched would not entitle the injured party to initiating an *actio de in rem verso*, but to one based on tort liability.

Please note that the NCC Draft IL seeks to remedy these flaws, by amending, on the one hand, the definition under Art.1345 (which was set to expressly specify that enrichment is not to be held against the person whose patrimony increased) and, on the other hand, by eliminating para.(2) and (3) of Art.1347 and replacing them with a new para.(2), providing that: “The enriched person shall have the obligation of restitution as set out under Art.1641 or Art.1642, as the case may be, which shall be applied accordingly”. The amendments proposed by the NCC Draft IL are welcome but, in our opinion, they are not sufficiently clear. On the one hand, Art.1641 and 1642 to which Art.1347 para.(2) would be referring, as per the NCC Draft IL, regulate not just the obligations of the good-faith debtor, but also those of the bad-faith debtor, which conflicts with the condition that the enriched person must be of good-faith, provided under Art.1345 in the proposed NCC Draft IL.⁷⁸

The stipulation at Art.1347 para.(2) proposed by the NCC Draft IL that the norms referred to therein shall be applied “accordingly” is not, in our opinion, sufficient to ensure a unitary interpretation and application of the legal provisions, a situation which we have previously pointed out in connection with other NCC provisions. On the other hand, we believe that restitution for unjust enrichment should also be subject to the provisions of Art.1645 para.(1) (according to which the good-faith debtor of the restitution obligation is entitled to keep the fruits of the assets subject to restitution and must bear the expenses in connection therewith), the reference under Art.1347 para.(2) as proposed in the NCC Draft IL being, on this point, incomplete.

Art.1346 NCC, drawing from Art.1494 QCC, lays down the cases of just enrichment. They do not represent an element of novelty, as they are also found in Romanian court practice. The text does not expressly qualify the type of enrichment relying on a court judgment or on the law as cases of just enrichment, but these cases could be included in the category generically referred to as “valid obligations” under Art.1346 let.a) NCC; however the list makes no mention to enrichment by acquisitive prescription or by good-faith possession, which the doctrine regards as cases of just enrichment and which cannot fall under the categories indicated by Art.1346 NCC.

However, we have reservations about the wording of Art.1346 let.a) of the NCC which, as mentioned above, includes, among the possible grounds of just enrichment, the “fulfillment of a valid obligation”. We deem that it would be enough to make reference to the “fulfillment of an obligation” and that the requirement to have a “valid” obligation is redundant. On the other hand, this wording, placed in the context of Art.1348 NCC which establishes the subsidiary character of the action for unjust enrichment, risks to create confusion in practice among the specific grounds on which considerations

⁷⁸ The stipulation from Art.1347 para.(2) proposed by the Draft IL that the norms referred to shall be applied “accordingly” is not, in our opinion, sufficient to ensure a unitary interpretation and application of the legal provisions, a situation which we have previously pointed out in connection with other NCC texts. The mere fact that the side title of Art.1642 reads “Obligations of the bad-faith debtor” may justify the interpretation that none of its provisions apply to a good-faith debtor, such as the debtor of the obligation of restitution in the case of unjust enrichment. On the other hand, Art.1642 seems to be referring to the bad faith of the debtor of the obligation to restate not necessarily from the time of enrichment but occurring at a later date, in which case the text might be deemed unenforceable.

are restituted in cases such as the nullity or rescission of a contract. Finally, the requirement to have a valid obligation does not exist either in the source which inspired these provisions, i.e. Art.1494 of the QCC.

In what regards the request for restitution available to the injured party, the NCC codifies the scholarly views regarding the subordinated nature of the request for restitution grounded on unjust enrichment (Art.1348).

(iv). Chapter IV “Civil liability”

(a) Section 1 “General provisions”

[Art.1349-1350] Section 1 of Chapter IV contains some fundamental provisions and general rules governing civil liability, taken out from legal doctrine and case law. They are grouped in general provisions on tort liability (Art.1349) and general provisions on contractual liability (Art.1350).

Art.1349 NCC enshrines the principle of full compensation for the injury suffered, currently laid down by Art.998-999, 1073 and 1084 of the CC. A similar enactment of the principle of in-kind compensation is, however, absent. Para.(4) makes reference to the special law on consumer protection in what concerns liability for the injury caused by defective products.

With regard to the definition given to contractual liability under Art.1350 NCC, we note that the lawmaker addressed non-performance in a broad sense, to also include improper or late performance of obligations; to avoid any interpretations to the contrary, we suggest the text should be supplemented. In addition, we consider that the phrase “without good cause” at para.(2) of the same article, which, read as such, could be controversial, should be clarified by a note, possibly a reference to the situations where non-fulfillment of contractual obligations is justified, indicated under Art.1555-1557 of the NCC. Art.1350 para.(3) NCC sets forth the rule that the parties are not entitled to eliminate the rules on contractual liability specified under the NCC and opt for more favorable ones. It has been stated in legal doctrine that the creditor injured by the non-fulfillment of a contractual obligation is not entitled to choose between initiating a contract-based legal action, based on a specific, derogatory liability and a legal action based on tort liability. The NCC text, inspired by Art.1458 under the QCC, expressly extends this prohibition to both contractual parties, seeking to equally limit the possibility that the party that has not performed its obligation to decrease its liability by opting for more favorable liability rules than those pertaining to contractual liability.

(b) Section 2 “Liability exoneration causes”

[Art.1351-1356] By laying down the liability exoneration causes, applicable to both forms of civil liability, the lawmakers of the NCC codified, to a large extent, the relevant doctrine and case law, drawing out ground rules for each exoneration cause and reuniting under the same section one of the causes ruling out the unlawful nature of the harmful act (normal exercise of a subjective right, provided under Art.1353 NCC) and the causes ruling out the guilt (force majeure and fortuitous event (Art.1351 NCC), the victim’s or third party’s act (Art.1352 NCC)). Art.1471-1477 of the QCC played an important role in this codification.

As for the fortuitous event and force majeure, the NCC finally settles the controversy generated by the lack of express regulation for the two concepts in the CC, defining them in Art.1351 para.(2) and (3) as two separate concepts, and instituting, under para.(4), the rule that insofar as the debtor is exempted from contractual liability for a fortuitous event, he shall also be exempt (*a fortiori*) in the event of force majeure. The text employs the definitions accepted in the legal doctrine for the two concepts and acknowledges the parties' possibility to contractually agree that liability shall not be excluded by the occurrence of a fortuitous or force majeure event (Art.1351 para.(1) of the NCC).

Art.1352 lays down the conditions when the victim's or third party's act may be regarded as liability exoneration cases. From the interpretation of the text, it follows, *a fortiori*, on one hand, that the act of the third party or victim which meets the requirements of force majeure shall exonerate from liability and, on the other hand, from a literal interpretation, that the act which fails to meet these requirements may exonerate from liability as well, but only to the extent that the law or the parties' agreement provide that fortuitous event also exonerates from liability. The text is defective as it fails to mention whether the act which fails to qualify as force majeure shall exempt from liability only if it qualifies, however, as a fortuitous event. The NCC Draft IL addresses this shortcoming. Art.1352 does not expressly provide whether liability exemption in the two aforementioned cases is total or partial and, in case it is only partial, if the defendant and the third party are to be held jointly liable. By reading together this text with Art.1371 of the NCC, according to which the defendant shall be liable only for the portion of injury that he caused, it follows that liability is not joint, save for the situation under Art.1370, when the author of the injury is impossible to identify.

Art.1354 NCC sets a limitation on liability for one's own conduct, when the injury is caused by the person having selflessly helped the victim and on liability for the act of things, in the case where the victim used, free of charge, the thing, animal or building that caused the injury. In such cases, the victim shall not be entitled to compensation of injury suffered unless he demonstrates the intent or gross negligence of the person that would have been found liable, according to law.

An amendment brought by the NCC to the current regulation consists in the codification of the new doctrine's concept on the abuse of rights (Art.1353).⁷⁹ Thus, it is considered that the person exercising the prerogatives provided by law as attached to his subjective right may not be held liable, even if the normal exercise of his right caused certain injuries to another person. The new concept proposed by the legal doctrine⁸⁰ and embraced by the NCC provides that the exercise of a right may be deemed abusive only when such right is not used to achieve its purpose, but rather to injure another person. Unfortunately, the text is not entirely correlated with Art.15 NCC, sanctioning the abuse of right, which is defined as the situation when a right is exercised for the purpose of injuring or damaging another person or is exercised in an excessive and unreasonable manner, contrary to the good faith.

Furthermore, the NCC codifies the legal doctrine regarding the clauses on civil liability; thus, Art.1355 para.(1) prohibits the parties from limiting their liability for the material damage caused to

⁷⁹ A general provision on the abuse of rights may be found in the Constitution, at Art.57.

⁸⁰ This concept is not entirely new, and may also be found in the Romanian inter-war doctrine.

another person by a deed committed with intent or by serious negligence. However, we doubt that the expression “material damage” is appropriate in this context, because it renders possible a *per a contrario* interpretation which would reach the conclusion that the parties may provide non-liability clauses for the moral damage caused with intent or by gross negligence. In our opinion, this is unacceptable.

According to Art.1355 para.(2) NCC, a non-liability clause is deemed to be valid only if the unlawful act was committed by ordinary negligence (“mere imprudence or carelessness”), and the injury affects the victim’s property. *Per a contrario*, when the injury affects the personal characteristics of the victim (others than those provided at para.(3), discussed in our next paragraph), it is impossible to eliminate liability, even if it is a case of *culpa levissima*.

In cases when the injury concerns the physical or mental integrity or the health, liability may be excluded or limited only in accordance with the law, and, consequently, the injury shall be fully compensated (Art.1355 para.(3) NCC, which resumes principles already established in doctrine). Finally, Art.1355 para.(4) regulates the effects of the victim’s statement on accepting the risk for the occurrence of an injury; the victim’s consent, or, as called by the doctrine, the non-liability clause, may not be construed, by itself, as a waiver to the compensation right.

Taking over the provisions of Art.1475 and 1476 of the QCC, the NCC expressly regulates the advertisements excluding or limiting contractual liability (Art.1356 para.(1)) and tort liability, respectively (Art.1356 para.(2)), in view of settling certain situations frequently occurring in practice, such as engaging the liability of hotel keepers. The wording is an application of the general rules on clauses excluding or limiting liability.

(c) Section 3 “Liability for one’s own conduct”

[Art.1357-1371] Concerning liability for one’s own conduct as a form of civil tort liability, NCC extends the regulation of this concept by codifying legal doctrine and case law in the field.

As to the conditions regarding liability for one’s own conduct, Art.1357 of the NCC brings no major amendments to the current regulation, the article consolidating the provisions of Art.998, 999 of the CC; however, attempt is made to classify the various forms of guilt in the civil law legislation, in principle, as per the pattern laid down in criminal law, into intent and negligence (para.(1)). An express provision would be welcome at a theoretical level, although, as stated in the legal doctrine, it usually has no practical interest, as civil liability is based upon the principle of full compensation of the injury, irrespective of the form of guilt. The NCC Draft IL provides for a replacement of the wording of Art.1357 para.(1) by the following wording: “The person causing an injury to another person by way of an unlawful act which was committed with guilt, shall have to make reparation thereof”. The suggested wording eliminates, on the one hand, the express establishment of forms of guilt in civil law as provided in the NCC, and, on the other hand, enshrines the lawmaker’s intention to waive the use of the concept of “negligence” as a generic name for any type of guilt. However, we note that although the forms of objective liability unconditioned by negligence are regulated by a lot of

legal texts, both in the special legislation,⁸¹ and in the NCC,⁸² the provisions of Art.1357 para.(1) NCC do not draw any reference in this respect, opting to include negligence as a mandatory element for engaging liability.

Thus, para.(2) of the text, to which the NCC Draft IL proposes no amendments, expressly provides for the principle that civil liability is also engaged when the unlawful act is committed with slight negligence (*culpa levissima*). It is thus consolidated the idea that, usually, civil tort liability is triggered if a unlawful act is perpetrated with guilt, irrespective of the form and degree thereof.

On the other hand, Art.1358 provides for particular criteria to be taken into account upon determining the negligence and the degree thereof (*culpa lata, culpa levis, culpa levissima*). As stated above, Art.1357 para.(2) expressly establishes the rule that civil liability is triggered irrespective of the degree of negligence, and the principle of full compensation of the injury shall also apply, irrespective of the form and degree of guilt. Nevertheless, the express provision of certain criteria establishing the degree of negligence is relevant, considering situations such as the one regulated under Art.1355 para.(2), where distinctions become relevant. The NCC Draft IL proposes the replacement of the concept of “negligence” in the wording of Art.1358 by the concept of “guilt”. The sense of the regulation is thus changed, and the criteria therein established shall apply upon the assessment of both the form of guilt (intent or negligence), and the degrees of negligence; thus, the regulation is given a broader scope.

Another amendment brought by the NCC consists in the codification of doctrine and practice of the courts with respect to the causes which remove the unlawful nature of the act, *i.e.* self-defense, state of necessity, disclosure of trade secret and fulfillment of an activity required or permitted by law, which are in fact imported from criminal law into civil law. The definition of self-defense and state of necessity may be found in the CrC, at Art.44 and Art.45, and they generate same exonerating effects for both criminal liability and civil liability.

As to the fulfillment of an activity required or permitted by law, one may notice that Art.1364 of the NCC appears, to a certain extent, to contradict the current legal doctrine and practice, providing that the person causing the injury is liable in such situations when he could have realized the unlawful nature of his act. The legal doctrine and practice applicable in the field address the issue in more detail, revealing that the fulfillment of an instruction received from a superior shall not remove the unlawful nature of the act, if the instruction is obviously unlawful or abusive, or if the manner of fulfillment is itself unlawful or culpable. In the absence of such provision, Art.1364 may lead to different interpretations and non-unitary practice, as the wording leaves it to the judge to assess, including under subjective criteria concerning the perpetrator, whether such person could or could not realize the unlawful nature of the act.

As to the disclosure of the trade secret, even if this is not a complete novelty to the Romanian relevant doctrine, the concept was fully taken over from Art.1472 of QCC.

⁸¹ For instance, the liability for environment damage, provided by GEO No.195/2005 on environment protection, as further amended and supplemented, the liability engaged as per Law No.703/2001 on civil liability for nuclear damage, etc.

⁸² For instance, the liability for the deed of another, the liability for the damage caused by animals, etc.

Another novelty brought by NCC, under the influence of NCPC, consists in the amendment of the provisions regarding the authority in the civil law trial of judgments passed in criminal cases and the effects thereof in a civil court. Thus, at this point, civil case law takes into account the principle established under Art.22 of the CrPC, according to which the final judgment of the criminal court shall have the authority of *res judicata* in the civil court which tries the civil law action, in respect of the existence of the act, person that perpetrated it and guilt thereof; the rule shall apply irrespective of the decision passed by the criminal court in the criminal action. The NCPP inserts a second sentence to such paragraph of Art.22 of the CrPC (which became Art.28 of NCPC), which paragraph was precisely taken over by Art.1365 of the NCC herein analyzed, and which provides that the civil law court shall neither be bound by the provisions of the criminal law nor by the final judgment of acquittal or cessation of the criminal trial in respect of the existence of the injury or guilt of the person perpetrating the unlawful act. The purpose of the wording is to emphasize the civil court's autonomy in making an assessment in such cases in which the injurious act or perpetrator thereof fell outside the scope of criminal law by way of a final judgment of the criminal court. Moreover, in accordance with the provisions of Art.25 para.(5) of the NCPC, the criminal court shall leave the civil action unsettled, should the accused be acquitted or the criminal trial be terminated. For a more detailed analysis of this new provision from NCPC and of the consequences which may arise from such new regulation, please see Section II.A.4.1.(b) hereof.

In this section, the NCC also classifies the provisions on the civil liability of certain categories of persons: the minor and the legally incapable person (Art.1366), the person lacking discernment, even if temporary, due to a mental impairment (Art.1367), the person causing or instigating another person to cause an injury, or helping him, or deliberately hiding assets coming from the unlawful act, or obstructing or delaying in any way whatsoever the commencement of legal proceedings against the perpetrator (Art.1369). Such wordings are inspired by the criminal law legislation on the liability of the minor, the person lacking discernment, person inducing himself a state of mental impairment, instigator and accomplice.

The minor who did not reach the age of 14 is relatively presumed to be without power of discernment, and the minor who reached the age of 14 is relatively presumed to have capacity in tort. The NCC clarifies a matter which gave rise to contrary opinions in the legal doctrine, namely the situation of the mentally disturbed persons; if such person is established to be legally incapable, he shall be treated as a minor below the age of 14 (Art.1366 para.(1)) from a legal perspective, and if he was not established as legally incapable, he shall be subject to the rules on persons lacking power of discernment, even if temporarily (Art.1367 para.(1)).

As regards liability for injury caused by several persons, Art.1370 regulates the situation where the injury was caused by the simultaneous or successive action of several persons, being impossible to individualize the author of the act, and in such case all persons shall be jointly held liable for compensation, while Art.1371 para.(1) regulates the situation of the joint negligence of the victim, in such situation a person being held liable only for that part of the injury that he caused. Force majeure cases, fortuitous events or third party acts for which the author is not held liable (Art.1371 para.(2)) are also assimilated to the joint negligence of the victim. We deem that there is an apparent contradiction between the side heading of Art.1371, which refers to negligence, and the actual

provision under such side heading, referring both to intent and negligence; the inconsistency arises from using in the title the concept of “negligence”, with the generic meaning of “guilt” in which it is currently used in civil law, while the body of the article refers to the notion of “negligence” in the narrow sense, as a form of guilt, along with the intent. The NCC Draft IL proposes that the title be harmonized to the contents, by replacing the current side title of Art.1371 with “Joint Guilt. Multiple Causes”.

Finally, by Art.1368, the NCC codifies a relatively recent trend in practice, accepted as well in doctrine, regarding the subsidiary obligation of the author causing the injury and lacking power of discernment to indemnify the victim, whenever the liability of the person who, according to the law, has the duty to supervise him, cannot be engaged. This new provision is inspired by Art.489-2 of FCC stipulating that the person causing injury to another, even if affected by a mental disorder, is equally bound to provide compensation.⁸³ Note should be made however on the qualitative difference between the regulation under Art.1368 and the one provided in the source text; while FCC refers to repairing the injury under these circumstances, maintaining, at least in the wording, the relation between the author and the victim in the field of tort liability, Art.1368 refers to the payment of an indemnity which shall not be established according to the scope of the injury, since the lack of tort liability causes the inapplicability of civil tort liability principles, but according to subjective criteria, i.e. by reference to the parties (their financial standing). The text applies the principle of equity, and not the principles of civil tort liability, fact which was also upheld by the HCCJ in its decision marking the beginning of this trend in Romanian court practice.⁸⁴

(d) Section 4 “Liability for the acts of another person”

[Art.1372-1374] The provisions included in this section regulate the liability for the acts of another person, more precisely liability for the acts of a minor or of a legally incapable person (Art.1372) and the liability of principals for their agents (Art.1373). Furthermore, special provisions are stipulated in relation to the correlation of the forms of liability for acts of another person (Art.1374).

In general, the regulations are more thorough than the ones currently in force, codifying many applicable principles from legal doctrine and case law. At the same time, the special provisions regarding the liability of teachers and craftsmen for the acts of their pupils and apprentices (Art.1000 para.4 of the CC) were removed and then included in the new regulation under Art.1372 para.(1) of the NCC, which states the liability of the person who is in charge of supervising the acts of the minor and of the legally incapable person.

Thus, the regulatory scope of Art.1372 includes all persons having the obligation to supervise the minor, since other persons in addition to the parents are held liable as well, who, pursuant to the law, to an agreement or a court order, have the obligation to supervise the minor. Para.(2) of the text

⁸³ In French, „*Celui qui a causé un dommage à autrui alors qu’il était sous l’empire d’un trouble mental n’en est pas moins obligé à réparation*”.

⁸⁴ HCCJ, Civil Division, Decision No. 175 of January 22, 1972.

stipulates the rule constantly asserted by doctrine, i.e. that the parents are liable for the minor's unlawful act causing injuries, notwithstanding whether said minor had or not power of discernment when committing it. Para.(3) resumes the essence of Art.1000 para.(5) of the CC, stating that the person in charge of supervising may be exempted from liability if it is proven that he could not have prevented the adverse act. The texts are applicable to the legally incapable person, whose tort liability is expressly assimilated in the new regulation (Art.1366 para.(1) of the NCC) to the capacity of the minor below the age of 14.

The NCC Draft IL proposes that para.(3) under Art.1372 be supplemented by the following sentence: "in case of parents, the proof is considered to be made only if they bring evidence that the child's act is not a consequence of the inappropriate manner in which they fulfilled the duties arising from the exercise of their parental authority." The amendment mainly creates a special regime with regard to parent's liability for minors' acts, different from the liability of any other person included in the scope of application of Art.1371. Based on the newly introduced notion of parental authority, parents' liability becomes aggravated liability, since the text indirectly asserts an opinion which was not unanimously supported by the scholars and practitioners of the current regulation, namely that parents' liability is based on the failure to fulfill or of the inappropriate fulfillment of the obligations to supervise and educate the minor (embraced by case law), and also of the obligation to bring up the minor, which has a larger scope than the obligation to educate same, since it includes all parental duties. Note should be made however that the amendment proposed by the NCC Draft IL does not regulate the situations where the exercise of parental authority does not belong with the parents.

The NCC modernizes and extends principals' scope of liability for the acts of their agents, codifying the doctrinal principles and the practical solutions to this matter (Art.1373). To this effect, the lawmakers, in addition to the definition of the principal (para.(2)), take from the doctrine the solution settling the matter of the principal's liability in case the latter proves that the victim was aware or could have been aware, according to the circumstances, on the date of the injurious act, that the agent acted with no connection to the duties or the purpose of the capacities entrusted by the principal, more precisely, if he proves that liability is not engaged in such cases (para.(3)).

Finally, Art.1374 expressly regulates the correlation between the forms of liability for the deeds of other person provided under Art.1372 and Art.1373, i.e. parents' special liability, the liability of persons having the obligation to supervise the minor or the legally incapable person, and the principal's liability for the agent's acts. Note should be made that the general and subsidiary character of parents' liability is established expressly; such concept is already applied in legal practice, namely parents shall not be held liable for the minor's act unless proof is provided to certify the liability of the person who had the obligation to supervise the minor. According to the text, the person having the obligation to supervise cannot be discharged from liability claiming that the minor's act is due to the inappropriate exercise of the parental authority by the parents (as regards, for instance, the obligation to bring up and educate the minor), but only proving that he fulfilled his own obligation to supervise (Art.1374 para.(1)). Furthermore, the principal shall not be exempt from liability for the act of his minor agent, and he shall incur primary special liability whenever the conditions of Art.1373 (Art. 1374 para.(2) sentence I) are fulfilled. The victim is granted the right to choose between the grounds

for liability for the minor's act, in case the principal is the minor's parent (Art.1374 para.(2) sentence II).

(e) Section 5 "Liability for injuries caused by animals or things"

[Art.1375-1380] NCC's lawmaker brought together in this section all provisions regarding liability for injuries caused by animals or things, currently provided under Art.1000 para.(1), Art.1001 and Art.1002 of the CC. Therefore, this section includes provisions on liability for injuries caused by animals (Art.1375), liability for injuries caused by things (Art. 1376), as well as liability for the partial or total destruction of the building (Art.1378). Other liability cases have been regulated as well (Art.1379); the concept of custody, such as defined in doctrine and applied in case law has been codified (Art.1377), and the grounds for exoneration from liability have been established (Art.1380).

As regards liability for injuries caused by animals (Art.1375), things (Art.1376) and liability for the partial or total destruction of buildings (Art.1378), NCC does not provide for any substantial amendments, the lawmakers merely supplementing these regulations with the main ideas upheld by the legal doctrine and with the solutions provided by case law. However, a few remarks are worth making in relation to the wording of such texts. Note should be made that the notion of "negligence" with the generic meaning of "guilt" is used in this section as well, but the NCC Draft IL does not propose the appropriate amendments, although there is an identity of reason with the amendments proposed for Art.1357, Art.1358, and Art.1371. If the NCC Draft IL is adopted in its current form, it shall generate confusion upon the application thereof, since the texts in the section analyzed herein will seem to refer strictly to one of the forms of guilt, namely negligence, but not to intent.

The amendment brought by the NCC consists in stating the cases of liability for injuries caused by things (Art.1376), by the insertion of a new paragraph (para.(2)) providing for the applicability of the legal regime established thereunder to collision of vehicles or to other similar cases, mention being made that the liability for compensation shall only be incumbent on the person whose negligent act meets, towards other persons, force majeure conditions. The final sentence of para.(2) attempts to settle the difficulties caused by the lack of an express regulation of the situation in which every legal custodian of the colliding vehicles is, at the same time, the victim and the author of the injury. As the CC contains no such express provisions, most Romanian scholars deemed that each of the parties involved shall be obligated to repair the injury suffered by the others, which is not the most practical solution after all, but it is the only one with grounds in the CC. Art.1376 para.(2) of the NCC provides for a more practical solution, namely the mutual neutralization of liability for things, whereas each legal custodian would incur its own damage, unless he proves the exclusive guilt of the other person whose act must have met the force majeure requirements in connection to the others. The NCC introduces a new case of liability under Art.1379: liability of the person occupying an immovable,

even without title, for the injury caused by a thing fallen or thrown out of the said.⁸⁵ When the requirements on liability for the act of the thing are also met, the victim is granted the right to choose the grounds of his claim for indemnifications: liability for the act of the thing or liability established under Art.1379 para.(1) (Art.1376 para.(2)).

As regards liability for the ruin of the building, we hereby consider that amendment of Art.1002 of the CC by Art.1378 of the NCC does not bring any benefit whatsoever, but, on the contrary, it renders the provision unclear and redundant, the concept of “building” including the idea of “construction of any kind” and the notion of “ruin” also including the idea of partial disaggregation of the building.⁸⁶

Art.1380 of the NCC establishes the causes for exoneration from liability in connection to injuries caused by animals, things, ruin of the building or to the injury caused by the things falling or being thrown out of the immovable. The list only includes the situations in which the injury is exclusively due to the actual act of the victim, to the act of a third party or to a force majeure case. It thus implicitly eliminates from the liability exoneration causes applicable in connection with the liability for the act of things, animal or building: the fortuitous event, the act of the victim/third party which does not meet the force majeure requirements, the exercise of rights, as well as the case of the person who offered selfless help, as provided under Art.1354. We would note that Art.1354 establishes a special case of exoneration from liability for the act of things, animal or building, when they were used free of charge by the victim, at the time when the injury was suffered, unless their legal custodian is guilty of gross negligence.

(f) Section 6 “Reparation of the injury in cases of tort liability”

[Art.1381-1395] In this final section of Chapter IV, the NCC’s lawmakers included provisions on the compensation for injuries (Art.1381, Art.1385, Art.1386, Art.1391, Art.1392, Art.1393), provisions on debtor’s or debtors’ liability, as well as on the relationships among the aforementioned (Art.1382, Art.1383, Art.1384), provisions on bodily and health harm (Art.1387), establishment of loss or lost work earnings (Art.1388), minor’s harm (Art.1389), as well as on the establishment of the person entitled to receive compensation in case of death (Art.1390). The NCC also includes special provisions related to the extinctive prescription (Art.1394, Art.1395).

As regards the object (Art.1381), the forms (Art.1386) and extent of compensation (Art.1385), the NCC’s provisions are not new, for they are merely a codification of the relevant legal doctrine and practice. In addition to the aforementioned, the lawmakers introduced a new element to be considered in the calculation of the injury’s extent, i.e. the expenses incurred by the injured person in order to

⁸⁵ We hereby mention that the current legal doctrine distinguishes between the situation of the legal custodian and that of the clandestine occupant, with dissenting opinions as to the legal custodian not being held liable for the injuries caused to him while the immovable was occupied by another person or being held liable and having a right of recourse against the clandestine occupant.

⁸⁶ According to the doctrine, building is defined as work made by the hand of man, by using certain materials which would be incorporated into the ground, thus becoming, by its enduring settlement, an immovable asset by nature. The ruin of the building is defined not only as the complete wrecking, but also as any disaggregation of the material from which it is made, which, by falling, causes injuries to another person.

avoid or limit the extent of the injury. The NCC Draft IL also provides a new method for identifying and calculating the injury, namely a calculation relying on a new element, in addition to the injury suffered and the gain which could have been obtained by the injured person under normal circumstances (loss of profits): losing the opportunity to avoid injury.

Furthermore, we note that, by codification of the legal doctrine and jurisprudence, the NCC also introduced provisions related to the quantification of injury in the case of bodily or health harm, lost work earnings, special provisions on the establishment of injury's quantum when the injured person is a minor, establishment of indemnification by reference to the aid and the pension, the possibility to grant medical treatment and funeral expenses, as well as on the establishment of persons entitled to receive compensation in case of death. It also takes on from the legal doctrine and case law the provisions regarding joint liability and relationships between debtors, as well as the provisions on the right of recourse in the case of joint liability.

A modification brought by the NCC consists in the codification of certain provisions related to the right of recourse of the person held liable for the act of another person's conduct (Art.1384). Although this regulation codifies general provisions already existing in the legal doctrine and case law, one may also notice the codification of a particular case, namely the Romanian State's liability for the conduct of another person. Thus, para.(2) of Art.1384 provides that the Ministry of Public Finance shall file a legal action against the person for whom the Romanian State is held liable, a mechanism which is already used in practice.

A formal modification brought by the NCC consists in the express regulation of the possibility to repair non-patrimonial injury (Art.1391). Even in the absence of a CC provision in this respect, the current legal doctrine and case law state that it is possible to recover non-patrimonial injury, a concept including any kind of injury which cannot be expressed in money. Such indemnifications are called "moral damage" and their quantum is to be decided by the judge. The NCC took over the doctrinal provisions in this respect. Unlike the right to compensation for patrimonial (pecuniary) injury, which is a receivable right subject to rules on the fulfillment, transfer, transformation and extinguishment of obligations as of the date when it is born (according to Art.1381 para.(3) of the NCC), the right to receive compensation for breach of rights inherent to the personality of any legal subject shall only be assigned following its establishment through a settlement agreement or by final ruling (Art.1391 para.(3)) and cannot be transferred to heirs; heirs can exercise it only when the legal action has been previously initiated by the deceased (Art.1391 para.(4)). Finally, para.(5) of the text refers to the provisions regarding the defense of non-patrimonial rights (means of defense (Art.253) defense of the right to have a name (Art.254), provisional measures (Art.255) and death of the holder of non-patrimonial rights (Art.256)).

The NCC's lawmakers introduces new provisions related to the applicability of the extinctive prescription as regards the right to receive compensation for the injury suffered in case of tort liability (Art.1394, Art.1395). Thus, as regards the suspension of the extinctive prescription, the provisions from the legal doctrine and practice have been codified in relation to the possibility to suspend such statute of limitation until the establishment of pension or aids owed by the social security system to the person entitled to receive such compensation, in the case of a damage caused by bodily or health harm or by the death of a person. It also contains special provisions regarding the possibility to defer the

extinctive prescription for all cases when the injury arises from an act for which criminal law provides for a longer extinctive prescription, as opposed to civil law. In this respect, mention should be made that the current legal doctrine notes that, unless this problem is settled, there may be cases when the extinctive prescription provided by civil law is shorter than the one provided by criminal law.

1.6.(c). Title III “Modalities of the Obligations”

(i). Chapter I “General Provisions”

[Art.1396–1398] Just as the current CC, NCC opts for expressly providing only for the condition and the term as modalities of the obligations. However, the legal doctrine shows that there is a third modality of the obligations (in fact, of the civil legal deed), i.e. the charge. NCC, as the CC, does stipulate the charge, but by special regulations in the matter of donations and legacies.

NCC classifies the obligations into pure and simple (i.e. which cannot be affected by modalities), simple obligations or obligations affected by modalities – Art.1396. The simple obligation is not affected by any term or condition and may be performed immediately, at one’s own initiative or at the creditor’s request – Art.1397 para.(1) NCC.

(ii). Chapter II “The Condition”

[Art.1399–1410] NCC approaches the conditions as a modality of obligations in a substantially similar manner to the current CC; the main changes to the current legislation will be summarized below.

According to Art.1402 NCC, the condition which is impossible, against the law or the good morals is deemed to be unwritten, and, if it is the actual cause of the contract, it triggers the absolute nullity thereof. The solution provided by NCC is new as compared to Art.1008 and Art.1009 of the CC, which is always sanctioning by nullity the contracts which stipulate conditions such as those envisaged at Art.1402 NCC. We see as inopportune the solution embraced by the first thesis of Art.1402 NCC (i.e. to consider the condition unwritten), even if it aims to safeguard the contract whose clauses are affected by a cause of nullity. This inopportunity is visible especially as regards the suspensive condition (if this is deemed to be unwritten, then it will be considered that a simple obligation has been undertaken, and the contract becomes effective as of the date of its execution, which no longer observes the parties’ will).

Art.1404 NCC provides how the fulfillment of a condition is found. In principle, the fulfillment of a condition is assessed under the criteria established by the parties or – a new element – according to the criteria that they “probably” had in the respective circumstances.

According to Art.1405 NCC, the condition is deemed to be met if the debtor bound by this condition hinders its fulfillment – a text which corresponds to the current Art.1014 of the CC. However, a new aspect follows from para.(2) of Art.1405 NCC, according to which the condition is deemed to be unfulfilled if the party interested in the fulfillment of the condition determines in bad faith the occurrence of the event. We do not see why the two paragraphs of Art.1405 have been treated differently, by providing for bad faith only at para.(2), but not also at para.(1).

Art.1406 NCC provides that the party in whose exclusive interest the condition was stipulated may unilaterally waive it, as long as the condition has not been met, which will change the obligation into a simple one. What remains unclear under NCC is whether the waiver to a condition may also have retroactive effects, just as the fulfillment of the condition under Art.1407 NCC (more exactly, from a practical perspective, the issue is stringent only as regards the obligation undertaken by a resolutive condition), or whether the change of the obligation into a simple one causes only *ex nunc* effects, as of the date when it was waived.

(iii). Chapter III “The Term”

[Art.1411–1420] A novelty in the matter of the term, as a modality of the obligation, is presented in Art.1415 NCC, regulating the judicial setting of a term, when the parties agree to postpone the setting of the term or leave to one of them the duty to set it, and, after a reasonable time period, the term has not been set yet. In this case, the court may, at either party’s request, set the term by taking into account the nature of the obligation, the status of the parties and any other circumstances. The court may also set the term when, by its nature, the obligation involves a term and there is no covenant whereby such term may be determined. The application for setting the term is settled in accordance with the rules applicable to injunction and is subject to a extinctive prescription period, which starts to run on the execution date of the contract.

We already expressed our reservations on using the court as an authority which has the role to supplement various clauses of the contract (because the parties should be able to determine the content of the contract by themselves; then, the intervention of the court may be tardy, as long as judicial procedure has its specific pace, often too slow as compared to the necessary dynamics of contractual relations, especially when they develop among professionals). We deem that these objections also apply to Art.1415 NCC. First, even if the injunction procedure applies, which, theoretically, should be swift, the practice proves that even such kind of trials last quite long, so that setting the term in court could complicate the relationships between the contracting parties, rather than support them. Then, the procedure provided at Art.1415 NCC has real chances to be used by bad-faith debtors intending to stall the fulfillment of their obligations, who will hinder the setting of a term and then leave to the creditor the initiative to initiate a legal action (or initiating themselves the judicial procedure provided at Art.1415 NCC).

It is also worth noting how the current Art.1025 of the CC (regulating forfeiture of the benefit of the term when the debtor becomes insolvent or reduces the security interests granted to its creditor). According to Art.1417 NCC, the debtor forfeits the benefit of the term if it is in a state of insolvency or, as the case may be, insolvent. Currently, under Art.112 para.(4) of Law No.85/2006, only the monetary receivables against the debtor’s property are deemed to be due as of the date when bankruptcy proceedings are opened. Furthermore, pursuant to Art.154² under Law No.85/2006, “*any forfeiture ...established under legal norms or contractual provisions in relation to the initiation of the insolvency proceeding shall be applicable only as of the opening date of bankruptcy proceedings*”. We deem that the solution provided under the special law, arising from a vast experience in matters of insolvency, is preferable.

Also, according to para.(1), the debtor shall also forfeit the benefit of the term when he intentionally or by serious negligence acts so as to diminish the security interests established in favor of his creditor or does not establish the promised security interests. However, the requirement to have an intention or to commit a serious negligence is not provided by Art.1025 of the CC and it is not clear why the debtor who, acting by simple negligence, affects the established security interests, is however protected by the benefit of the term (so much the more that the following text, presented in the paragraph below, draws no distinction by reference to the seriousness of the negligence).

The forfeiture of the benefit of the term may also be requested, as per Art.1417 para.(3) NCC, when, by his default, the debtor can no longer satisfy a condition which was deemed essential by the creditor at the time when the contract was executed. In such case, it is necessary that the essential character of the condition and the possibility of forfeiture be expressly stipulated, and that the creditor would have had a legitimate interest to deem such condition essential – Art.1417 para.(3) NCC.

Another new regulation may be identified at Art.1420 NCC, according to which, if an event that the parties deem to have a term does not occur, the obligation becomes due on the day when the event should have normally occurred.

1.6.(d). Title IV “Complex Obligations”

(i). Chapter I “Divisible and Indivisible Obligations”

[Art.1421–1433] The provisions of Art.1421–1433 NCC develop and detail the corresponding provisions currently found in Art.1057–1065 of the CC. According to Art.1421 NCC, obligations may be divisible (among several debtors or creditors, as the case may be) or indivisible. As regards the divisible obligation, Art.1423 NCC (in the form proposed by the NCC Draft IL) institutes the presumption of equality among the debtors, respectively the creditors of a divisible obligation. This solution is different from the one provided in the current Art.1060 of the CC, which stipulates that, in what concerns the heirs, divisibility is applied by reference to their succession quotas. We deem that this traditional solution should also be kept by NCC.

Obligations are presumed to be divisible, unless indivisibility has been expressly stipulated or the object of the obligation is not, by its nature, susceptible of division either materially or intellectually.

The obligation to perform, by equivalence, an indivisible obligation is divisible. Additional compensation can only be requested to the debtor who is guilty of the non-fulfillment of the obligation. The creditors are entitled to such compensation only pro rata with the part of the receivable owed to each of them – Art.1430 NCC. In the context of these NCC provisions, we note that the meaning of the expression “additional compensation”, used more than once in NCC (for example, in Art.1454 NCC, but not in Art.1530 *et seq.* of the NCC, which represent the general regulation on the creditors’ capacity to obtain damages in case the obligation is not performed) is not clear.

(ii). Chapter II “Solidary Obligations”

(a) Section 1 “Solidary Obligations between Creditors”

[Art.1434–1442] The provisions of this section resume and develop, without making any substantive amendments, the rules which are currently contained in Art.1034-1038 CC. The new provisions may be found in Art.1436 NCC. According to para.(1), joint creditors are presumed to have mutually empowered themselves to act for the management and satisfaction of their common interest. Also, according to para.(2), any acts whereby one of the joint creditors would consent to the reduction or elimination of the rights, accessories or benefits of the receivable or would damage in any other way the interests of the other creditors are not enforceable against the latter. These texts may be deemed a development of Art.1038 CC, according to which the joint creditor represents the other co-creditors, in all acts which may result in the preservation of the obligation.

The next two paragraphs of Art.1436 refer to the status of the trials initiated against the debtor, applying the aforementioned rules. Thus, if a joint creditor obtains a judgment against the common debtor, this will also inure to the benefit of the other creditors (para.(3)). On the other hand, if the judgment is issued in favor of the common debtor, it may also be invoked against the creditors who were not parties in the trial (para.(4)). We deem that this last provision falls under the scope of the *res judicata* authority, regulated at Art.429 *et seq.* NCPC, and this is why the opportunity of maintaining such provision should be reviewed. In addition, we deem that it is not exactly correct to say that such judgment cannot be “invoked” against the other creditors, because it may be used at least as a means of evidence.

NCC also contains new texts in the matter of set-off and confusion of rights, determining that in such cases the receivable is extinguished pro rata with the part held by the creditor against which the set-off is claimed or which is in a state of confusion of patrimonies (Art.1438 and Art.1439 NCC).

As regards the extinctive prescription, Art.1441 para.(2) NCC keeps the rule of Art.1036 CC, which provides that the acts by which the extinctive prescription period recommences, which are made by one of the joint creditors, inure to the benefit of all joint creditors. In addition to the CC regulations, Art.1441 para.(1) NCC lends a similar effect to the situations leading to the suspension of the extinctive prescription period.

A last novelty in this field is Art.1442 NCC, which provides that the obligation in favor of a joint creditor is divided *de jure* between his heirs. Finally, this section from the NCC does not resume the provisions of Art.1037 of the CC according to which “The joint creditor who was paid the entire debt is bound to share it with the other co-creditors, unless it proves that the obligation is contracted in his interest only”.

(b) Section 2 “Solidary Obligations between Debtors”

1. General provisions

[Art.1443–1446] This section of the NCC resumes, without any substantive amendments, the provisions of Art.1039-1041 CC. Art.1446 NCC rephrases the rule of joint liability of the co-debtors of a commercial obligation provided at Art.42 para.(1) of the Commercial Code, in a way which takes into account the fact that the monist system of private law has been embraced. The joint liability shall be presumed between the debtors of an obligation contracted in an enterprise’s course of business, if not otherwise provided by the law.

2. Effects of Solidarity in the Relationships between the Creditor and the Jointly Liable Debtors

I. Main Effects in the Relationships between the Creditor and the Jointly Liable Debtors

[Art.1447-1453] Art.1447 resumes the provisions of Art.1042 and 1043 of the CC. Art.1447 para.(2) final thesis adds the possibility that the jointly liable debtor seized by the creditor would request the bringing in the trial of the other co-debtors. Although the provision is inspired by Art.1529 of the QCC, it is however debatable, considering that it affects one of the main advantages of passive solidarity (joint liability), *i.e.* the creditor’s right to chose the debtor against whom he wants to exercise his rights. The recourse of the seized debtor against the other jointly liable debtors should not influence in any way the enforcement initiated by the creditor; this is a matter which should be solved only after the seized debtor made the payment to the creditor and in a procedural framework that would not involve him.

Another novelty may be found in Art.1448 para.(2) NCC, inspired by Art.1531 of the QCC, according to which the jointly liable debtor who, due to a deed of the creditor, is deprived of a security interest or a right that he could have capitalized by subrogation is discharged of the debt up to the value of such security interests or rights.

The provisions from the next articles of the NCC refer to the effects of set-off, debt relief, confusion of rights and waiver of solidarity. In principle, the occurrence of these events extinguishes the receivable for the part incumbent to the debtor who finds himself in one of these situations; thus, the basic idea of the CC regulation is kept in relation to the confusion and waiver of joint liability.

II. Secondary Effects in the Relations between the Creditor and the Jointly Liable Debtors

[Art.1454-1455] A novelty provided at Art.1455 is the regulation of the effects of judgments which may be issued in a trial between the creditor and one or more jointly liable debtors. Thus, as per para.(1), the judgment issued against one of the jointly liable co-debtors does not have a *res judicata* authority towards the other co-debtors, and, according to para.(2), the judgment issued in favor of one of the jointly liable co-debtors is also to the benefit of the others, except for the case when it relied on a cause which could be invoked only by the respective co-debtor.

Art.1460 of the NCC brings another novelty, i.e. that the obligation of a jointly liable debtor is divided *de jure* between his heirs, except for the case when such obligation is indivisible.

3. Effects of Solidarity in the Relationships between the Debtors

[Art.1456-1460] A new important regulation from this section of the NCC is Art.1458 NCC, which sets that, in the case of the recourse filed by the jointly liable debtor who made the payment, the seized debtor may plead against the plaintiff all common means of defense that the latter did not file against the creditor. In addition, it may file against the plaintiff all means of defense which are personal to him, but not those which are purely personal to another co-debtor.

(iii). Chapter III “Alternative and Optional Obligations”

(a) Section 1 “Alternative Obligations”

[Art.1461-1467] This section of the NCC corresponds, in general, to the provisions of Art.1026-1033 CC, which it resumes, in an amended form, without bringing any substantive amendments. In drafting the NCC texts, the appropriate regulations from the QCC have also been taken into account.

(b) Section 2 “Optional Obligations”

[Art.1468] This article does not bring any substantive amendments to the current regulations on this matter.

1.6.(e). Title V “Performance of Obligations”

(i). Chapter I “Payment”

(a) Section 1 “General Provisions”

[Art.1469–1471] The regulations concerning the payment are generally similar to those from the current CC. The obligation is extinguished by payment when the underlying performance is willingly performed. Payment consists in the delivery of an amount of money or, as the case may be, in fulfilling any other performance which represents the object of the obligation. If payment envisages the fulfillment of a natural obligation, restitution of the performance cannot be allowed. However, we note that in the NCC, as in the current CC, the concept of natural obligation is not defined.

(b) Section 2 “Subjects of the Payment”

[Art.1472–1479] The payment rules provided by the current CC are maintained by NCC. Nevertheless, Art.1473 NCC provides that the debtor who fulfilled the owed performance can no longer request restitution on the ground that it was incapable on the fulfillment date. The solution is different from the one provided by the current CC, which stipulates that the payment, in order to be valid, must be made by an owner capable to dispose of the item that is subject-matter of the payment made.

(c) Section 3 “Payment Conditions”

[Art.1480–1498] NCC contains new provisions on the so-called “obligations of means” (in French, “*obligation de moyens*”) and “obligations of result” (in French, “*obligation de résultat*”). Under Art.1481 NCC, in the case of an obligation of result, the debtor is bound to to achieve a certain

result which he has promised for the creditor. In case of obligations of means, the debtor must use all necessary means to achieve the promised result. To determine whether an obligation is one of result or one of means, the way the obligation is worded in the contract shall be particularly taken into account, as well as the existence and nature of the performance to be fulfilled in exchange, as well as other elements of the contract, *i.e.* the level of risk that the achievement of a result involves and the influence that the other party has on the fulfillment of the obligation.

If the asset which must make the object of the payment was lost, destroyed or withdrawn from the civil circuit, but not as a result of the debtor's fault, the latter must assign to the creditor all indemnification-related rights or legal actions that he holds in relation to the respective asset – Art.1484 NCC.

As regards the capitalization of interests, Art.1489 para.(2) NCC provides that interests may accrue to the outstanding interest rates only when the law or the contract, within the limits allowed by the law, so provides, or, absent such provisions, when the court requires it. In this last case, interest accrues only as of the date of the filed legal action.

Another novelty is Art.1491 NCC, with the side heading “payment made with the asset of another”. When, in performing his obligation, the debtor delivers an asset which does not belong to him or of which he cannot dispose, he cannot request the creditor to restitute the delivered asset unless he undertakes to fulfill the owed performance by delivering another asset of which he may dispose of. However, the good-faith creditor may return the received asset and request, if applicable, indemnification to cover any caused loss.

Traditionally, under the current CC, it was provided that, as a general rule, payment is made at the debtor's domicile, and not at the creditor's. NCC partially changes this state of facts. According to Art.1494 para.(1) let.a) NCC, monetary obligations must be fulfilled at the domicile or, as the case may be, the headquarters of the creditor on the payment date. In the case of individually determined assets, the rule of the CC is maintained, in the sense that payment shall be made at the place where the asset was found when the contract was executed. In the other cases, according to NCC, payment is to be made at the debtor's domicile. Both under NCC and under the current CC, the aforementioned norms are applicable if the parties do not provide otherwise.

A last significant novelty on the place of payment is that, provided that it notifies the creditor in prior, the debtor may request that the obligation be performed at his domicile or, as the case may be, his headquarters if the change of the creditor's domicile makes the obligation substantially more onerous – Art.1494 para.(2) NCC. However, it is not clear whether the mere issuance of the notification by the debtor is enough to change the place of payment, because the code uses the expression “the debtor may request” (which would involve the existence of a reaction of approval or disapproval from the creditor).

An even more complicated issue is raised from the perspective of international private law. The law of the place where payment is to be made governs the manner of performing the obligations, according to Art.80 para.(2) of Law No.105/1992, and the creditor must comply with this law in taking the measures which are meant, according to the contract, to prevent or remedy the non-fulfillment or to limit its damaging effects. NCC provides, on the settlement of the conflict of laws, that “the law of the

State where payment is to be made determines the currency in which such payment is to be made, except for the case when, in their international private law relationships arising from the contract, the parties agreed on another payment currency”.

Moreover, Art.12 para.(2) of Rome I Regulation (an act which has direct application and priority in EU law-related relationships) provides that “In relation to the manner of fulfillment and the steps to be taken in the event of defective fulfillment, regard shall be had to the law of the country in which fulfillment takes place”.

By consequence, the place of fulfillment where the obligation is performed may be determinant for finding the law applicable to the fulfillment method and the measures to be taken in case of defective fulfillment, and therefore it would be preferable to avoid the uncertainty created by the possibility offered to the debtor of unilaterally changing the place of payment. Note should be made that the source of inspiration used to draft this text, *i.e.* Art.6.1.6 of the Unidroit Principles, provides a different solution, namely that the party changing its headquarters after the execution of the agreement must incur the additional expenses for the performance that such change might cause.

If payment is made by bank transfer, the new legislation provides that the payment date is the one when the creditor’s account is credited with the amount of money making the object of payment— Art.1497 of the NCC.

(d) Section 4 “Proof of Payment”

[Art.1499–1505] Currently, one of the most important rules as regards the issue of the proof of payment is that the payment, being considered to be a legal deed, is subject to the rules of evidence applicable to this matter. Thus, among others, for considerations amounting to more than RON 250, the proof of payment can be provided only by an instrument – Art.1169 of the CC. Within the structure of the NCPC, the matter of evidence is dealt with in principle, which provides under Art.303 para.(2) that “no legal deed can be proven with witnesses, if the value of its object amounts to more than RON 250. Nonetheless, testimonial evidence of a legal act can be provided against an entrepreneur or another professional, irrespective of the value thereof, if it was made by same in exercising his professional activity, except if the special law requires documentary evidence”. Art.1499 of the NCC departs however from this rule, establishing that the proof of payment can be given by any means of evidence, unless otherwise provided by law.

The paying debtor is entitled to obtain a discharge receipt; a new provision as compared to the current CC is stipulated under Art.1500 para.(3) of the NCC, entitling the debtor to suspend payment if the creditor unreasonably refuses to issue said receipt.

A very useful provision is stipulated under Art.1502 of the NCC according to which, in case of periodic performances, if a receipt is issued for one performance, the payment is presumed to be made for the previously outstanding considerations.

In case of payment by bank transfer, the payment order signed by the debtor and approved by the paying bank indicates that the payment was made until proven otherwise, and the debtor is entitled to request the creditor’s bank, at any moment, a written confirmation of the payment made by bank transfer, which represents the proof of payment – Art.1504 of the NCC.

(e) Section 5 “Imputation of Payment”

[Art.1506–1509] The fundamental rule in this respect– i.e. that the imputation of payment is made pursuant to the parties’ agreement – remains unchanged (Art.1506 para.(1) of the NCC).

A new aspect regarding the imputation of payment may be found in Art.1509 para.(1) let.b) of the NCC, introducing the rule pursuant to which, if the imputation of payment is not made by any of the parties, prior to setting-off the most burdensome debt, the debtor’s unsecured debts or the debts for which the creditor holds the fewest security interests shall be deemed as extinguished first.

(f) Section 6 “Formal Notice to the Creditor”

[Art.1510–1515] The systematic regulation of the creditor's formal notice in NCC is a novelty as compared to the current CC. Pursuant to Art.1510 NCC, the creditor may be submitted a formal notice, when he unreasonably refuses a payment offered accordingly, or when he refuses to fulfill the preparatory acts without which the debtor cannot fulfill his obligation. The effects of the formal notice are the following: the creditor takes over the risk of the impossibility to fulfill the obligation, the debtor keeps the civil fruits collected after the formal notice is submitted, the creditor’s obligation to repair the damages caused by the delay and to cover the expenses for the preservation of the owed asset is born. As regards keeping the civil fruits, note should be made (and ultimately it should be necessary to reflect upon the necessity to amend Art.1510) that it is not specified whether the debtor shall incur the expenses related to acquiring the collected civil fruits, such as provided under Art.1645 para.(1) of the NCC in relation to the restitution of performances.

It is not clear why, as compared to the related text regarding the formal notice to the debtor (Art.1521 and Art.1523 of the NCC), Art.1510 of the NCC does not refer to the possibility of stipulating a *de jure* formal notice to the creditor by a contractual clause to this effect.

We should also like to point out the procedural difference between the formal notice to the creditor and the formal notice to the debtor. While the latter may be performed by written notice from the creditor or by a legal action, it appears that the only manner in which the creditor may be formally notified is, pursuant to Art.1514 and 1515 of the NCC, the procedure of the offer to pay and deposit of the payment, as regulated under the Civil Procedure Code.

Pursuant to Art.1514 para.(1) NCC, if the nature of the asset renders the deposit impossible, if the asset is perishable or the storage thereof requires maintenance costs or considerable expenditures, the debtor may initiate the public sale of the asset and may deposit the price, notifying the creditor in advance, and obtaining the approval of the court to this effect. Pursuant to para.(2) of the same article, if the asset is listed on the stock exchange or other regulated market, if it has a current price or its value is too small as compared to the expenses related to a public sale, the court may approve the sale of the asset without notifying the creditor. Such references to the necessity of obtaining the court’s authorization raise questions about the debtor’s possibility to actually make use of the means of public sale of the asset. As presumed, this asset is either “perishable”, or its storage is costly, so the court’s obligation to follow a verification procedure shall affect the practical possibility of selling the asset. Equally, in case of para.(2), quoted above, the question arises as to what is the use for the debtor that the court approve the sale “without notice to the creditor” (anyhow, if the court approval procedure requires the summoning of the parties, the creditor shall be “notified”).

Finally, one last new element is provided under Art.1515 of the NCC, stipulating that the debtor is entitled to withdraw the deposited asset, as long as the creditor did not declare that he accepts the deposit or if it was not validated by the court. The receivable arises again, with all its related accessories, once the asset is withdrawn.

(ii). Chapter II “Enforcement of Obligations”

(a) Section 1 “General Provisions”

[Art.1516–1520] This section generally systematizes the rules applicable to the performance of obligations. The main provisions are in principle those included in Art.1516 of the NCC pursuant to which the creditor is entitled to the full, exact and timely fulfillment of the obligation.

Pursuant to para.(2) under Art.1516 NCC, when the debtor fails to fulfill his obligation without grounds, and has been formally notified, the creditor may, at his discretion and without losing his right to receive indemnifications, if such are due to him: (1.) request, or as the case may be, proceed to the enforcement of the obligation; (2.) if it is a contractual obligation, obtain the rescission or termination of the contract, or as the case may be, the reduction of his own related obligation; (3.) use, when necessary, any other means provided by the law to satisfy his right.

In compliance with Art.1517, a party cannot invoke the other party’s failure to fulfill its obligations if the non-performance is caused by its own action or omission.

Art.1519 of the NCC has the potential to be of great importance in practice, since it provides that, if the parties do not agree otherwise, the debtor is liable for the damages caused by the fault of the person that the debtor uses in the fulfillment of his contractual obligations. Art.8.107 of PECL, invoked as a source of inspiration for the NCC text, does not provide any requirement regarding the fault of the person used by the debtor (“A party who entrusts performance of the contract to another person remains responsible for performance”). The text may be applied in relation to almost all legal deeds where the debtor is a professional. The condition of the fault of the third party used by the debtor complicates unnecessarily the creditor’s legal status. Actually, the conditions of liability should be met only by the debtor.

(b) Section 2 “Formal Notice to the Debtor”

[Art.1521–1526] Unlike the current CC, this section provides a systematic regulation on the formal notice to the debtor. It may operate *de jure* or upon the creditor's request. Usually, the formal notice can be submitted by written notification, served by the court bailiff or by other means ensuring the acknowledgement of receipt, or in a statement of claim.

An important novelty is that, by the notification, the debtor must be granted a deadline for the fulfillment of his obligation, by taking into account the nature of the obligation and the circumstances; if the notification does not stipulate such deadline, the debtor may fulfill the obligation within a reasonable term, calculated as of the date when the notification is served – Art.1522 para.(3) of the NCC.

Pursuant to Art.1522 para.(4) NCC, “until the expiry of the term provided under para.(3), the creditor may suspend the fulfillment of his own obligation, he may claim damages, but he cannot exercise the other rights provided under Art.1516, if not otherwise provided by the law. However, the creditor may exercise these rights if the debtor notifies him that he shall not fulfill his obligations within the established term, or if upon the expiry of such term, the obligation was not fulfilled”. According to Art.1516 para.(1), the creditor is entitled to the full, exact and timely fulfillment of the obligation, and under Art.1516 para.(2), when the debtor unreasonably fails to carry out his obligation, the creditor may, at his own discretion, and without losing the right to claim damages, if such are due: (1.) request, or as the case may be, proceed to the enforcement of the obligation; (2.) if it is a contractual obligation, obtain the rescission or termination of the contract, or, as the case may be, the reduction of his own related obligation; (3.) use, when necessary, any other means provided by the law to satisfy his right.

Note should be made that the new regulation is more lenient towards the debtor as compared to the current CC. If the parties to a contract do not provide that the protraction of the obligations’ fulfillment causes the issuance of the formal notice, and the debtor is not in one of the situations set out restrictively under Art.1523 para.(2) let.a)-e) of the NCC, in practical terms, the creditor shall have to grant the debtor a new fulfillment term, after the expiry of which he shall be able to exercise his rights.

As regards the right to claim compensation, the solution is different: pursuant to Art.1522 para.(4), quoted above, the creditor may claim compensation even for the period prior to the expiry of the fulfillment term that he must grant under the formal notice. The question is raised as to whether the damages may be calculated as of the due date of the obligation, or as of the date of the formal notice (according to the traditional solution of principle). In relation to financial obligations, Art.1535 para.(1) of the NCC refers to the due date (although Art.1523 para.(2) let.d) establishes the rule that the debtor is *de jure* in delay as regards his financial obligations only if the obligation was undertaken in an enterprise’s course of business); however, as regards the obligation to do something, Art.1536 of the NCC provides that damages are calculated as of the date when the debtor has been formally notified.

The situation described above also has practical effects on the commencement of the extinctive prescription period. According to Art.2524 NCC, if the law does not provide otherwise, in the case of the contractual obligations to give or to do something, such period starts running as of the date when the obligation becomes outstanding and the debtor thus had to perform it. Therefore, the date when the extinctive prescription period commences (which is the date when the obligations becomes outstanding) is different from the date when the right to initiate legal proceedings for the enforcement of the obligation may be exercised (which is the term set in the formal notice or a reasonable term for the fulfillment of the obligation).

As regards risk-bearing, Art.1525 of the NCC, which is inspired by Art.1600 para.(2) of the QCC, sets out that the debtor is liable as of the date when he has been formally notified, for any loss caused by a fortuitous case, except for the situation where the fortuitous case exempts the debtor from the fulfillment of the obligation. Nonetheless, pursuant to Art.1274 para.(1) of the NCC, if not provided otherwise, as long as the asset is not handed over, contractual risk remains with the debtor having the

obligation to hand over, even if the ownership was transferred to the acquirer. On the other hand, as regards the restitution of performances, Art.1641 para.(2) of the NCC provides that the person bound to make the restitution shall be discharged of such obligation if the asset disappears without him being at fault (drawing no distinction as to the application of rules on the formal notice). We deem that a better correlation of these texts should be considered.

(c) Section 3 “Specific Performance”

[Art.1527–1529] The regulations on specific performance are not substantially different from those contained in the current CC. Pursuant to Art.1527 of the NCC, the creditor may always request that the debtor be forced to make specific performance of his obligation, except if such specific performance is impossible. The fact that the right to receive specific performance includes, as the case may be, the right to repair or replace an asset, as well as any other means to remedy a defective performance, is a novelty in the civil code.

A more significant new element is provided under Art.1528 of the NCC, on the performance of the obligation to do something. In case of non-performance of such obligation, the creditor shall be able, at the debtor’s expense, to perform himself such obligation or cause it to be performed. This prerogative may be exercised only if the debtor has been formally notified *de jure* or the creditor informs the debtor to this effect simultaneously with or subsequently to the formal notice. Currently, Art.1077 of the CC provides that in case of failure to observe the obligations to do something, the creditor may be authorized by the court to perform said obligations, on the debtor’s account.

As regards the obligations not to do something, Art.1529 of the NCC mainly resumes the solution under Art.1076 of the CC, providing the creditor with the possibility to request the court approval to eliminate or remove what the debtor did in breach of his obligation, at the debtor’s expense, within the limits established by judgment.

(d) Section 4 “Performance by equivalence”

1. General Provisions

[Art.1530] The general principles established by the current CC in relation to performance by equivalence are mainly resumed by NCC.

2. Damage

I. Assessment of Damage

[Art.1531-1537] The relevant texts, although they resume to a great extent the CC principles, also contain new solutions, which shall be briefly discussed below. First of all, it is expressly established that when establishing the damage, the reduction of expenses or the avoidance of certain losses by the creditor further to the non-performance of the obligation shall be taken into account as well; this could reduce the quantum of the damages that the creditor could benefit from – Art.1531 para.(2) of the NCC. The NCC Draft IL proposes, however, the amendment of para.(2), promoting the idea that “the damage includes the actual loss incurred by the creditor, and the benefit of which he has been deprived. When determining the extent of the damage, the expenses reasonably incurred by the creditor to avoid or mitigate the damage shall also be taken into account” [emphasis

added]. Furthermore, the creditor's right to obtain the repair of non-patrimonial damage is also provided expressly– Art.1531 para.(3) of the NCC.

Art.1532 para.(2) of the NCC provides for the possibility that the debtor be ordered to repair the damage caused by losing an opportunity, by reference to the probability for said opportunity to occur. According to the NCC Draft IL, this text is to be revised as follows: “the damage that would be caused by losing the opportunity to gain an advantage may be repaired pro rata with the probability to obtain the advantage, taking into account the circumstances and the actual situation of the creditor” [emphasis added].

If the damage is attributable to the creditor, i.e. if same, by his unlawful action or omission, contributed to the occurrence of the damage, the damages owed by the debtor shall be diminished accordingly. This provision is applicable when the damage is partially caused by an event the risk of which was undertaken by the creditor. The debtor does not owe indemnification for the damage that the creditor could have avoided by exercising minimum care. – Art.1534 of the NCC. The NCC Draft IL proposes the elimination of the final thesis under Art.1534 para.(2), expressly allowing the creditor to recover the expenses reasonably incurred in limiting the damage.

Art.1535 of the NCC brings a series of clarifications, details and developments regarding liquidated damages, respectively interest, in relation to the delay in performing pecuniary obligations. The creditor does not have to prove that he incurred damage in order to be entitled to the interest agreed by the parties or established by law. An interesting novelty as compared to the current regulations is the possibility granted to the creditor of obtaining damages for any “additional” damage incurred further to the non-performance of the obligation. Pursuant to the NCC Draft IL, this text shall be modified (for the better, in our opinion, since the proposed text seems much more clear) in the sense that “if no default interest larger than the legal interest is due, the creditor is entitled, in addition to the legal interest, to damages for the full repair of the incurred damage”.

In his turn, the debtor shall not be able to prove that the damage incurred by the creditor further to the payment delay would actually be smaller than the legal or contractual interest.

A relatively simple measure for protecting the creditor is established under Art.1536 of the NCC.. Thus, in case of other obligations than those related to the payment of an amount of money, the delayed performance always entitles to damages equal to the legal interest, accruing as of the date when the debtor has been formally notified on the financial equivalent of the obligation, except for the case when a penalty clause is stipulated, or the creditor can prove that a larger damage than the one caused by the delay in performing the obligation has occurred.

Art.1537 confirms the rule which, in principle, is also valid under the CC, *i.e.* that the proof of the non-performance of the obligation does not exempt the creditor from the proof of damage, except if provided otherwise by law or by the parties' agreement.

II. The Penalty Clause and the Advance Payment

[Art.1538-1546] As regards the penalty clause, NCC approaches the problem of amending the penalty, when the latter does not correspond to the actual value of the damage. Therefore, the penalty may be reduced when the main obligation was partially performed, and such performance was beneficial for the creditor, or when the penalty is obviously excessive as to the damage foreseeable by the parties upon the execution of the contract. In this latter case, the penalty thus diminished must remain higher than the main debt. These rules are of a mandatory nature, and any provision to the contrary shall be deemed unwritten.

When the main obligation is indivisible, without being a solidary (joint) obligation, and its non-performance results from the act of a co-debtor, the penalty may either be fully requested to the debtor who failed to perform, or to the other co-debtors, as per their shares. They shall keep the right of recourse against the debtor which caused the non-performance – Art.1542 of the NCC.

However, when the main obligation is divisible, the penalty shall also be divisible, and shall be borne alone by the co-debtor which is in default and only for the share he is liable for. If the penalty clause was stipulated to prevent a partial payment, and one of the co-debtors prevented the full performance of the obligation, the full penalty may be requested to the latter, and the other jointly liable debtors may be requested only an amount *pro rata* to their share of the debt, without limiting their recourse against the debtor in default – Art.1543 of the NCC.

The current regulation on advance payment, which is expressly provided only in matters concerning the sale-purchase contract, is now extended to all contractual obligations by Art.1544-1546, which add certain distinctions between confirmatory and punitive advance payment. In this latter case, should the contract expressly provide the right of a party or both parties to terminate the contract, the party terminating the contract shall lose the advance payment or, as the case may be, shall have to refund double the amount he received.

3. Debtor's Guilt

[Art.1547-1548] The final texts of the section on performance by equivalence address the issue of the debtor's fault. First, Art.1547 provides that the debtor is bound to remedy the losses caused by his negligence. We deem that the text, in its current wording, is the result of a lawmaker's slip. Art.16 para.(1) of the NCC already provides that, if not otherwise provided by law, the person shall be liable only for the acts committed intentionally or by negligence, and thus the (probably unintended) effect of Art.1547 of the NCC would be exclusion of liability for intentional acts. To this end, the NCC Draft IL proposes the amendment of Art.1547, referring both to negligence and to intent.

Notwithstanding this amendment, the wording of Art.1547 remains unreliable in the light of the existence of certain wide categories of liabilities of an objective nature. Also, the amendment proposed by the NCC Draft IL at Art.1530 ("The creditor shall be entitled to damages for the reparation of the injury caused by the debtor, and which comes as a direct and necessary consequence of the culpable failure to perform his obligation" – emphasis added) is not only useless (as it reiterates the provisions of Art.1547 in other words), but also incorrect (for ignoring the existence of the objective liability).

(e) Section 5 “Rescission, Termination and Reduction of Considerations”

[Art.1549–1554] Regulations on rescission of the contract (in French, “*résolution du contrat*”) and termination of the contract (in French, “*résiliation du contrat*”) reveal major differences as compared to the current regulation of the CC. Thus, although, in principle, Art.1550 of the NCC continues to provide that rescission may be ordered by the court upon request, or may be unilaterally declared by the entitled party, the fact is that it follows from the provisions of Art.1552 of the NCC (analyzed a few paragraphs below) that, in principle, that rescission will have a unilateral nature, while judicial rescission will lack any interest in being promoted.

Unlike in the CC, rescission may also occur with respect to a part of the contract, but only when the performance thereof is divisible – Art.1549 para.(2). Moreover, the NCC Draft IL envisages that, in the case of the plurilateral contract, one party’s failure to fulfill the obligation shall not entail the contract rescission as the other parties are concerned, except for the case when the unfulfilled performance should have been deemed essential, according to the circumstances.

The NCC Draft IL proposes the supplementation of Art.1550 with a new para.(2), providing that “should the term set for the performance of a party be stipulated as essential to the benefit of the other party, the latter shall have to notify the other party within 3 days, unless otherwise provided by an arrangement or customary practice, if he wants fulfillment subsequent to the expiry of the term. In the absence of such notice, the contract shall be deemed de jure rescinded even if rescission has not been expressly provided”.

Another novelty of the NCC is the reduction of performances, regulated under Art.1551, which shall operate, if applicable as per the circumstances, in the case of less important non-fulfillments, in which case the creditor shall not be entitled to rescission. Nevertheless, he shall be entitled to the *pro rata* reduction of his performance if, as per the circumstances, such reduction is possible. If the reduction of performances is not possible, the creditor shall be entitled to damages only.

There are certain general problems concerning the institution of reducing performances, which we shall briefly address below. First, the utility and the practical operation of such new institution versus the creditor’s possibility to obtain damages (compensation) is not clear. The right to obtain damages is currently given a solid legal regulation, improved by the NCC, and a consistent case law application, which clarified both the principles underlying the award of damages and the particular methods of calculating the same. By contrast, the possibility of reducing considerations will be a genuine *terra incognita* for the parties concerned and the courts. The “*pro rata*” reduction formula promoted by the lawmaker can predictably operate only in the case when the parties’ performances and those owed to them in return are relatively particularized and assessable (for instance, a particular quantity of merchandise is sold for a certain price, but only a partial quantity is delivered). When the parties’ obligations are of a complex nature (for instance, in the case of construction companies, for large projects) the application of the rule of *pro rata* reduction of performance is practically impossible or, in any way, subject to arbitrary opinions.

Secondly, the NCC maintains a certain confusion with respect to the relation between reduction of performances and award of damages. Although Art.1551 (and Art.1516 of the NCC) considers the

two institutions as different (and probably, cumulative) means of reparation for the breach of certain contractual obligations, there is, nevertheless, a set of texts addressing the “reduction of obligations ... by the amount of damages” to which the party would be entitled (see, for instance, Art.1222 and Art.1257 of the NCC, both texts referring to the matter of the vices of consent).

Thirdly, although Art.1551 of the NCC takes into account a reduction of performances only in the case of an insignificant non-fulfillment of certain contractual obligations, NCC provides a set of applications of such institution in extremely various circumstances. For instance, reduction of performances may be granted only in cases such as the existence of certain vices of consent (lesion, duress and fraud (*dolus*)), partial destruction of the asset contemplated under the lease agreement (Art.1818 para.(2) of the NCC), loss of part of the crop in land lease agreements (Art.1841 NCC), etc.

Fourthly, one may inquire as to whether the restitution of performances should not be thought as a mechanism operating exclusively on an *ex nunc* basis, *i.e.* for the future only, while for the past only damages should be awarded. Should the current solution of the NCC be maintained (where the reduction of performances may be cumulated with the award of damages accruing from the time when the contract is breached until the remedy of such breach), the creditor may find himself benefiting at the same time both from damages (which should, nevertheless, be awarded in an amount which would reinstate him to the status when the contract would not have been breached), and from a reduction of his performance. In other words, it may create a situation in which the creditor would be in a better economic position if the contract was breached than if the contract was performed, which is unacceptable.

Based on Art.1551 para.(1), second and third theses, in the case of contracts with successive performance, the creditor shall be entitled to termination, even if the non-fulfillment is insignificant, but repetitive. Any provision to the contrary shall be deemed unwritten.

According to Art.1552 of the NCC, contract rescission or termination may occur by notifying the debtor in writing when the parties agreed to proceed so (which corresponds to the current situation to a great extent, inasmuch as there is a termination clause intended to operate based on this mechanism), when the debtor has been formally notified *de jure* or when he failed to fulfill the obligation within the term set in the formal notice. These two hypotheses of enforcing rescission by merely notifying the debtor in writing are daring novelties as compared to the regulation of the current CC according to which, in such cases, in the absence of the parties’ agreement, rescission shall be judicial.

The rescission or termination statement shall have to be made within the statute of limitation period provided for by the law for the underlying legal operation. In the cases provided by law, the rescission or termination statement shall be registered with the land book or, as the case may be, other public registries, to be made enforceable against third parties.

One final issue concerning the effects of Art.1552 para.(1) of the NCC concerns the relationship between the three cases of applying the unilateral rescission. Considering that the last two hypotheses of the wording are related to the formal notification of the debtor, and the first hypothesis makes no reference to such condition, it appears that, if the parties agree to the possibility of a unilateral rescission, the formal notice would no longer be a requirement for rescission.

The NCC Draft IL proposes the supplementation of Art.1552 by a new para.(4), which would provide that “the rescission statement shall be irrevocable as of its service upon the debtor, or expiry of the term provided under para.(1), as the case may be”.

Should the parties agree to it, a termination clause shall generate effects if it expressly provides the obligations whose non-fulfillment entails the *de jure* rescission or termination of the contract. In the case above, rescission or termination is subordinated to the formal notification of the debtor, unless agreed that the debtor is deemed to have been formally notified further to the mere non-fulfillment. The formal notice shall have no effects unless it expressly indicates the conditions in which the termination clause operates – Art.1553 of the NCC. Nevertheless, we deem useful a clarification of the relation between the provisions of Art.1553 of the NCC and those of the first thesis of Art.1552 para.(1), which refer to the issuance of a unilateral rescission statement when the parties provided for such possibility. In the current regulation, from the systematic interpretation of the two legal texts, it seems to follow that the effect of the termination clause, unlike the unilateral rescission, would be automatically generated by mere non-fulfillment. Nevertheless, the current doctrine is of the general opinion that the right to rescind the contract is a potestative right of the creditor, which has the right to opt for a specific performance of the contract.

Last, but not least, we notice differences in terms of terminology between the concepts used under Art.1552 and Art.1553 of the NCC. Currently, the concept of termination clause includes several types of clauses, all of them having the effect of a conventional organization of the contract rescission as a result of the non-fulfillment of the obligations arising out of the contract. Nevertheless, in the light of the NCC, it appears that the concept of termination clause, as regulated under Art.1553 of the NCC, differs from the unilateral rescission clause, which is addressed by Art.1552 NCC.

Rescission has no effects on the clauses referring to the settlement of disputes or on clauses intended to have effects even in case of rescission – Art.1554 para.(2) of the NCC. We have already specified in our comments on Art.1322 of the NCC that there is a quite large set of contractual clauses likely to have effects even after the termination of the contract and, thus, the solution under Art.1554 para.(2) should be nuanced.

(f) Section 6 “Justified Causes for Non-fulfillment of Contractual Obligations”

[Art.1555-1557] Art.1556 of the NCC includes, as a novelty, an express regulation of the non-fulfillment exception. When obligations arising out of a synallagmatic contract are due, and one of the parties fail to fulfill or offer to fulfill the obligation, the other party may, to a proper extent, refuse to perform his own obligation, unless the law, parties’ will or customary practices require that the other party perform first. Fulfillment may not be refused if, due to circumstances and in consideration of the low significance of the non-performed consideration, such refusal would be contrary to good faith.

According to Art.1557 of the NCC, when the impossibility to perform is absolute and permanent and concerns a major contractual obligation, the contract shall be *de jure* terminated, without other formalities being required, upon the very occurrence of the fortuitous event. If the impossibility to

perform is not absolute and permanent, the creditor may suspend the fulfillment of his obligations or may terminate the contract. In this last case, the rules on rescission shall apply accordingly.

This article should be read and construed together with Art.1634 of the NCC, having as side heading, “Fortuitous Impossibility to Perform”. In fact, the two legal texts were placed together in the initial draft of the NCC. Art.1634 of the NCC includes a set of provisions which, as stated, shall apply in strict connection with Art.1557 of the NCC. Thus, according to such text:

“(1) The debtor shall be exempted when such obligation can no longer be fulfilled, due to a cause of Force Majeure, fortuitous event or other similar events, occurring prior to the service of the formal notice on the debtor.

(2) Moreover, the debtor shall also be exempted, even if a formal notice was served on him, when the creditor could not have benefited anyway from the fulfillment of the obligations due to the circumstances provided under para.(1), unless the debtor undertook the risk of their occurrence.

(3) When impossibility to perform is temporary, the fulfillment of the obligation shall be suspended for a reasonable term, calculated in consideration of the duration and consequences of the event which caused the impossibility to fulfill the obligation.

(4) The burden of producing proof on the impossibility to fulfill the obligation shall be incumbent upon the debtor.

(5) The debtor shall have to notify the creditor on the existence of the event causing the impossibility to fulfill his obligations. Should no notice reach the creditor within a reasonable term as of the time when the debtor became aware or should have been aware of the impossibility to fulfill the obligation, the debtor shall be liable for the injury caused on the creditor thereby.

(6) If the obligation concerns res genera, the debtor may not claim the fortuitous impossibility to fulfill such obligation”.

First, we notice a difference in terms of terminology, which, in our opinion, should be corrected, between Art.1557, Art.1321 and Art.1634: while Art.1321 and Art.1634 use “fortuitous impossibility to fulfill the obligation”, Art.1557 uses “impossibility to fulfill the obligation”.

A second issue is raised in connection with the situation when the debtor has already been formally notified when the fortuitous event occurs. According to Art.1634 para.(1) of the NCC, subject to the distinctions under para.(2), the debtor shall be exempted only if he had not already been formally notified. Nevertheless, according to Art.1557 para.(1) of the NCC, even in this case, the contract were to be terminated *ipso jure*, which could deprive the creditor of certain advantageous security interests or contractual clauses. The provision at Art.1322 according to which, upon termination of contract, the parties may be under the obligation to repair the losses caused and, as the case may be, to restitute the performances received for entering the contract is not, in our opinion, a sufficiently adequate solution for protecting the creditor, who will probably prefer the contract to remain effective.

Furthermore, where the fortuitous impossibility to fulfill the obligations is temporary, Art.1634 para.(3) NCC, addressing the issue from the debtor’s perspective, provides that the fulfillment of the obligation is to be suspended for a reasonable period of time. Conversely, Art.1557 para.(2), this time

envisaging the creditor's perspective, states that the latter may, in his turn, suspend the fulfillment of his own obligations and, what is more, he may even rescind the contract, whereupon the rules of rescission shall apply accordingly.

(iii). Chapter III “Means of Protecting the Rights of the Creditor”

(a) Section 1 “Conservatory Measures”

[Art.1558–1559] The provisions under this section set out the conservatory and pre-judgment measures that creditors may resort to in order to protect the rights available to them. Conservatory measures are the preservation of evidence, fulfillment of registration and notification formalities on behalf of the debtor, exercise of the derivative action or taking pre-judgment measures.

The main pre-judgment measures consist in pre-judgment seizure and garnishment, which are regulated by the Civil Procedure Code.

(b) Section 2 “Derivative Action”

[Art.1560-1561] This section builds upon the provisions of Art.974 of the CC. We note that, in addition to the aforementioned text, an express requirement was introduced in the sense that the receivable of the creditor bringing the derivative action must be uncontested and payable; however it is not stipulated that the receivable should also have a precisely determined quantum.

(c) Section 3 “Revocation Action”

[Art.1562-1565] The section dedicated to the revocation action (*actio pauliana*) expands the provisions of the current Art.975 of the CC. Whereas the current legal doctrine upholds that *actio pauliana* may be brought against those acts undertaken by the debtor which increase or generate his state of insolvency, according to Art.1562 para.(2) NCC, such acts are provided only for exemplification purposes; as a consequence, the creditor could, in theory, prove that he also incurs another type of injury further to the debtor's acts the revocation of which he is seeking.

When bringing an *actio pauliana*, the holder thereof must have an uncontested receivable. Mention is not made whether the said receivable should also have a precisely determined quantum and be payable, as the current doctrine upholds.

Art.1565 NCC lays down in a much clearer manner than the current CC the effects resulting from the admission of *actio pauliana*. Thus, the challenged deed shall be found unenforceable against the creditor who brought the action as well as against all the other creditors who, having right of action, intervened in the case. They shall be entitled to payment from the price of the seized asset, with due observance of the preference arrangements existing among them. The third party acquirer may keep the asset by paying to the creditor who benefits from the admission of the action a sum of money equal to the loss the latter incurred by concluding the contract. Otherwise, the asset shall be blocked by the court judgment admitting the revocation action until the enforcement of the receivable on which the action relied comes to an end, the provisions governing registration and the effects of the inalienability clause applying accordingly.

The period of prescription for bringing the *actio pauliana* is set to one year from the date when the creditor became aware or should have become aware of the loss ensuing from the challenged deed – Art.1564 NCC.

1.6.(f). Title VI “Transfer and Transformation of Obligations”

(i). Chapter I “Assignment of Receivables”

(a) Section 1 “Assignment of Receivables in General”

[Art.1566–1586] In contrast to the current CC, which regiments the assignment of receivables under sale-related matters, the authors of the NCC elected to include this section as part of the general regulation of obligations. The rules governing the sale (or, as the case may be, those that govern any legal operation within the frame of which the parties agree to perform the consideration consisting in the transfer of a receivable) shall apply in addition to the norms on the assignment of receivables, where it is carried out against a consideration; where the assignment of receivable is carried out free of consideration, the provisions of this section shall be accordingly supplemented by those governing the donation contract – Art.1567 NCC.

Art.1568 NCC clarifies the scope of the rights being transferred at the same time with the assignment of receivables. Thus, the assignee is to acquire all of the assignor’s rights in connection with the assigned receivable, as well as the security right and all the other accessories of the assigned receivable. Where the receivable is secured by pledge, the assignor may not relinquish possession of the pledged asset to the assignee, without the pledgor’s consent. If the pledgor opposes, the pledged asset shall remain with the assignor.

Other elements of novelty in this matter are laid down in Art.1569 NCC. Thus, according to para.(2), those receivables that are declared non-transferrable by law may not be assigned. The receivable the object of which is a performance other than the payment of money may be assigned only if such assignment does not render the obligation substantially more onerous.

Art.1570 NCC contains some new regulations with regard to the event where the assignor and the assignee consent on the assignment despite there being an inalienability clause in place that was agreed with the debtor. Such an assignment shall have effects with respect to the debtor, but only provided that: “a) the debtor has consented to the assignment; b) the interdiction is not expressly stipulated in the deed ascertaining the receivable, and the assignee did not know, nor did he have the obligation to know of the existence of the interdiction at the time of the assignment; c) the assignment contemplates a receivable which consists in a sum of money”. There are some aspects which we find unclear in connection with this text. Firstly, one could not determine with precision whether the above-cited listing is to be read as an alternative or a cumulative one. Even though the wording appears to be pointing to the conclusion that the elements in the listing are cumulative, this seems to be disproved by the premise provided at let.a), *i.e.* the debtor’s consent to the assignment; such consent would normally stand as an amendment of the inalienability clause, such that no further fulfillment of any condition would be required for the assignment to be enforceable against the debtor.

Other new provisions that we find noteworthy in this section of the NCC include clarifications on the effects that the assignment has before the assigned debtor is notified thereof. In such a case, if the

debtor continues to make payments to the assignor, the assignee shall be entitled to all that the latter received from the debtor. Moreover, the assignee shall be able to perform conservatory acts in connection with the assigned right – Art.1575 NCC.

According to Art.1576 NCC, the assignment of receivable further conveys to the assignee, from the date of the assignment, the right to collect the interest rates and other revenues related to the receivable, which fell due but have not been collected yet by the assignor.

Another new provision, which calls for caution on the part of both the debtor and the creditor when agreeing on the assignment of a receivable, establishes, as previously stated, the debtor's right to be indemnified by the assignor and assignee for any additional expenditure occasioned by the receivable – Art.1577 NCC.

According to Art.1578 para.(1) NCC, even if the assignment becomes effective between the assignor and assignee as of the conclusion of the assignment contract (Art.1572 para.(2) NCC and Art.1573 para.(1) NCC), the debtor shall become bound to make payment to the assignee from the moment he: a) accepts the assignment by way of an deed bearing a certified date; or b) receives a written notification of the assignment, either in hard copy or in electronic format, which indicates the identity of the assignee, reasonably identifies the assigned receivable and, where the assignment is partial, indicates the extent of the assignment and instructs the debtor to make payment to the assignee.

The above-quoted text generates multiple problems of interpretation and implementation. First of all, the intention to simplify the formality through which the debtor accepts the assignment (for which the Art.1193 of the current CC requires an authentic deed) is manifest. Secondly, it is however unclear why it is requested in this context that the debtor's acceptance of the assignment be made by a deed bearing a "certified date". The issue concerning the certified date of a private deed is dealt with at Art.272 of the NCPC. The rule on this matter is that "the date of private deeds shall not become enforceable against other persons than the ones having drafted them, before the date they become certified, in any of the methods provided by law" [emphasis added]. Consequently, the date of the private deed originating from the debtor shall be enforceable against him as of the date of such deed, regardless when the certified date is obtained. On the other hand, the distinction drawn at let.b), between the notification in hard copy or electronic format is, in our view, inconsequential. According to Art.266 of the NCPC the medium containing the private deed is immaterial as far as the qualification of its probative value is concerned.

Lastly, it is not to be disregarded that the current regulation in the CC on ensuring the enforceability of the assignment against third parties follows a slightly different logic from the one in NCC. Thus, in the CC, the relevant concept of third parties includes the assigned debtor, the subsequent and successive assignees of the same receivable, as well as the assignor's creditors. When it comes to ensuring the enforceability of the assignment of receivable, NCC no longer deals with third parties in global terms, laying down instead distinct provisions to govern the situation of the assigned debtor (Art.1578), his surety (Art.1581) and of the successive assignees (Art.1583), while the case of the assignor's creditors seem to have been overlooked, although they have a justified and extremely strong interest in maintaining the assignor's assets and liabilities intact.

As for successive assignments, Art.1583 provides that when the assignor has assigned the same receivable to multiple assignees, the debtor shall be discharged by making payment in consideration of the first assignment notified to him or that which he first accepted by way of an instrument with a certified date, while, as regards the relationships between the successive assignees of the same receivable, precedence is granted to the first assignee to have registered the assignment with the archive, irrespective of the assignment date or of the date when it was notified to the debtor.

We consider that the solutions offered by NCC on this subject call for revision so that better use is made of the current CC regulations. Thus, one would find it natural that the relationships between debtors (and, where the case, his surety) and the assignee or assignor should not require the acceptance of the assignment to be conditional upon any formality; similarly, the written notification of the assignment may be provided in a less formalistic fashion.

Nevertheless, when discussing the enforceability against other types of third parties in such matters (namely the subsequent and successive assignees of the same receivable and the assignor's creditors) it is imperative, so as to prevent or mitigate the effects of fraud, that enforceability be ensured through instruments bearing a certified date, whether these represent the debtor's acceptance or a notification made to him.

We also note an error of wording contained at Art.1578 para.(1) let.b) NCC, which is corrected by the NCC Draft IL. Thus, according to the initial text of the NCC, the written notification on the assignment “indicates the identity of the assignee, reasonably identifies the assigned receivable and, where the assignment is partial, indicates the extent of the assignment and instructs the debtor to make payment to the assignee”. According to the NCC Draft IL it “indicates the identity of the assignee, reasonably identifies the assigned receivable and instructs the debtor to make payment to the assignee; where the assignment is partial, the extent of the assignment should must also be mentioned” [emphasis added].

Art.1595 lays down a set of rules that govern the obligation of warranty. Similarly with the current civil legislation, the assignor shall bear, in principle, the liability for the existence of the receivable at the date of the assignment, at least in what regards the assignment made against a consideration; as for the assignment made free of consideration, the assignor shall not be held to warrant even the existence of the receivable. With regard to the warranty of solvency of the assigned debtor, as before, it exists only if it expressly stipulated.

According to Art.1595 para.(3) NCC, the liability for the solvency of the assigned debtor shall not exceed the price of the assignment plus - a new element as compared to Art.1397 of the CC - the assignee's expenses occasioned by the assignment.

Moreover, according to Art.1595 para.(4) NCC, if, at the time of the assignment, the assignor was aware of the assigned debtor's state of insolvency, the legal provisions laying down the liability borne by the bad faith seller for the hidden defects of the sold assets shall apply accordingly.

Finally, under the side heading “Assignor's Liability for Eviction” Art.1596 provides that, in all cases, the assignor shall be liable if, through his own deed, occurring alone or concurrently with that of another person, the assignee fails to acquire the receivable as part of his assets or fails to render it

enforceable against third parties. In such a case, the extent of the assignor's liability shall be determined in accordance with Art.1585 para.(4) NCC (cited above).

- (b) Section 2 “Assignment of a Receivable Attested by a Registered Security, a Security to Order or a Bearer Security”

[Art.1587–1592] This section regulates rules which, although present in various special enactments, were not part of the current CC. In principle, receivables incorporated in registered securities that are either at order or bearer securities are not subject to assignment upon the parties' mere consent and the regime of the aforementioned instruments and of other types of securities is to be established by a special law.

The transfer of registered securities shall be recorded on the security in question as well as in the registers assigned to their recordkeeping. In order to be transferred, securities at order need to be endorsed, in line with the provisions applicable to bills of exchange. The receivable which is incorporated in a bearer security shall be transferred upon the physical remittance of such security. Any stipulation to the contrary shall be deemed unwritten – Art.1588 NCC.

(ii). Chapter II “Subrogation”

[Art.1593–1598] The texts which deal with subrogation are mostly consistent with the solution currently existing at Art.1106–1109 of the CC. The novelty that we note consists in the provisions at Art.1595 para.(2) NCC, which, in regard of the subrogation made with the debtor's consent, no longer require for the loan deed entered into by the debtor in order to pay his debt to be concluded in authentic form; the new regulations solely require that the deed concerned bear a certified date.

(iii). Chapter III “Debt Takeover”

- (a) Section 1 “General Provisions”

[Art.1599–1604] The provisions that govern the takeover of the debt are new in the Romanian legislation. At present, when the takeover of a debt is envisaged by a person that was not a party to the initial legal relationship, the parties concerned usually resort to delegation or novation by substitution of the debtor (which equates to a perfect delegation), which is not always convenient, as novation does not entail the transfer of the initial obligation, but rather the creation of a new one.

We note that, although not explicitly established by NCC, the institution of delegation is mentioned under Art.2643 thereof, which stipulates that in the matter of rules on private international law, “delegation and novation shall be governed by the law applicable to the obligation forming their object”.

The obligation to pay a sum of money, or to perform another consideration may be transferred by the debtor to another person: a) either by a contract concluded between the initial debtor and the new debtor, provided that the creditor gives his consent thereto; b) or based on a contract concluded between the creditor and the new debtor, whereby the latter shall undertake the obligation – Art.1599 NCC.

Pursuant to the debt takeover contract, the new debtor shall replace the former one, who shall be discharged, unless otherwise provided. However, if the new debtor is insolvent, the initial debtor shall not be discharged following the debt takeover, if it is proven that the new debtor was not solvent upon debt takeover and the creditor consented to the takeover without being aware of such circumstance – Art.1600 and Art.1601 NCC.

As regards the means of defense available to the debtor, Art.1603 NCC provides that, unless the contract stipulates otherwise, the new debtor may oppose to the creditor all the means of defense that could have been opposed by the initial debtor, except for set-off or any other personal defense of such initial debtor. The new debtor may not oppose to the creditor means of defense grounded on the legal relationship between him and the initial debtor, even if this relationship was the reason which determined the new debtor to perform the takeover.

The creditor may use against the new debtor all his rights in connection to the debt which was taken over. The debt takeover has no effect on the existence of the security interests securing the receivable, except when they cannot be separated from the debtor's person. Nevertheless, the obligation of the surety or of the third party establishing a security for the fulfillment of the receivable shall be extinguished if these persons failed to agree on the takeover – Art.1602 NCC.

Finally, upon cancellation of the takeover contract, the initial debtor's obligation shall be reestablished, along with all its accessories, provided that the third parties acquired the rights in good faith. Furthermore, the creditor may claim damages from the person who took over the debt, unless the latter proves that he cannot be held liable for the cancellation of the contract and the damage incurred by the creditor – Art.1604 NCC.

(b) Section 2 “Debt Takeover under a Contract Concluded with the Debtor”

[Art.1605-1608] As mentioned above, the debt takeover based on a contract concluded with the debtor shall require the creditor's consent thereto – Art.1605 NCC. Insofar as the creditor failed to express his consent thereto, under Art.1606 para.(3) NCC, the parties to the debt takeover contract may amend or unilaterally terminate such contract. In case the creditor fails to express his point of view thereon, the debt takeover shall be considered rejected – Art.1607 para.(3) NCC.

Under Art.1608 NCC, as long as the creditor did not agree with, or rejected the takeover, the person who took over the debt must discharge the debtor by performing the obligation in due time. The creditor shall not acquire an own right against the person who must discharge the debtor, unless evidence is submitted as to the contracting parties' will to do otherwise.

(iv). Chapter IV “Novation”

[Art.1609-1614] The provisions of this chapter take over the substance of the regulation currently provided at Art.1128–1137 of the CC, except for the provisions on delegation, which are currently contained in Art.1132–1133 of the CC.

1.6.(g). Title VII “Extinguishment of Obligations”

(i). Chapter I “General Provisions”

[Art.1615] This chapter is meant as an introduction, listing the methods to extinguish the obligation, namely payment, set-off, confusion of rights, debt relief, fortuitous impossibility of fulfillment, as well as other methods expressly provided by the law.

(ii). Chapter II “Set-off”

[Art.1616–1623] NCC’s provisions on set-off are generally compliant with those included at Art.1143–1153 of the CC, the differences being insignificant.

(iii). Chapter III “Confusion of Rights”

[Art.1624–1628] The new regulations on the confusion of rights are generally similar to those provided by Art.1154–1155 of the CC. As a novelty, we note the provision of Art.1627 NCC which states that, in case of confusion of rights, the rights previously acquired by third parties in relation to the receivable thus extinguished shall not be breached thereby.

Furthermore, Art.1625 NCC provides for a special case of confusion of rights which does not extinguish the main obligation, but merely the related security interests. Thus, the mortgage shall be extinguished when the qualities of mortgagee and owner of the mortgaged asset are united in the same person. However, it shall be reestablished if the creditor is evicted for reasons beyond his control.

(iv). Chapter IV “Debt Relief”

[Art.1629–1633] NCC’s provisions on debt relief are a modernized version of the substance of the provisions currently included in Art.1138–1142 CC. The doctrine traditionally considered debt relief a gratuitous legal deed, based on the creditor’s intent to make a gift to his debtor. However, in accordance to Art.1630 para.(2) NCC, inspired by Art.1688 QCC, debt relief shall be given for a good and valuable consideration or free of consideration, according to the type of deed by which it is made.

The IL Draft provides for the amendment of Art.1633 of the NCC in a manner which complies, in general, with the solutions currently established by Art.1141 and 1142 CC.

(v). Chapter V “Fortuitous Impossibility to Fulfill the Obligation”

[Art.1634] The provisions on fortuitous impossibility to fulfill the obligation are partially consistent with Art.1156 CC. As a novelty, it is established that the debtor has the obligation to notify the creditor on the occurrence of the event causing the fortuitous impossibility to fulfill the obligations; if such notice is not sent within a reasonable term after the debtor became aware or should have been aware of such impossibility of fulfillment, the debtor shall be held liable for the damaged thus cause to the creditor.

Another novelty is the express provision applying the *genera non pereunt* principle, according to which, if the object of the obligation consists of *res genera*, the debtor may not claim the fortuitous impossibility of fulfillment. Even if such rule is basically correct as regards the possibility to claim

contract cessation, mention should be made that even in such situation, the debtor should still benefit from the stay of his obligations throughout the duration of the effects caused by the fortuitous event.

A provision with even more obscure effects is Art.1634 para.(2) NCC, according to which “the debtor shall also be discharged, even if he has formally notified, when the creditor could not have benefited anyway from the fulfillment of the obligation because of the circumstances provided by para.(1) (i.e. force majeure, fortuitous event or other such similar events – our note), except when the debtor took over the risk of such occurrences”. The text is similar to Art.1156 para.(2) of the CC stating that “even when the debtor has been formally notified, unless he took over the fortuitous events, the obligation shall be extinguished, if the asset might have perished even while being in the creditor’s possession, in case it had been given to the latter”. However, the wording of Art.1634 para.(2) basically annihilates the rule provided under para.(1), namely the idea that the debtor shall remain liable for the fulfillment of his obligation when the fortuitous event occurs after being formally notified (because the hypothesis provided at para.(2), *i.e.* that the creditor could not benefit from the fulfillment of the obligation, shall always materialize).

1.6.(h). Title VIII “Restitution of Performances”

(i). Chapter I “General Provisions”

[Art.1635–1638] The provisions regarding the restitution of performances are systematized for the first time as compared to the current CC. Under Art.1635 para.(1) NCC, performances shall be restituted whenever a person is bound by law to return the assets received without having the right to receive them or by mistake or under a legal deed subsequently cancelled with retroactive effect or providing for obligations that have become impossible to perform due to a force majeure event, a fortuitous event or another similar event.

Nevertheless, the wording of the aforementioned text is designed to lead to confusion. First, the scope of Art.1635 para.(1) is the “restitution of performances”. Under Art.1164 NCC, a “performance” is the materialized content of an obligation and may appear in a wide range of forms. However, although Art.1635 para.(1) generally refers to performances, in fact it solely regulates the restitution of the assets received without having the right to do so, or by mistake, or under a legal deed cancelled for one of the aforementioned causes. Or, the concept of “performance” (even if it may include the delivery of an asset) is different from the concept of “asset” (which is defined, in its turn, by Art.535 of the NCC, as consisting of tangible or intangible assets which make the object of a patrimonial right).

Although the restitution of performances is assimilated once again, under Art.1639 of the NCC, to the restitution of the received asset, Art.1640 para.(1) of the NCC contradicts this premise, providing, *inter alia*, that the idea of restitution “[also] concerns the provision of certain services already provided” [our note, emphasis added]. We would also like to point out that the provisions of QCC, used as a source of inspiration for NCC, do not expressly refer to the restitution of services provided, but merely to the restitution of assets.

In accordance with Art.1635 para.(2) of the NCC, the performance based on a future cause that has not been fulfilled shall also be subject to restitution, unless the provider thereof made it without being

aware that the fulfillment thereof was impossible, or he knowingly hindered the realization thereof, as the case may be.

Art.1637 para.(1) provides that the restitution shall be in kind (i.e. specific) or by equivalence . This provision uselessly and simplistically anticipates the provisions of Art.1639 NCC (“the restitution of performances shall be made in kind, by restituting the received asset”) and of Art.1640 (“if restitution cannot be made in kind [...] a restitution by equivalence shall be made”).

Another new provision is contained in Art.1638 NCC, which states that the performance received or performed based on an illegal or immoral cause shall always be subject to restitution. The quoted provision overturns the applicability to relevant future causes of the principle *nemo auditur propriam turpitudinem allegans*, as an exception to the principle that the nullity has retroactive effects, which has so far has been broadly acknowledged by the legal doctrine and case law. In practical terms, Art.1638 NCC, in the quoted form, shall allow any of the parties who fulfilled a performance to request the restitution thereof, relying, *inter alia*, on the illegal or immoral nature of the cause of the obligation on which the respective performance relied.

(ii). Chapter II “Methods of Restitution”

[Art.1639-1647] Art.1639 and Art.1640 NCC establish the essential principle in this matter, namely that restitution of performances shall be made in kind, while restitution by equivalence shall be made when the former is not possible or when there is a “serious hindrance” thereto.

Art.1640 NCC also states that the restitution obligation regarding the provision of certain services already performed shall also be fulfilled by equivalence. Considering that the contracts on the provision of services are usually involving successive performances, we maintain our comments on Art.1254 para.(2) NCC, where we estimated that the solution to extend the retroactive effects of nullity to successive performance contracts should be reviewed. In fact, even if NCC’s solution were maintained *tale quale*, we can’t help but notice that there are categories of performances that are not covered by Art.1640, by reference to Art.1635 NCC, such as, for instance, the performances consisting in the transfer of a right to use an asset.

The following provisions of the NCC contain further novelties as compared to the current CC. According to Art.1641 NCC, “(1) If the asset was lost entirely or was transferred, and the person who has the obligation to perform the restitution is in good faith, or received the asset based on a deed which was cancelled with retroactive effect, without his fault, he must retribute the value of the asset upon delivery, loss or transfer thereof, whichever is smaller. (2) The person who has the obligation to perform the restitution shall be discharged if the asset is lost without his fault. Under these circumstances, he is bound to assign to the creditor the insurance indemnity that he received or the right to receive them, as the case may be. (3) The debtor of the obligation to retribute shall only pay the equivalent value for the use of the asset when such use was the main object of the performance or when the asset was, by its nature, susceptible to rapid deterioration”.

A systematic interpretation of para.(1) and (2) indicates that the good-faith debtor shall benefit from the advantages stipulated at para.(1), namely shall be allowed to pay the smallest value of the restituted asset from among three alternative values provided at para.(1), even when the asset was lost due to its negligence or willful misconduct. The question is whether it is fair that the debtor who

contributed to the loss of the asset which had to be restituted (or even destroyed such asset) should still benefit from the favorable provisions of Art.1641 para.(1).

Under Art.1642 of the NCC, with the side heading “Obligations of the Bad Faith Debtor”, “(1) If the person who has the obligation to perform the restitution has destroyed or transferred in bad faith the received asset, or if the contract was cancelled with retroactive effect due to his fault, he shall have the obligation to reconstitute the value of the asset upon receipt, loss or transfer thereof, whichever is higher. (2) The debtor of the obligation to reconstitute shall have the obligation to pay the equivalent of the asset that was not lost due to his fault, unless it is proven that the asset would have been lost even if it had been held by the creditor of the obligation to reconstitute. (3) The debtor of the obligation to reconstitute is also obligated to pay the creditor the equivalent value for the use of the asset”.

We consider that there are some inconsistencies as to the scope of this text, arising from the ambiguity of the concept of “good-faith debtor”, as opposed to the meaning of the concept of “bad-faith debtor”. The handiest explanation for the meaning of these concepts would be that good or bad faith is to be assessed by reference to the debtor’s participation or at least knowledge of the ground on which the restitution obligation relies. The problem with Art.1642 para.(1) NCC referring to the standing of the bad-faith debtor is that it seems to suggest something else: the persons falling under the scope of this text may also be those who “destroyed” the asset received or transferred such asset in bad faith, in which case the debtors who were deemed to be in good faith according to the aforementioned criterion might also become bad-faith debtors.

The right to the repayment of expenses made with the asset subject to restitution shall be governed by the rules on the accession of the good-faith holder or, if the person who has the obligation to perform the restitution is in bad faith or if the restitution cause is attributable to him, by the rules on the accession of the bad-faith holder – Art.1644 of the NCC.

As regards the restitution of fruits, Art.1645 of the NCC basically maintains the solution given by the current civil legislation, i.e. that the civil fruits picked up by the good-faith holder shall be kept by the same. It also includes an express provision at para.(1), according to which the good-faith debtor shall bear the expenses made for the production of the said civil fruits. The status of the bad-faith debtor is distinct: he must reconstitute not only the civil fruits obtained, but also the civil fruits he “might have obtained” (which, in our opinion is not specific enough; we would like to point out that this solution is not only new to the current CC, but also by reference to Art.170 QCC, which served as an inspiration for these NCC texts). The restitution of civil fruits shall be made after “setting-off” the expenses incurred with their production. We consider that the use of the concept of “set-off” in this context should be rethought, because, in this case, we are not dealing with an actual set-off in the sense of Art.1616-1623 NCC, but rather with a decrease in the value of the civil fruits which must be restituted.

Art.1646 para.(1) is significant for the situation with the obligation to reconstitute performances is mutual, the restitution expenses being distributed among parties, pro rata with the amount of the performances restituted. In case the debtor of the restitution obligation is in bad faith, or he caused the cancellation of the contract by “his own fault”, all restitution expenses shall be incurred by the aforementioned – Art.1646 para.(2) of the NCC. This final text is based on the idea that only one of the parties may be in bad faith. We would like to point out that the relating text of Art.1705 of QCC is slightly distinct,

in that it refers to the situation in which “one of the parties is in bad faith” (which renders the text inapplicable for the case when both parties to the legal relationship containing the restitution obligation are in bad faith).

(iii). Chapter III “Effects of Restitution towards Third Parties”

[Art.1648–1649] These texts bring certain nuances to the application of the *resoluto iure dantis resolvitor ius accipientis* principle. Thus, under Art.1648 of the NCC, even if, in principle, the third party acquirer of the asset subject to restitution shall also be bound by the restitution obligation, he has however the possibility to invoke the legal norms applicable in the matter of the land book or the effect of good-faith acquirement of movable assets or, as the case may be, the rules on acquisitive prescription. The rules shall also apply *mutatis mutandis* when real rights have been established over the asset subject to restitution.

According to Art.1649 of the NCC, besides the aforementioned acts of disposition, all other legal acts made to the benefit of a good-faith third party shall be enforceable against the true owner or the person entitled to restitution, with the exception of successive performance contracts which, subject to the compliance with the registration formalities required by the law, shall continue to have effects for the duration stipulated by the parties, which shall not exceed one year from the cancellation of the title of the person establishing them.

1.6.(i). Title IX “Various special contracts”

Book V of NCC deals with the special contracts under a separate title, Title IX-“Various Special Contracts”, which includes 20 such contracts⁸⁷.

Each special contract is assigned a distinct chapter, while the contracts meant as variations on the same type of contract are provided in sub-divisions of the same chapter (for example, the compulsory deposit, the hotel deposit, the conventional seizure are regulated as sub-divisions of the deposit contract; the commission contract, the consignment contract and the dispatch contract are analyzed as sub-divisions of the mandate contract without representation).

⁸⁷ Title IX of Book V of NCC has the following structure: Chapter I – The Sale Contract (Art.1650-1762), Chapter II – The Exchange Contract (Art.1763-1765), Chapter III – The Supply Contract (Art.1766-1771), Chapter IV – The Repurchase Contract (Art.1772-1776), Chapter V – The Lease Contract (Art.1777-1850), Chapter VI – The Contractor Agreement (Art.1851-1880), Chapter VII – The Articles of Association (Art.1881-1954), Chapter VIII – The Transport Contract (Art.1955-2008), Chapter IX – The Mandate Contract (Art.2009-2071), Chapter X – The Agency Contract (Art.2072-2095), Chapter XI – The Intermediation Contract (Art.2096-2102), Chapter XII – The Consignment Contract (Art.2103-2143), Chapter XIII – The Loan Contract (Art.2144-2170), Chapter XIV – The Current Account Contract (Art.2171-2183), Chapter XV – The Current Bank Account and Other Banking Contracts (Art.2184-2198), Chapter XVI – The Insurance Contract (Art.2199-2241), Chapter XVII – The Life Annuity Contract (Art.2242-2253), Chapter XVIII – The Support Contract (Art.2254-2263), Chapter XIX – Gambling and Betting (Art.2264-2266), Chapter XX – The Settlement Agreement (Art.2267-2278).

(i). Chapter I “The Sale Contract”

[Impact] As a general comment, from the perspective of the new provisions on sale, the novelties that have been brought as compared to the essential principles of CC are not substantial in nature. Due to the purely theoretical nature of the amendments, we do not identify any significant institutional, staffing or finance/budget impact of these norms in the implementation of NCC.

We note, however, that the new regulation tends to discard or at least mitigate the effects of the consensualism principle (i), codifies well-established doctrinal ideas or case law solutions, amongst which the most important appears to be the court’s possibility to issue judgments in lieu of the culpable promisors’ consent and, thus, perfecting the sale contract (ii), solves doctrinal and case law disputes on certain sale topics, for example establishing that the sale of another’s asset is valid (iii) and it expressly regulates the preemption right (iv). We also note that there are a few novelties which may have an impact on the civil procedure (v).

(a) Discarding the principle of consensualism.

The new definition of sale brings a conceptual approach which is significantly different from CC. If, under the former code, the “sale is perfect (...) as soon as the parties have agreed (...)” - Art.1295 CC and the ownership transfer is governed, in principle, by the rule of consensualism, NCC seems to derogate from this rule and to accept that the ownership transfer may be regarded as a future obligation of the seller. In our opinion, such nuance is in line with the modern developments on this type of contract. The principle of consensualism regarding the sale is subjected to numerous exceptions (sale of future assets, sale of class assets, various solemn sale contracts, etc.). Moreover, the practice regarding the transfer of ownership upon the agreement of the parties lost ground by reference to the transfer subjected to certain formalities or modalities. We deem that these are solid reasons to account for this change of perspective and which explain why the “consensual” label was cast off from the sale contract (for other details, see the comments under Art.1650 NCC).

(b) The court’s judgment, as a substitute of the sale contract in case either party breaches the promissory agreement or even when a unilateral promise is breached.

The right to request the court to issue judgments in lieu of sale contracts in other fields than the legal circulation of lands (when a promisor refuses to comply with his obligation under the promissory agreement) is a codification of an already existing and relatively unitary practice. Nevertheless, given the new express legal provisions of Art.1699 NCC (encompassing also unilateral promises), we do not exclude an increase in the number of disputes generated by the refusal to comply with the unilateral/bilateral sale or purchase promises. It is impossible to estimate how significant such increase will be, especially given that such actions are time-barred within 6 months.

(c) The sale of another’s asset, possible *de jure*, difficult to apply in practice.

As a novelty, according to NCC the sale of another’s asset is, in principle, a valid contract. The texts confirming this truth may, however, raise controversies. According to Art.1683 para.(3), the ownership is transferred *de jure* to the purchaser when the seller acquires the asset or the sale contract is ratified by the owner. In practice, the impact of such legal provision may consist in serious blockings and difficulties. It is hard to make a “*de jure*” transfer of the ownership over the respective

asset to the purchaser precisely at the time when it is “acquired by the seller” (or, respectively, when the sale is ratified by the current owner). This simultaneity is, in fact, a fiction which may encounter insurmountable difficulties, especially when the sale is not consensual, but solemn or real. By way of example, at T0, A sells to B the land owned by and registered on the name of C. At T1, A becomes the owner of the land, registered on his name, by acquiring it from C. To the question of who the owner is, the authentic contract entered into by C and A, as well as the related formalities are the evidence that A is the owner. Under the said text from NCC, the “*de jure*” owner is B. Another example may come from the very dynamic sector of securities transfer. The examples may continue with other solemn or real contracts.

(d) The preemption right, a flexible idea, but a rigid mechanism.

Although the intention to provide special regulations for the preemption right is commendable, the conditions in which such right may be exercised, as regulated by NCC (Art.1730-1733) may raise controversies, since:

- The prerequisite for concluding a sale contract with a third party (subject to the condition precedent of “non-exercise of the preemption right by the preemptor”) is the first step towards an artificial and rigid mechanism;
- The execution of the sale contract with the preemptor “under the conditions of the contract concluded with the third party” may generate endless debates on what these conditions are, i.e. only those concerning the price or all contractual conditions, including warranties, terms, modalities of the legal deed negotiated with the third party, arbitration clauses, etc;
- If “the seller is liable towards the good-faith third party for the eviction resulting from the exercise of preemption” (Art.1733 para.(1)), then the seller, in order to avoid such liability, must inform the third party on the existence of the preemptor and his right. How feasible would be, under these circumstances, the third party’s involvement in real and serious negotiations which are both time-consuming and costly, and whose completion would, above all, be uncertain?
- If the transmission of an offer to the preemptor is regulated by a special legal provision (Art.1730 para.3) and the rejection of such offer hinders the preemptor from exercising his preemption right, then one may find it hard to perceive the rationale behind such an intricate mechanism regulating the contract concluded with the third party under a condition precedent. From this perspective, we deem that the simpler and more natural solution, identifiable also in the case law, would have been to regulate the preemption right by reference to the serious and firm offer received from a third party and served to the preemptor, followed, in case of refusal, by a transparent procedure for communicating the deeds concluded with the third party.

(e) Consequences on the civil procedure.

The competence for appointing the expert for determining the sale’s price as per Art.1662 para.(2), rests with the chairman of the district court from the place where the contract was executed. This

provisions deviates from NCPC’s intention to relieve the chairman of the court from a part of his workload.⁸⁸ If we refer strictly to the provisions of art.1662, the impact cannot be qualified as significant, considering that such type of cases are quite rare, but we note that NCC provides for other claims as well, which are to be settled by the chairman of the court.

(a) Section 1 “General Provisions”

1. Scope of enforcement

[Art.1650-1651] NCC redefines the concept of sale contract, opting for a simplified title (currently such contract is entitled as “sale-purchase contract”) (Art.1650).

According to NCC, the sale is “the contract whereby the seller transfers or, as the case may be, undertakes to transfer to the purchaser the ownership over an asset in consideration for a price which the purchaser undertakes to pay”.

The new definition of the sale brings a significant conceptual change as compared to CC. We note, however, that such commendable conceptual change may nevertheless entail diverging interpretations. Some of them have been already expressed. For instance, it has already been argued that absorbing the definition of the promissory agreement in the text dedicated exclusively to the definition of the sale contract is not beneficial for the clarity of the institution as such. Indeed, the definition seems to refer to the sale contract as *instrumentum*, also including the concept of sale (“undertakes to transfer”), and not only to sale as *negotium*, which takes place on the date when the ownership is transferred. For these reasons, we do not exclude the occurrence of certain difficulties in interpretation in relation to the time when the contract is formed or when the ownership is transferred.

Inspired by the doctrine, Art.1650 para.(2) mentions that other rights may also form the object of a sale, in addition to the ownership right (for example, rights over receivables), as well as the dismemberments of the ownership right.

Art.1651 provides that the rules governing the sale are applicable to the seller’s and transferor’s obligations under any other contract having as effect the transfer of a right, if no other special or general rules are provided.

2. Who Can Purchase or Sell

[Art.1653-1656] As regards the incapacity to purchase litigious rights, directly or by intermediaries,⁸⁹ NCC extends the interdiction to purchase – which currently applies only to magistrates and lawyers (Art.1609 CC) – to other professional categories involved in the areas of justice, *i.e.*, court clerks, executors, notaries public, legal advisors and insolvency practitioners (Art.1653 para.(1)). Para.(2) of Art.1653 provides for the exceptions to this rule. The text also defines

⁸⁸ The Draft IL intends to amend this article, by replacing the expression “president of the district court” with “president of the competent court”. As long as the application for the appointment of an expert is not pecuniary in nature, the proposal from the Draft IL does not seem to bring any fundamental changes: the “competent court” remains the district court.

⁸⁹ It seems that NCC took on the doctrinal opinion according to which the interdiction does not operate in a sale by tender, this type of sale being expressly included only among the incapacities provided by Art.1654. For the avoidance of any controversy, this exception should have been expressly regulated.

the concept of litigious right (Art.1653 para.(3)).⁹⁰ The applicable sanction is absolute nullity, as in the current regulation.

Other incapacities to purchase, directly or by intermediaries, are regulated by Art.1654. The interdiction also covers the purchase by public tender, which so far has not been expressly regulated. The new provisions maintain the current interdiction to purchase for the attorneys-in-fact (Art.1608 CC), but exclude from the application of this interdiction, under certain circumstances, the contract with oneself and the double representation (which form the object of Art.1304 NCC) (Art.1654 para.(1) let.a)).⁹¹ The tutor's interdiction to purchase is also extended to the parents, the curator and the provisional administrator (Art.1654 para.(1) let.b)). Para.(1) implements a new incapacity to purchase for the public servants, syndic judges, insolvency practitioners, executors, as well as other similar categories of persons, who could influence the conditions of a sale in which they have been involved or that has as object the assets administered by them or whose administration they supervise. This legal solution is superior to the current provisions (referring only to the public servants intermediating the sale), because it makes the interdiction conditional on the actual powers of the respective professional to influence the conditions of the sale.⁹² The sanction applicable for the interdictions provided at Art.1654 para.(1) let.a) and b) is the relative nullity, similarly to the sanction acknowledged by the doctrine for attorneys-in-fact and tutors. As regards the situation under Art.1654 para.(1) let.c), it was deemed that a public interest is protected, and therefore the absolute nullity of the sale has been provided.

As an absolute novelty in the field of sale, NCC regulates the incapacities to sell in consideration of the persons involved in the transaction. Art.1655 para.(1) provides that the persons provided at Art.1654 para.(1) cannot sell their own assets for a price consisting in an amount of money resulting from operating or selling the asset or patrimony they administer or the administration of which they supervise.⁹³ We understand that the rationale of this text is to avoid the defrauding of the rights related to the administered or supervised patrimony. Nevertheless, in our opinion, this provision lacks clarity, because it fails to identify the potential purchasers indirectly affected by such interdiction (it may be supposed that the acquirer can be no other than the represented person) and to provide how the occurrence of such situation may be assessed, considering that money are fungible assets.

According to Art.1655 para.(2), the provisions of Art.1655 para.(1) shall also apply *mutatis mutandis* to the contracts which, in exchange for a consideration promised by the persons provided at art.1654

⁹⁰ NCC did not take on the doctrinal opinion according to which the right is litigious also when there is a probability that a future and serious challenge could occur (*dubius eventus litis*).

⁹¹ The Draft IL intends to amend this article in the sense that only the exception provided at Art.1304 NCC is excluded, thus the incapacity to purchase being also applicable to the contract with oneself (in fact an application of this incapacity) and to double representation.

⁹² For instance, the previous doctrine showed that the interdiction concerning the public servants does not apply if the assets to be sold have fixed prices, which excludes subjective assessments. We deem that the current wording of Art.1654 para.(1) let.c) is in line with this interpretation.

⁹³ This paragraph has been inspired by art.1709 para.(2) QCC.

para.(1), the other party undertakes to pay a certain amount of money. This text is also questionable, in our opinion, particularly given its ambiguous and incomplete wording.⁹⁴

According to this text, the action for annulment brought by persons prohibited from selling or purchasing is inadmissible (Art.1656).

3. *Object of the Sale*

[Art.1657-1667] With regard to sellable assets, NCC reiterates the rule that any asset may be freely sold, unless prohibited by law, and expressly establishes the conventional inalienability in the matter of sales (by contract or testament) (Art.1657).⁹⁵

By codifying the doctrine, the text establishes the sale of a future asset, the rule being that ownership is transferred upon *completion* of the asset (save for buildings which are subject to the special provisions regarding the land book) (Art.1658 para.(1)).

The concept of “completed asset” is defined at Art.1658 para.(5) according to which the assets is “is deemed completed when it becomes suitable for use in accordance with the purpose envisaged through the conclusion of the contract”. This definition has received criticisms in the recent doctrine in what regards the term employed (the verb “to complete” exclusively refers to the outcome of a human action) and more importantly because it suggests that the future asset exists upon the conclusion of the contract, but is not yet suitable for use. According to this line of reasoning, the fruits, the classical example offered by doctrine when illustrating the concept of future asset, would no longer qualify as such, since it often happens that they do not exist upon the execution of the contract.

If the assets are limited class assets, ownership is transferred upon their individualization (Art.1658 para.(2)). A complete regulation would have also defined the concept of “limited class assets”, so as to also clarify the case where the limited class asset may be deemed a future asset, as opposed to “class assets” which are not included in Art.1658.

If the asset (even one from a limited genre) is partially completed, the purchaser may opt between cancellation of the sale and reduction of the price. The risk of non-completion is, unless otherwise provided for in the contract, borne by the seller, who shall further be bound to pay damages if such non-completion may be attributed to him (Art.1658 para.(3)).

According to Art.1658 para.(4), if the purchaser undertook the risk for the non-completion of the asset or of a limited class, as the case may be, he shall remain bound to pay the price.

⁹⁴ This text may be interpreted in the sense that the interdiction under para.(1) also applies to the services provided by the persons under Art.1654 para.(1) against a price which has the same origin as provided at para.(1); however, the text of para.(2) may be interpreted various other ways, given that expressions such as “the other party” or “amount of money” are not articulated, while the term “promised” is also ambiguous.

⁹⁵ It has been previously upheld by the Romanian doctrine that such inalienability is not permitted unless justified by a serious and legitimate reason and is temporary, otherwise being contrary to the principle of free movement of goods and to the owner’s right of absolute disposition over his property (Art.533 para.(4) NCC), a right which is guaranteed by the Constitution (art. 136). NCC expressly institutes the validity of the inalienability clause Art.627, Art.628.

As to the sale of an individually determined asset which is partially lost upon the moment of sale, (Art.1659 para.(2)), the current solution consisting in the rescission of the contract (Art.1311 CC) was replaced with the annulment, justified by the fact that the grounds for annulment bear on the formation of the contract, alternatively with the current solution of reducing the price.

The text explicitly provides that the sale price consists in a sum of money, a condition which stills remains essential for the sale contract (Art.1660).

Following the reconfirmation at Art.1661 of the principle according to which the sale price may also be determinable, the next article establishes a 6-month legal term for determining the price, unless the parties agree upon another term, and, in the alternative, the appointment by the court of a third party expert if the expert appointed by the parties fails to determine the price within the said term (Art.1662 para.(2)-(3)).

The source of this article is found in Art.61 of the Commercial Code (and Art.1473 para.(2) ICC). The original provision however deals with the case of the third party's refusal of the appointment, rather than his failure to carry out the mandate. The new provision on the other hand, leads to the conclusion that the court may appoint the third party even against one of the parties' will, an arguable solution considering that the person designated to determine the price is the common attorney-in-fact of both parties, acting on the basis of an *intuitu personae* appointment and that its mandate can be revoked only by the parties' mutual consent.

Lastly, if the price is not determined within one year following the conclusion of the contract, the sale shall be null and void, unless the parties have agreed on another way of determining the price (Art.1662 para.(4)).

It has been pointed out in recent doctrine that it does not result from the legal provision what happens if no interested party requests the appointment of the expert within 6 months. One might infer that, in such a case, the right is forfeited, which further means that the contract shall be ineffective, *i.e.* null and void, before the lapse of the 1-year term set out at Art.1662 para.(2).

NCC ratifies an international custom, in the sense that if the price determination is based on the weight of the sold asset, the weight of the package shall not be taken into account (Art.1663).

As a rule, it is provided that the lack of an express price determination does not necessarily mean that the price is not determined, if such can be determined on the basis of external factors. Art.1664 para.(1) institutes the rule that the sale price is sufficiently determined if it can be established according to circumstances. Art.1664 para.(2)-(3) repeat the principles at Art.40 of the Commercial Code, and establish the presumption that the price is to be qualified as determinable if the assets forming the object of the contract are assets which the seller sells on a regular basis, or assets whose price is set by regulated markets.

Enshrines the rule according to which the price must not be fictitious, *i.e.* established without the intention of paying, on sanction of relative nullity (Art.1665 para.(1)). Under the previous doctrine, the contract was in such cases null as a sale, but valid as a donation.

According to Art.1665 para.(2) the sale is also voidable when the price is so disproportionate compared to the value of the asset (giveaway price), "that it is evident that the parties did not wish to

agree on a sale”.⁹⁶ This provision is also departing from the well-established doctrinal interpretation qualifying the contract null as a sale, but valid as a direct, and not disguised, donation.

As for sale expenses, the statutory novelty lies in the regulation of the fee related to the price payment operations (for example, banking fees) incumbent on the purchaser (para.(3)), which applies if the parties do not provide otherwise (Art.1666).

Delivery and dispatch expenses are, similarly with the current regulation, incumbent on the purchaser, however the new provisions oblige the seller to arrange for the dispatch, at the purchaser’s expense (Art.1667).

4. The Option to Purchase and the Promise to Sell

[Art.1668-1670] As a novelty, it establishes the statutory inalienability of the individually determined asset contemplated by an option to purchase until the moment the option is exercised or until the option term lapses, as applicable.⁹⁷ Art.1668 para.(2)-(3) regulates the registration and deregistration in/from the land book of the agreed options on land book registration rights. In our view, this provision is redundant as there is a similar provision of general applicability laid down in relation to land book matters (Art.906 para.(4) NCC).

As regards the promise to sell and the promise to purchase, the already existing provisions found in the special law addressing solely the case of promissory contracts contemplating lands have been generalized,⁹⁸ the court being now allowed to render a judgment in lieu of a contract in connection with assets of any type that are contemplated by bilateral promises to sell or even unilateral promises to sell/purchase (Art.1669 para.(1)-(3)). The right to bring such a court action is barred within 6 months from the date when the contract was set to be concluded (Art.1669 para.(2)). The unilateral promise to purchase an individually determined asset becomes ineffective when its creditor transfers the asset or establishes a real right over it (Art.1669 para.(4)). Art.1670 institutes the rule that the price of the promise to sell shall be considered, unless otherwise provided, as an advance payment.

5. Obligations of the Seller

I. General Provisions

[Art.1671-1672] With regard to the interpretation of sale contract’s clauses, the rule is maintained that contracts are to be interpreted in favor of the purchaser, being however subject to any potential derogating rules laid down by the consumer law, namely consumer contracts and adhesion contracts (Art.1671).

The previous regulation on the main obligations of the seller (Art.1313 CC), *i.e.* the delivery obligation and the warranty obligation, is supplemented by the obligation to transfer the ownership, which we shall address herein below (Art.1672).

⁹⁶ Since the text covers conditions related to the price, as does Art.1660 NCC, we deem that it would have been advisable, for a coherent wording, if these provisions would have been incorporated in Art.1660.

⁹⁷ The option to purchase is defined by Art.1278 NCC.

⁹⁸ Art.5 para.(2) of Title X of Law No.247/2005.

II. Transfer of Ownership or of the Right that is Sold

[Art.1673-1684] The obligation to transfer the ownership or the right that is being sold established by Art.1673 para.(1) upon the seller is a new element in this field. Such novelty is the outcome of the changes in the conceptual approach to the sale and of the departure from the classical consensual view: as a rule, the transfer of ownership is the seller's main obligation (Art.1673) and, as an exception, if there are no contractual or legal norms to the contrary, the automatic effect of the execution of the contract itself (Art.1674). Para.(3) of Art.1673, providing that the rules governing the transfer by sale of the ownership right are applicable *mutatis mutandis* to the transfer by sale of other rights, seems redundant since this aspect flows inherently from the very definition of sale under Art.1650 para.(2).

It institutes the general rule that the sales for which the law requires registration formalities shall be unenforceable against third parties until said formalities are fulfilled (Art.1675).

In line with the new regulation on land book matters, the transfer of ownership over the real estate is subject to the special provisions governing this specific subject-matter (Art.1676). The seller has the obligation to update the land book registrations in connection with the real estate (Art.1677).

NCC establishes, in what regards the transfer of ownership, several varieties of the sale, by reiterating existing norms or codifying doctrinal provisions. With regard to the sale of class assets (Art.1678)⁹⁹ or the bulk sale of assets (Art.1679) the new regulation makes no alterations. The sale by sample or model constitutes however a new element, in such case ownership being transferred upon delivery (Art.1680).

Art.1681, which regulates the sale on trial, introduces a new statutory term for the trial *i.e.* 30 days from the delivery of the asset, unless otherwise provided by customary practice or agreement (para.(2)). A legal presumption for the existence of the sale on trial is instituted in the case where the content of the contract reveals that the assets is to be tried (para.(3)).¹⁰⁰

As to the taste sale, the current regulation stipulating the purchaser's consent is maintained and supplemented with a new expiry term of the purchase agreement, to which effect the provisions of Art.1681 para.(2) shall apply. The contract is deemed executed either upon the expiry of the agreement, or upon the expiry of the term, in the case when the asset is held by the purchaser, who fails to decide during the term (Art.1682).

A novelty as compared to the previous regulation is that under NCC the sale of another person's asset is treated, in principle, as a valid contract, the purchaser being allowed to request rescission of the

⁹⁹ The NCC Draft IL is set to make the stipulation that this text also refers to limited class assets. We reiterate our recommendation that the limited class assets should be given a definition in NCC.

¹⁰⁰ According to Art.7 para.(1) of GO No.130/2000, the consumer is entitled to unilaterally terminate the distance contract within 10 business days. We take the view that, in practice, this type of contract would most often qualify as a sale on trial, with the exception that the contract may be terminated for any reason whatsoever. Therefore the extension (harmonization) of the term under the special regulation to the new 30-day general term laid down by NCC should be considered.

contract and, eventually, damages, in case the true owner does not transfer ownership to the seller or does not ratify the sale or does not otherwise secure the purchaser's ownership, whether directly or indirectly (Art.1683 para.(1),(2),(4)).¹⁰¹ Following the general view expressed by the Italian scholars, the asset must be individually determined.

According to Art.1683 para.(3), ownership passes *de jure* to the purchaser upon the acquisition of the asset by the seller or upon the ratification of the sale contract by the owner. The aforementioned text risks to stir serious controversy and cause difficulties in practice, aspects highlighted in the introductory section of this chapter dedicated to the impact of the regulation of the sale contract.

In what regards the sale by a co-owner of a jointly owned asset, it is established that, in the event of eviction, the purchaser shall have the right to opt between the rescission of the contract and the reduction of the price, proportionally with the acquired share, as well as damages (Art.1683 para.(5)).

According to para.(6) of Art.1683, where the seller fails to acquire ownership or to obtain the true owners' ratification, the amount of the damages is to be determined in accordance with the rules established for eviction (Art.1702, Art.1703 NCC). However, the purchaser cannot claim reimbursement of the expenses related to the independent or voluptuary works if he was aware upon the execution of the contract that the asset was jointly owned and did not belong entirely to the seller.

Art.1684 regulates the sale with the right on the retention of ownership, *i.e.* the sale subject to the condition precedent consisting in the payment of the price. The stipulation of the right on the retention of ownership is enforceable against third parties following the completion of the registration formalities required by law, according to the nature of the asset.

The legal codification of the *pactum reservati domini*, which stirred controversy in the older doctrine that invoked the consensual principle, is a welcomed initiative. However, in what regards the legislative technique, it is unclear why this concept was not regulated in the sub-section of "Sale in Installments and Retention of Ownership" (Art.1755-1757 NCC).

III. Delivery of the Asset

[Art.1685-1694] Art.1685 sets the rule according to which the delivery takes effect by making the sold asset available to the purchaser. Consequently, the general rule retained from the large number of already existing provisions (Art.1314-1334 CC) is the passive delivery, which is of doctrinal inspiration. The extent of the obligation to deliver is regulated in similar terms with the current ones (Art.1686).

With regard to the delivery of an immovable asset, Art.1687 institutes the rule that such implies that the asset is "made available to the purchaser", discarding the current mention on the handover of keys

¹⁰¹ The dominant opinion previously expressed by the doctrine was in favor of the absolute nullity of the sale of another person's asset, influenced in this respect by the Napoleonic Civil Code, not explicitly reiterated by CC. However, the sale of another person's asset was laid down, subsequent to the Napoleonic Code, by the Italian Civil Code of 1882, and reiterated in the Italian Civil Code of 1942 (Art.1478-1480 ICC), the model for NCC. At any rate, this new regulation ends all major doctrinal controversies on this topic.

(Art.1315 CC). The delivery of a movable asset is mainly carried out by way of handover, as in the current regulation (Art.1316 CC), or, as a novelty, through delivery of title (Art.1688).

As to the place of delivery, as compared to CC rules, delivery may also be performed at a location differing from the location of the assets, according to customary practices (Art.1689)¹⁰².

Regarding the state of the sold asset, similarly to the current provisions, the asset shall have to be delivered as it was on the execution date of the contract. The novelty consists in the regulation of the legal regime of (apparent) defects with respect to which the purchaser shall have to inform the seller “without delay” after having verified the state of the asset on takeover, instituting an absolute presumption in the sense that the asset was delivered as it was on the execution of the contract, should no such notice be sent (Art.1690 para.(2), para.(3)).¹⁰³ The regulation transposes Art.70 of the Commercial Code, with certain amendments on the duration of the term.

The NCC Draft IL intends to supplement this article by including only apparent defects in the scope of defects testable upon delivery. The reason for such intervention appears to be the need to draw a clear distinction from the matters of warranty against hidden defects. Nevertheless, such distinction could be drawn even without an express amendment, on the ground of the final paragraph of Art.1690, according to which only the provisions of Art.1707-1714 shall remain applicable with respect to hidden defects.

Art.1691 reiterates and amends Art.71-72 of the Commercial Code seeking to unify the subject matter of the civil sale with that regarding the commercial sale.

Thus, if the parties disagree on the quality of the asset, *i.e.* the purchaser challenges the quality of the asset delivered by the seller, an emergency procedure is regulated for the appointment by the chairman of the court of an expert appraiser to establish the quality of the asset (Art.1691 para.(1)). The same decision may also order that the asset be seized/consigned (Art.1691 para.(2)).

Moreover, according to Art.1691 para.(3), should the keeping of the asset be too burdensome, the court may even order the sale of the asset, on the expense of the owner, and under the conditions established by law.

The legal texts above are unclear on certain matters. On the one hand, they appear not to indicate whether the procedure for notifying the defects is distinct from the one challenging the quality (in other terms, if the referral of the case on inadequate quality to the judge is subsequent to the prior notification of the seller on such topic, similarly to the notification on defects, regulated under Art. 1690 para.(2) and para.(3); in our opinion, we tend to believe that it does not). On the other hand, it is not clear whether the claim filed with the court for the compulsory sale of the asset is included in the

¹⁰² Some specialists have already pointed to the fact that certain references in NCC to customary practices may be ineffective, to the extent the domestic customary practices are not consolidated.

¹⁰³ Art.2530 of NCC, regulating the prescription of the right to file action for liability for apparent defects, sets the time of delivery as the time when the prescription term starts to run. We deem that this term shall start to run only if, subsequent to delivery, the purchaser failed to notify the seller on such defects, according to the procedure provided under Art.1690 of NCC. It should be noted that Art.1530 para.(2) extends the scope of para.(1) to the lack of agreed qualities or to quantitative shortcomings, as well.

same case as the appointment of the expert appraiser and the seizure/consigning of the asset¹⁰⁴ and, if so, which is the order of such claims. From this standpoint, Art.71 of the Commercial Code is drafted in more clear terms, as it regulates the subsidiary or alternative nature of the provision on sale, as compared to the provision on consigning/seizing the assets. The interpretation given to the new texts in court practice shall be most likely similar to the current regulation under the Commercial Code.

As to the time of delivery, Art.1693 NCC keeps the rule of the delivery conditioned by the payment of the price as well as the presumption according to which the parties agreed for the delivery to occur at a later date, if the delivery of the asset may only occur upon the expiry of a term, due to certain circumstances known by the purchaser upon the sale.

Art.1694 maintains the current solution (Art.1323 of CC) regarding the seller's refusal to deliver the asset if the purchaser becomes insolvent or the warranties offered to the seller are decreased, in the case of the obligation to pay the price within a certain term (para.(1)). Nevertheless, as a new rule, if the seller was aware upon the conclusion of the contract of the purchaser's insolvency, the former has to deliver the asset within the respective term if the state of insolvency did not significantly aggravate.

IV. Warranty against Eviction

[Art.1695-1706] As compared to the current solutions and the established Romanian doctrine, NCC brings no major novelties in the matter of the seller's obligation to provide warranty against eviction.

Art.1695,1697 regulate the conditions of the warranty against eviction resulting from the claims of a third party, *i.e.* that they be grounded on a right arising prior to the date of the sale and which was not notified to the purchaser by such date (Art.1695 para.(2)). The warranty is due against the eviction caused by the seller's default, irrespective of the date when it occurred (Art.1695 para.(3)). NCC reiterates the principle according to which the seller may not evict (Art.1696).

As a novelty, NCC expressly regulates the indivisibility of the warranty obligation between debtors (Art.1697).¹⁰⁵

As to the conventional amendment or removal of the warranty, the provisions of Art.1338, Art.1340 CC were restated, without other notable novelties (Art.1698).

The limits of the clause disclaiming liability for eviction keep the solution of Art.1339 of CC, in the sense that the seller cannot circumvent the warranty arising from a personal act, and extend enforceability to the eviction occurring for causes known by the seller upon the sale, but not disclosed to the purchaser (Art.1699).

¹⁰⁴ If the claim on the sale is submitted in the same case, then the "judgment" under Art.1691 para.(1) should be construed as a resolution, as the expedition requirements for the issuance of the judgment appointing the expert appraiser could not be complied with, if the court would have to make a determination in the same judgment on the sale of the asset, as well.

¹⁰⁵ Out of the three elements of the obligation to provide a warranty against eviction, *i.e.* the obligation to do, the obligation not to do and the obligation to give (the amount due as indemnification), the doctrine took the view that the latter would be divisible between the co-owner sellers. The new regulation waived this distinction because it was probably considered that a proper protection of the creditor implicitly requires the indivisibility of the obligation to give.

The current provisions on the rescission of the contract concluded by the purchaser (Art.1341, Art.1347 of CC), price restitution (Art.1342, Art.1343, Art.1344 of CC) and extent of damages to which the purchaser is entitled (Art.1341, Art.1345, Art.1346, Art.1350 of CC) are now regulated in a unitary manner (Art.1700, Art.1701, Art.1702).

Regarding the effects of partial eviction, as a novelty as compared to the current Art.1348 of CC, NCC expressly provides that the purchaser may claim damages accruing in accordance with the principles applicable in the case of total eviction (Art.1703).

As a novelty, the removal of eviction by the purchaser by paying an amount or delivering another asset to the third party evictor, results in the exemption of the seller from the consequences of the warranty, in the first case by the repayment of the amount paid to the purchaser plus the legal interest calculated from the date of payment, and in the second case, by the payment of the value of the given asset, and, as both cases are concerned, by the payment of all related expenses (Art.1704).

Art.1705 para.(1) keeps the current provision (Art.1351 of CC) on the obligation of the purchaser to introduce the seller as a party in the trial, in case the former be sued by a third party evictor, subject to the sanction of losing the right to warranty, should the seller produce evidence attesting that there were sufficient reasons for the claim to be dismissed. Additionally, the same sanction is regulated in case the trial never took place or no judgment was passed because the purchaser acknowledged the right of the third party evictor, except for the case when the purchaser attests that there were no sufficient reasons for obstructing the eviction (Art.1705 para.(2)).¹⁰⁶

By codifying the existing doctrine, Art.1706 NCC establishes the principle according to which the beneficiary of the warranty against eviction shall be any subsequent acquirer of the asset, irrespective whether the acquirement is for valuable consideration or for free.

V. Warranty against Defects of the Sold Asset

[Art.1707-1715] The conditions on the guarantee against hidden defects are regulated by Art.1707 in a relatively similar fashion to the current provisions (Art.1352,1353,1360 of CC). As a novelty, NCC codifies the existing doctrine on the definition of hidden defects, *i.e* such defects which, on the execution date of the contract, cannot be found by a prudent and diligent purchaser without specialized assistance (Art.1707 para.(2)). The NCC Draft IL proposes a replacement of the wording “on the execution date” by “on the delivery date”, which would represent an improvement in the regulation of NCC’s wording.

NCC also establishes the condition that the defect or its cause must exist upon the delivery of the asset (Art.1707 para.(3)).

The conventional amendment or replacement of the warranty is null in case of defects which were or should have been known by the seller on the execution date of the contract, thus sanctioning the bad-faith seller. In line with the prevailing interpretation expressed by the Romanian doctrine and inspired

¹⁰⁶ This is a variation on the principle of *exceptio mali processu*, inspired by Art.1485 of ICC.

by Art.1733 of QCC, the hypothesis that the seller “should have been aware of the defects” has also been inserted (Art.1708).

As an absolute novelty, NCC introduces a procedure on the disclosure of defects. Art.1709 para.(1) lays down the rule on the disclosure of the hidden defects within the contractual disclosure term or, in the alternative, within certain legal terms distinctly provided for buildings (3 months) and for other assets (2 months) which shall start to run upon the finding of defects. In case of failure to disclose or late disclosure, the injury thus caused to the seller shall be taken into account when establishing the indemnification due by the seller to the purchaser for the hidden defects (thesis II of Art.1709 para.(1)). This legal text appears to reveal that such terms are terms for the forfeiture of the right to claim the full amount of the indemnifications.

The NCC Draft IL envisages to amend Art.1709 para.(1) in the sense that the purchaser’s obligation to notify shall have to be exercised “within a reasonable term, established as per the circumstances, subject to the forfeiture of the right to request the measure provided under Art.1710 para.(1) let.d)”, *i.e.* contract rescission. The new proposed wording clarifies the sanction enforceable in the case of forfeiture of the term, which is a commendable measure, and chooses a more lenient regulation on the disclosure term.

Art.1709 para.(2) provides the moment in time from which the terms shall start to run should the defect occur gradually. Para.(3) establishes the rule according to which Art.1709 shall not apply to the bad-faith seller, with respect to which, the defect may be disclosed at any time.¹⁰⁷

As effects of the warranty, in addition to the corresponding decrease in the price or the rescission of sale, the purchaser may opt for a remediation of the defects by the seller, an effect which is accepted by doctrine, as well as for the replacement of the sold asset by an asset of the same type, but without defects (Art.1710 para.(1)). Upon the seller’s request, the court may also order another measure than the one requested by the purchaser, as per the purpose of the contract and other circumstances (Art.1710 para.(2)).

[Art.1711] The contract may be safeguarded if the defects do not affect all the sold assets, and the affected assets may be separated from the other assets, without damaging the purchaser (Art.1711 para.(1)). To this end, mention is made that, should the court order rescission under Art.1710, the contract shall be only partially terminated. Art.1711 para.(2) provides that the above provision shall not apply, if the asset affected by defects is the main asset, in what concerns its accessories.

The extent of warranty in case of a good-faith seller (when the price is decreased accordingly or the sale is rescinded under Art.1710 para.(1)) shall be limited to the price and expenses incurred with the sale, while the bad-faith seller shall also have to pay damages (this latter case being similar to the current provisions) (Art.1712).

¹⁰⁷ The Draft IL inserts a new para.(1¹), which reads as follows: “*Should the purchaser be a professional, and the sold asset be a tangible movable asset, the term provided under para.(1) shall be two business days.*” Consequently, the intention is to set more strict standards in commercial matters.

NCC regulates the new rule according to which the loss or deterioration of the asset, even as a result of a force majeure event, shall not prevent the purchaser from being granted the enforcement of the measures provided under Art.1710 para.(1) (Art.1713).

NCC regulates, as a novelty, the warranty for the lack of qualities agreed by the parties, for which the provisions on the warranty against hidden defects shall apply (Art.1714).¹⁰⁸

Art.1715 regulates the warranty in case of the sale by sample or model, in the sense that the seller warrants that the asset corresponds to the sample or model.

VI. On the Warranty for Proper Functioning

[Art.1716-1718] For the purposes of modernizing the legal framework on warranties, NCC inserts the warranty for proper functioning, which may operate in parallel with the warranty against hidden defects. One may understand that the conditions on the warranty for proper functioning may be those undertaken by the seller under the contract or those required by the special law. NCC establishes that, if the repair is not possible, or if the duration thereof exceeds the term provided under the contract or special law, the seller shall have the obligation to replace the sold asset (Art.1716 para.(2)). The maximum duration for repair shall be 15 days from the date the purchaser requested the repair of the asset, if not otherwise required by the contract or the special law (para.(2)). Should the seller fail to replace the asset within a reasonable term, the purchaser may opt for the restitution of the price (Art.1716 para.(3)).

The warranty shall not cover defects arising out of the improper use of the asset, *i.e.* defects attributable to the purchaser. The purchaser's conduct shall also be assessed by taking into account the written instructions communicated by the seller (Art.1717).

The purchaser shall have to notify the defect as soon as it discovers it and, in any case, prior to the expiry of the warranty period, subject to the sanction of forfeiture of the right to warranty (Art.1718 para.(1)). The NCC Draft IL proposes the amendment of this legal provision, in the sense of keeping only the purchaser's obligation to notify the defect within a reasonable term.

6. Purchaser's Obligations

[Art.1719-1729] The current norms (Art.1361,1317 of CC) on the main obligations of the purchaser, *i.e.* payment of the price and acceptance of the asset, are unified (Art.1719).

NCC provides, in a dispositive manner, the rule pursuant to which the place of price payment is the place where the asset is located upon the execution of the contract (handover place, pursuant to Art.1362 of CC and 1689 of NCC) (Art.1720 para.(1)). The price payment date is, if not stipulated otherwise, the date when ownership is transferred. Art.1720 para.(2) establishes a new regulation for the assets in transit, under which payment shall be made according to custom or, in the absence thereof, at destination.

¹⁰⁸ In our opinion, the qualitative inadequacy of the asset may also be apparent or hidden, and, from such perspective, the levels of seriousness in the qualitative shortcomings should have been stipulated.

As regards price-related interests, such depend upon the nature of the asset that is being sold and accrue as of the date of transfer of the ownership (if the asset produces civil or natural fruits) and respectively as of the delivery date (if the asset produces other benefits) (Art.1721).

The NCC Draft IL proposes a new wording of Art.1721, in the sense that interest accrues as of the asset delivery date, and when the due date of price payment is subsequent to the handover of the asset, as of the expiry of such due date.

Similar to the current regulation (Art.1364 CC), the purchaser who discovers the existence of a cause for eviction is entitled to **suspend the payment of the price** until the hindrance ceases or until the seller offers the appropriate warranty (Art.1722 para.(1)). As a novelty, the purchaser may not suspend the payment of the price if he was aware of the danger of eviction when he executed the agreement, or if the agreement provided that the payment shall be made even in cases of hindrance.

The seller's possibility to benefit from a privilege or, as the case may be, from a statutory mortgage over the sold asset, in order to warrant the obligation to pay the price, is established as a general rule (Art.1723).

The sanction for the failure to pay may be the rescission of the sale, which is similar to the current regulation (Art.1365 CC), or the enforcement of the payment obligation, a consequence already recognized by doctrine, with damages to be paid in both situations, if required (Art.1724).

As regards the *de jure* cancellation of the sale of movable assets for the failure to fulfill the obligation to takeover/pay the assets, NCC modifies the solution retained by Art.1370 of CC, distinguishing between regular movable assets and movable assets subject to swift depreciation or frequent variations of value. In the former case, the purchaser is deemed to have been formally notified *de jure* on the non-fulfillment of his obligations if, upon the due date, he did not pay the price and he did not take over the asset (Art.1725 para.(1)). In the case of movable assets subject to swift deterioration or frequent variations of value, the purchaser is deemed to have been formally notified *de jure* on the non-takeover of such assets when he failed to take them over on the due date, even if the price was paid, or when he requested delivery without having paid the price (Art.1725 para.(2)).

The new solution is therefore not the “*de jure cancellation of the movable assets sale*” (the initial solution of the Draft NCC, inspired by Art.1740 para.(1) of QCC), such as stated in the side heading of Art.1725 NCC, but a *de jure* formal notice to the purchaser as regards the obligation to take over and, if applicable, the obligation to pay.¹⁰⁹ In fact, we have noted that the NCC Draft IL takes into account this deficiency of the regulation, proposing that the side heading of Art.1725 be changed with a new title of “*De Jure Formal Notice*”.

As regards direct enforcement of the parties' obligations, NCC embraces the solution provided under Art.68 of the Commercial Code (Art.1726).

¹⁰⁹ Pursuant to Art.47 para.(5) of Law No.24/2000, the side heading of the articles provide a summary of their object thereof and are for convenience only.

Therefore, if the purchaser fails to fulfill his takeover or payment obligations, the seller has the option to deposit the sold asset, at the discretion and expense of the purchaser, or to sell it (Art.1726 para.(1)). The asset shall be sold by public tender or even at the current price, defined under Art.1726 para.(2), by a person authorized by law to this effect, the seller being entitled to the payment of the balance between the price agreed upon the first sale and the price actually obtained as well as damages.

If the failure to perform the contract lies with the seller, and the assets making the object of the contract are fungible assets subject to a current price, the purchaser is entitled to purchase assets of the same type at the seller's expense through an authorized agent, and to claim the balance between the expenses incurred in performing such operation, and the price agreed with the seller, as well as damages, as the case may be (Art.1726 para.(3)-(4)).¹¹⁰

Pursuant to Art.1726 para.(5), the party who will exercise the right provided by this article is bound to notify the other party immediately on this matter.

If the purchaser did not pay the price, and the sale was made without payment term, the restitution of the sold movable asset may be requested by the seller, similarly to the current regulation (Art.1730 item 5 the second thesis of CC) simultaneously with the notice of rescission of the contract, however within 15 days as of the delivery date (not 8 days, as provided by the current regulation) (Art.1727 para.(1)). This text reiterates the seller's privileged right of receivable for the restitution of the asset.

Pursuant to Art.1727 para.(2), if the action for restitution was not filed within the term provided under para.(1), the seller may no longer enforce against the other creditors of the purchaser the effects of the subsequent rescission of the contract, on grounds of failure to pay the price. In other words, the seller no longer has a right of priority in the restitution in kind of the asset.

In light of this interpretation, the final reference made by Art.1727 para.(2) to the applicability of Art.1646 (Restitution Expenses) and Art.1647 (Restitution of Considerations by Incapable Persons) does not make any sense. In fact, the Draft IL clarifies this matter, rectifying the reference norm in the sense that it actually refers to Art.1648 and Art.1649 of NCC which deal with the effects of restitution to third parties.

Art.1728 rephrases the special case of rescission concerning immovable assets, currently regulated under Art.1367 of CC, establishing that, in case an express termination clause stipulates the *de jure* rescission of the contract for failure to pay the price, such rescission will also take place without the intervention of the court, but only after the purchaser is served a formal notice. Pursuant to Art.1728 of NCC, when provided that, if the price of the immovable asset is not paid upon the agreed term, the purchaser is deemed to have been formally notified *de jure*, the latter may also pay after the expiry of the term, as long as he did not receive the seller's statement of rescission. The text of Art.1728 seems

¹¹⁰ We deem that the text of Art.1726 para.(3)-(4) would have been more appropriate in Section 5 on Seller's Obligations. The unitary regulation of such premise in the Romanian Commercial Code is explained by the complex structure of Title VI – On sale in said code, but it is not justified in the context of a structured chapter, such as Chapter I “Sale Contract” under Title IX of Book V of NCC is designed to be.

to be an application of general law in the matter of rescission, no longer maintaining the solution provided by the current regulation, which favors the purchaser of immovable assets.

The rescission of an immovable asset sale produces effects towards third parties in accordance with the conditions provided in the special land book regulations, *i.e.* Art.909 of NCC (Terms for Exercising the Action for Rectification) and Art.910 of NCC (Effects of the Admission of the Action for Rectification) (Art.1729).

7. Preemption Right

[Art.1730-1740] Mostly observing the model of the CC1940, NCC provides, as a new element, the conditions for exercising the preemption right.

The first articles dedicated to the preemption right establish the scope of application, the conditions and the effects of the exercise thereof. We will identify and systematically interpret below the main relevant norms.

According to its side heading, Art.1730 regulates the concept and the scope of application of the preemption right. Preemption consists in the right of the conventional or legal holder of a preemption right (preemptor) to benefit from priority in purchasing an asset (para.(1)).

Pursuant to Art.1730 para.(2), NCC's provisions on the preemption right "*are applicable only if not otherwise established by law or under the contract*".

Hence, the parties to a contract may agree on a conventional preemption right under different terms and conditions than those provided in NCC, the latter remaining however applicable as regards the aspects not provided by the parties under the contract.

However, although Art.1730 para.(2) seems to establish the permissive nature of all articles in this sub-section 7, we have noticed that some norms have a mandatory nature. Such a mandatory norm is provided at Art.1734 of NCC regarding the concurrent preemptors, prohibiting the contractual clauses coming against the rules of priority in exercising the preemption right under this article (Art.1734 para.(2)). Furthermore, Art.1737 on the registration of the preemption right over an immovable asset with the land book, which establishes procedural rules, must be considered as mandatory.

Furthermore, after the entry into force of the NCC, we do not exclude the necessity of harmonizing its provisions with the relevant rules on preemption right provided in other enactments. An example regarding the possible problems of interpretation which might arise in practice is discussed in detail under Art.1746 regarding the legal preemption right of co-owners and neighbors in the sale of forest lands in relation to another legal preemption right of the state, regulated under Art.45 of the Forest Code.

Art.1730 para.(3) establishes the framework within which the preemption right may be exercised, in case the seller submits “an sale offer”.¹¹¹ The preemption right can no longer be exercised once the sale offer regarding the proposed contract is refused. The sale offer is considered to be refused if it was not accepted within a certain term, which is different for movable assets (10 days at the most) and immovable assets (30 days at the most). The acceptance term of the offer starts running “*as of the communication of the offer by the preemptor*”. As regards the moment when the acceptance term of the sale offer starts running, we deem that a clerical error was made in the final thesis of Art.1730 para.(3), since the offer is to be communicated by the seller to the preemptor and not the other way around. We recommend that this error be corrected.

The sale to a third party of the preempted assets can be made only under the condition precedent that the preemptor would not exercise his preemption right (Art.1731).

Art.1732 regulates the conditions for exercising the preemption right, starting from the premise according to which the seller already executed a sale contract with a third party (as provided under Art.1731). All elements of the notice to be sent by the seller or third party to the preemptor are determined, *i.e.* the contents of the contract executed with the third party (para.(1)) and, more specifically, the seller’s identification data, the description of the asset, the liens encumbering it, the terms and conditions of sale, the place where the asset is located (para.(2)). Pursuant to para.(3)-(4), the preemptor may exercise his right within 10 days at the most (for movable assets) or 30 days at the most (for immovable assets) as of receipt of the notification, by communicating to the seller his agreement to execute the sale contract, and by depositing the price in favor of the seller. As an effect of the exercise of preemption, the contract of sale is considered to be executed by the preemptor and the seller, under the conditions provided in the contract executed with the third party, and this latter contract shall be cancelled retroactively. The seller is liable before the good-faith third party for the eviction arising from the exercise of preemption (Art.1733 para.(1)). Pursuant to Art.1733 para.(2), the clauses of the contract executed with the third party meant to prevent the exercise of the preemption right “*are not effective against the preemptor*”.

For comments regarding the impact of implementing NCC’s provisions concerning the preemption right, please refer to the introductory section of this chapter dedicated to the impact of implementing the sale contract.

¹¹¹ The explanation in the CDEP Table regarding Art.1730 para.(3) provided the key for the interpretation thereof: “this paragraph allows the parties to a sale contract to make sure, prior to agreeing upon, that the preemptor will not prevent the execution of the contract”. By consequence, Art.1730 para.(3) is meant to regulate another situation when the preemption right may be exercised, respectively prior to the execution by the owner of a sale contract with a third party. However, this premise does not clearly arise from the wording of Art.1730 para.(3), and the imminent character of the execution of a contract by the seller and a third party is not explicit either. Moreover, a series of articles in sub-section 7 fail to take into account this situation, with the following consequences: the contents of the sale offer is not determined (unlike the notification, which is regulated in detail under Art.1732); the provision under Art.1732 on the deposit of the price in favor of the seller is not applicable in this situation, and the sale contract between the owner and the preemptor is not executed automatically by the mere acceptance of the sale offer (similarly to Art.1733 para.(1)); the case of interdependent assets, considered under Art.1735 para.(2), is not adapted to the situation when the preemption right is exercised further to a sale offer pursuant to Art.1730 para.(3), although it could be applicable in this case as well.

Art.1734 establishes as a mandatory provision the order of granting the preemption right in case of concurrent preemptors, priority being given, in principle, to the legal preemptors, and if there are several legal preemptors, to the one chosen by the seller, and, in subsidiary, to the conventional preemptors, i.e. those who were the first to register their right in the land book, as regards immovable assets, or those who registered their right on a previous certified date, in case of movable assets.

As regards concurrent legal preemptors, when one of them is the State and the other is a private legal entity, we emphasize that situations may arise where the State's preemption right is regulated by a special law meant to ensure the satisfaction of a public interest. In such case, the protected public interest could be annihilated by the mere fact that the sale is executed with the preemptor selected by the seller pursuant to Art.1.734 para.(1) let.b) of NCC.¹¹² Hence, if, in a given case, priority for the benefit of the State would be desired in case of concurrent legal preemptors, it would be recommendable that the text of Art.1734 para.(1) let.b) of NCC be modified by inserting the phrase “if not provided otherwise by the law”.

If the seller sold multiple assets to the third party, among which only one makes the object of the preemption right, the seller may claim from the preemptor only a price prorated to the value of the preempted asset (Art.1735 para.(1)) or, in exceptional cases, the entire price agreed with the third party, but only if the sold assets cannot be separated without causing damage to the seller (Art.1735 para.(2)).

According to Art.1736 regarding the due date of the obligation to pay the price, when the contract executed with the third party provides for price payment terms, the preemptor cannot avail himself of such terms.

By consequence, the sale contract executed by the seller and the preemptor shall have the same content as the contract previously executed by the seller with the third party, except for the possible payment terms agreed with such third party, the preemptor having the obligation to deposit the entire price along with the exercise of the preemption right.¹¹³

Art.1737 establishes rules on the registration of the preemption right on an immovable asset with the land book. Only the conventional preemption right in relation to an immovable asset is registered in the land book (para.(1)).

The third party purchaser bound by condition precedent shall be able to register his right in the land book, based on the sale contract executed with the owner, also bound by the condition precedent that, within 30 days as of the service of the resolution by which the registration was ordered, the preemptor should not have notified the land registry office on the proof of having deposited the price in favor of the seller (Art.1737 para.(2)). If the preemptor did not submit the notification in due time, the

¹¹² See also our comments on Art.1746 NCC regarding the legal preemption right of co-owners and neighbors upon the sale of forest lands in relation to another legal preemption right of the State, as regulated under Art.45 of the Forest Code.

¹¹³ This regulation may be construed as a legal means for the seller to establish a price significantly higher than the one he could have obtained if he had requested the third party to pay the price upon the execution of the sale contract (on the ground that the price is paid in installments), but which would no longer be grounded if the price were paid immediately, such as the preemptor shall be bound to do.

preemption right is extinguished and is de-registered *ex officio* from the land book (Art.1737 para.(4)). The notification submitted in due time to the land registry office replaces the communication provided under Art.1732 para.(3) and has the same effects, the preemptor having the right to request the de-registration from the land book of the third party's right and the registration of his own right (Art.1737 para.(3)).¹¹⁴

The right of preemption during enforcement shall be exercised pursuant to the requirements of civil procedure code (Art.1738).

Regarding the characters of the right of preemption, Art.1739 NCC establishes the rule that the right of preemption is indivisible and may not be assigned.

Extinguishment of the conventional right of preemption shall occur upon the preemptor's death, unless established for a certain period. The right of preemption shall therefore be transferred by succession, only if the period for exercising the said is limited in time and, even in this situation, the term shall be reduced to 5 years from the establishment date, if a longer term was stipulated (Art.1740).

(b) Section 2 "Sale of Immovable Assets"

1. Special Rules Applicable to the Sale of Immovable Assets

[Art.1741-1745] In case the sale of a immovable asset is made without the indication of its surface, for a global price, neither the purchaser nor the seller may request the rescission or the adjustment of the price on the ground that the surface is smaller or larger than then they thought (Art.1741). Consequently, the new regulation establishes the standard of a diligent purchaser/seller, with the effect that, if the parties fail to mention in the contract the surface of the immovable asset subject to sale, they will lose the right to request rescission/price adjustment, if they discover that the immovable asset is larger/smaller than they thought.

As regards the sale of a surface pertaining to a larger lot of land, in case such is made under a certain price per measurement unit, without specifying the surface or location thereof, the purchaser may request the change of venue of the property only after the measurement and delimitation of the sold surface is performed (Art.1742).

Concerning the sale of a determined immovable asset by indicating the surface, if the actual surface is smaller than the one indicated in the contract, the current solution is maintained (Art.1327 CC), namely the purchaser may request the seller to transfer him the surface they agreed upon but, if the purchaser fails to request or the seller cannot transfer such surface, the purchaser may obtain a corresponding price reduction. Additionally, NCC codifies the doctrine on the purchaser's option to

¹¹⁴ In our opinion, the communication provided under Art.1732 para.(3) should still be served to the owner, since this communication does not merely have the role of being accompanied by the proof of having deposited the price in favor of the owner. Furthermore, in order to avoid interpretations, it would have been recommendable to specify that the preemptor may request the registration of his "ownership" right.

request the contract's rescission if, due to the difference in surface, the asset can no longer be used for the purpose for which it was purchased (Art.1743 para.(1)).

If the actual surface proves to be larger than the one stipulated, and the excess is above 1/20 of the surface agreed upon, the purchaser shall pay the excess or may obtain the rescission of the contract. However, when the excess is not above 1/20 of the surface agreed upon, the purchaser may not obtain rescission, but he is not obliged to pay the excess amount either, as opposed to the current solution (Art.1327 CC) pursuant to which the excess payment must be paid, regardless of the difference (Art.1743 para.(2)). This amendment requires the purchaser to prevent the risk of a detrimental sale, by knowing/specifying the exact surface of the sold immovable asset.

Pursuant to Art.1744, the term for exercising the action for assessment (for the excess price/price reduction) or the action for rescission is, as in the current regulation (Art.1334 CC), of one year from the execution date of the contract, under sanction of forfeiture of such right. As a novelty, NCC provides that the term may also run from the date agreed upon by the parties for the measurement of the immovable asset, if any. We note that the lawmaker chose to qualify the one year term, which is currently regarded as a prescription term, as a forfeiture term, although traditionally the right to file action is subject to a prescription term. NCC opted for a harsher sanction than the one provided under the current regulation (forfeiture terms cannot be stayed or tolled), most likely in order to ensure a stability of the civil circuit in such cases that are often due to the parties' lack of diligence upon the execution of the contract.

As regards the sale of two lands by mentioning their individual surface, Art.1745 resumes the current regulation provided by Art.1333 CC.

2. Sale of forest lands

[Art.1746] For the first time, NCC establishes co-owners' and neighbors' legal right of preemption upon the sale of forest lands.

According to Art.1730 para.(2), "the provisions of this code as to the right of preemption shall only be applicable unless the law or the contract provide otherwise". Therefore, the co-owners' and neighbors' right of preemption over the sale of forest lands shall be governed by the rules instituted by Art.1730-1740 NCC.

It should be emphasized that the State also has a right of preemption upon the purchase of forests which are enclaves in the public property forest land or are neighboring the latter, a right established by Art.45 of the Forest Code.¹¹⁵ In case that both the State and a beneficiary of the right of preemption provided by Art.1746 NCC exercise their preemption rights over the same forest land, given their

¹¹⁵ Under Art.45para.(5)-(7) of Forest Code (5) "The State has a right of preemption upon the purchase of forests constituting forests enclaves in the public property of the State, or are neighboring the latter, for an equal price and under similar conditions. (6) The seller has the obligation to notify in writing the administrator of the forests in the public property of the State on his intent to sell, and the State may exercise its right of preemption within 30 days following such notice. (7) If the administrator of the forests which are the public property of the State fails to express his written intent to purchase within the term provided by para.(6), the seller is free to sell the land. (8) The seller's failure to observe the obligation stated under para.(6) shall entail the absolute nullity of the sale-purchase contract."

capacity of holders of legal rights of preemption, Art.1734 para.(1) let.b) NCC would be applicable, and the sale-purchase contract is to be considered concluded with the holder of the legal right of preemption chosen by the seller, therefore either with the State or with the neighbor/co-owner. The question is whether this outcome is compliant with Art.45 of Forest Code, which provides that the State has a specific right of preemption for the satisfaction of a public interest, namely a good administration of the forests belonging to the public property of the State by liquidation of enclaves and correction of forest perimeter. If it is deemed necessary, in this situation or in other situations where the State and other legal preemptors are concurrent, for the State's right of preemption to have priority, Art.1734 para.(1) let.b) must be amended (to this end, *see* our comment on Art.1734). Furthermore, such situation requires the harmonization of the procedural conditions for the exercise of preemptions which are provided in the two enactments.¹¹⁶

(c) Section 3 “Sale of Inheritance”

[Art.1747-1754] As a novelty, NCC establishes the concept of inheritance as a object of sale, namely “*the right to inherit an opened inheritance or a share thereof*” (Art.1747 para.(1)). The contract on the sale of inheritance must be concluded in authentic form, under the sanction of absolute nullity, regardless of the nature of the assets forming the object of the inheritance (according to the existing doctrine, the authentic form was necessary only when the inheritance also included ownership rights over a land (Art.1747 para.(2)).

Similarly with Art.1399 CC, NCC provides that the seller only warrants for his capacity as heir, unless the assets on which he has rights are expressly identified, with the additional note that the parties may also expressly agree to disregard such warranty (Art.1748).

Liability for the debts of the inheritance shall continue to be incumbent on the seller. NCC thus codifies the Romanian doctrine, which established this rule as an effect of the absence of any provisions regulating the assignment of debt under Romanian civil law (Art.1751).

NCC establishes the regime of family assets which belong to the inheritance and which are presumed not to be a part of the sold inheritance (Art.1752).

NCC codifies the existing doctrine in what regards the necessity that the seller fulfills the registration formalities required under the law, in order to render enforceable the acquirement of every inherited right (Art.1753 para.(2)). Regarding the immovable assets, the text makes reference to the land book rules related to the acquisition of ownership, taking into account that registration has the effect of establishing rights, as provided under NCC (Art.1753 para.(1)).

NCC's provisions on the sale of inheritance shall also apply to other forms of inheritance transfer, either for valuable consideration or for free (Art.1754 para.(1)). Regarding the transfers for free, the

¹¹⁶ According to the Draft IL, on the entry into force date of NCC, the provisions on the right of preemption contained in the special laws shall be supplemented by Art.1730-1740 NCC. In our opinion, this rule is welcome but, until a practice is forged in relation thereto, the harmonization of the special laws by including norms referencing to NCC's provisions would seem useful.

donation rules shall apply as regards the form thereof (Art.1011), the warranty against eviction (Art.1018) and the warranty against hidden defects (Art.1019).

(d) Section 4 “Other types of sale”

1. Sale in Installments and Retention of Ownership

[Art.1755-1757] The validity of a stipulation on the retention of ownership is acknowledged by Art.1684 NCC. Art.1755 provides for the common ground for postponing the ownership transfer, namely to secure the payment obligation in a sale where the price is paid in installments, with the purchaser acquiring the ownership right upon the payment of the last installment. However, the risk over the asset is transferred to the purchaser upon delivery.

As already mentioned when discussing Art.1684, the concept of retention of ownership and its most important practical application, *i.e.* the retention of ownership for payment in installments, are tightly related and that is why, as recent doctrine has also showed, a unitary regulation would have been useful. For instance, it would have been useful to provide for the transfer of risk to the purchaser for any type of sale with retention of ownership, such as, for example, the sale with full payment of the price in the future, even if such form of sale is not frequent in practice.

For a minimum protection of the purchaser’s interests, it is provided that, if not otherwise agreed by the parties, non-payment of one installment of the price, which does not exceed 1/8 of the price, shall not entitle to seek the contract’s rescission, the purchaser continuing to enjoy the benefit of the term for the payment of successive installments (Art.1756).¹¹⁷

As regards the rescission of the contract with payment in installments, NCC establishes, in the seller’s benefit, in addition to damages, that an indemnification must be paid for the use of the asset by the purchaser, similarly with the leasing contract (Art.1757 para.(1)). As for the installments, they shall be returned, unless it was agreed that such would be withheld by the seller as penalty, which may however be reduced by court order, pursuant to the provisions on penalty clauses (Art.1757 para.(2)). The provisions of para.(2) regarding the withholding of installments as penalties in case of rescission shall also apply to the leasing contract or the rent contract which contains a clause for the purchase of the asset at the end of the lease term (Art.1757 para.(3)).

2. Sale with Repurchase Option

[Art.1758-1762] This newly introduced section of NCC re-establishes the institution of sale with repurchase option, previously provided by Art.1371-1387 CC, which were repealed by Art.4 of the 1931 Anti-Usury Law . The sale with repurchase option was prohibited because, in practice, it disguised loans at usury interests, where the respective asset was a security interest in real property and the lender-purchaser stipulated in the sale-purchase contract, as repurchase price, a disproportionately large amount of money as compared to the borrowed amount (*i.e.* the initial price). Similarly with other modern codes providing for such institution, (QCC, ICC), NCC establishes the

¹¹⁷ The wording seems inappropriate, as "non-payment" means "late payment", and not exemption from payment.

validity of the sale with repurchase option, by including provisions designed to prevent the occurrence of loans with usury interests dissimulated under the form of such sale.

Regarding the concept, the sale with repurchase option is a sale subject to a condition subsequent, whereby the seller reserves the right to repurchase the asset or right transferred to the purchaser (Art.1758 para.(1)). The term of the repurchase option shall not exceed 5 years (Art.1758 para.(2)).¹¹⁸

The exercise of the repurchase option by the seller shall only be made if the latter repays to the purchaser the received price and the expenses incurred with the execution of the sale-purchase contract and the fulfillment of the registration formalities (Art.1759 para.(1)). If this option is exercised, the seller will have the obligation to repay to the buyer all the expenses related to the asset takeover and transport, the required and useful expenses, but in this latter case only up to the added value (Art.1759 para.(2)). If the seller fails to exercise the option within the due term, the purchaser's ownership right shall be consolidated further to non-fulfillment of the condition subsequent (Art.1759 para.(3)).

The effects of the sale with repurchase option are established in accordance with the provisions on the condition subsequent. By way of exception, NCC regulates the seller's obligation to observe the lease contracts concluded by the purchaser prior to exercising the option, if the registration formalities were fulfilled, but no longer than 3 years from such exercise (Art.1760 para.(1)). Art.1760 para.(2) establishes the seller's obligation to notify the repurchase option to the purchaser and to any sub-acquirer against whom the option right is enforceable. Within a month from notification, the seller must deposit the amounts mentioned under Art.1759 para.(1) in the account of the purchaser or of the third party acquirer, as the case may be, under the sanction of forfeiture of the right to exercise the repurchase option (Art.1760 para.(3)).

In case the object of the sale with repurchase option is a share out of a non-partitioned asset, the partition shall also envisage the seller, if the latter has not yet exercised such option (Art.1761 para.(1)), and the option must be exercised, under the sanction of forfeiture of the right, within the partition, and not afterwards, even when the asset is partially or totally awarded to the purchaser (Art.1761 para.(2)).

In the case of the sale with repurchase option, if the balance between the "repurchase price" and the price of the sale exceeds the maximum interest threshold established by law, the sanction applied shall be the absolute nullity (Art.1.762 para.(1)). The provisions of para.(1) shall also apply to sales where the seller undertakes to repurchase the sold asset (Art.1762 para.(2)).

Thus, NCC maintains the sanction of absolute nullity for the sale with repurchase option which is made in order to circumvent the maximum legal interest, therefore providing for a usury interest. The NCC Draft IL intends to replace the absolute nullity sanction by a *de jure* reduction of the repurchase price up to the sale price. This amendment is most welcome, in our opinion, for it safeguards the sale to the benefit of the purchaser, *i.e.* the potential borrower at usury interest, allowing him to recover his asset.

¹¹⁸ This article was inspired by QCC (Art.1750 para.(1) and Art.1753).

(ii). Chapter II "The Exchange Contract"

[Impact] As it follows from the Statement of Reasons, the new regulation of the exchange contract envisages a correlation of the subject-matter with that of the sale contract. Due to the purely theoretical nature of the amendments, we do not identify any major impact of an institutional, human resources or financial/budgetary nature upon the implementation of the NCC.

[Art.1763-1765] The concept of exchange contract is defined by the NCC as the contract whereby each of the parties, referred to as co-exchangers, transfers or, as applicable, undertakes to transfer a good in view of acquiring another one (Art.1763). We note that in the case of exchange as well, similarly with the definition of the sale contract, it was opted to incorporate the promissory exchange contract ("undertakes to transfer") in the text which is exclusively dedicated to the definition of the exchange.¹¹⁹ In agreement with the recent doctrinal views on the definition of sale, we draw attention to the fact that this change of stance may be deemed unsuitable, as far as the clarity of the institution itself is concerned, and may give rise to diverging interpretations.

Although, as Art.1764 announces, the provisions that govern the sale shall also apply to the exchange, it would have been more advisable, in our view, if the definition of the exchange contract were uniformly regulated in the sense that not only ownership, but other rights as well, including dismemberments of the ownership right may be transferred by way of exchange, similarly to Art.1650 para.(2) regulated in the matter of sale.¹²⁰

Art.1764 institutes the rule according to which the provisions in the matter of sale are to apply accordingly to the exchange contract as well, similarly to Art.1409 CC (para.(1)). Para.(2), defines the role of the parties by reference to the sale. Thus, either party is deemed a seller, with regard to the good it transfers, and a purchaser in regard to the good it acquires.

Unless otherwise stipulated in the contract, the exchange expenses shall be equally borne by the parties (Art.1765).

(iii). Chapter III "The Supply Contract"

[Impact] There is currently no statutory regulation for the supply contract in the Romanian law. In accord with the lawmaker's intention of encompassing in the NCC the regulation of as many commercial contracts as possible, Art.1766-1771 of the NCC lay down the general legal framework of the contract for the supply of goods and services, inspired from the QCC. According to the CDEP Table, the concept of supply, as regulated under the NCC, reflects the doctrinal opinion that the supply contract may equally contemplate the supply of goods as well as the provision of services, thus ending the disputes surrounding the legal nature of this contract (lease of services or sale), hence instituting it as a self-standing legal concept.

¹¹⁹ The model for Art.1763 is Art.1795 QCC and Art.1552 ICC, which refers strictly to the transfer of ownership upon executing the contract and does not include the promise to carry out the exchange at a later time.

¹²⁰ For instance, Art.1552 ICC expressly provides that both the ownership as well as another right may be transferred through exchange.

Given the mandatory nature of the most part of the norms established in relation to supply, we do not identify any significant major impact of an institutional, human resources or financial/budgetary nature upon the implementation of the NCC.

[Art.1766-1771] The supply contract is the contract whereby a party, referred to as supplier, undertakes to transfer ownership over a determined quantity of goods and to deliver them, on one or several dates subsequent to the execution of the contract or on a continuous basis, or to provide certain services, on one or several subsequent dates or on a continuous basis, whereas the other party, referred to as beneficiary, undertakes to take over the goods and accept the provision of service and to pay their price (Art.1766 para.(1)). An essential aspect of the concept of supply is thus emphasized, *i.e.* the existence of a contractually determined time interval between execution of contract and performance of obligations.

As an accessory to the obligation of supplying goods, the supplier may undertake to provide to the beneficiary those services that are necessary for the supply of the goods (Art.1766 para.(2)).

According to Art.1766 para.(3), if the same contract provides both for the sale of goods as well as the supply of goods and services, it is to be qualified based on the characteristic (main) obligation and on the accessory one.¹²¹ The corresponding regulation from the QCC, the inspiration source for this norm, is much clearer in that the provision of services is treated as an accessory as compared to the value of the sold good. In our opinion, it would have been advisable if the NCC had at least incorporated the concept of "characteristic obligation", which lacks a statutory definition, thereby ensuring an easier implementation in practice for this article.

The ownership right over the goods is transferred from the supplier to the beneficiary upon the goods' delivery. The NCC institutes the beneficiary's obligation of taking over the goods as and when provided for in the contract (Art.1767 para.(1)). The takeover of the goods occurs upon their acceptance by the beneficiary, *i.e.* identifying and ascertaining the quantity and quality of the goods (Art.1767 para.(2)). When the supplier is in charge with dispatching the products, the received products shall be deemed delivered to the beneficiary upon delivery thereof to the carrier (Art.1767 para.(3)).

Art.1768 regulates the price of the products and services contemplated by the supply contract, which may be established contractually or by law (para.(1)). On the legally established price, Art.1768 para.(2) institutes the rule according to which, should the statutory regulation of the price or the mechanism for determining it change in the course of the contract, the parties shall continue to apply the same price or determination mechanism initially laid down in the contract, unless the law otherwise provides. According to para.(3), in case the law expressly sets forth that the new price/method of determining is also to apply to ongoing contracts, either party may unilaterally terminate the contract within 30 days from the enactment of the law, during which time the parties

¹²¹ Art.1766 para.(3) was regulated in accordance with Art.2103 CCQ.

shall not be bound to apply the new legal provisions.¹²² Thus, a legal instrument is instituted for the unilateral termination of the contract in the case where either party finds the new legal provisions unfavorable.

The NCC allows the supplier to subcontract the supply of goods or services to a third party, save for the case of *intuitu personae* contracts or when the nature of the contract does not allow subcontracting (Art.1769 para.(1)). Para.(2) of Art.1769 states that subcontracting occurs if the product or service that makes the object of the supply contract is in fact supplied, in whole or in part, by a third party with whom the supplier has subcontracted to this effect. According to Art.1770, in the case of subcontracting, the principal supplier remains liable towards the beneficiary, both for the performance of the contract as well as for the quality of the products and services supplied by the subcontractor, having however right of recourse against the latter.

The provisions governing the sale contract supplement the NCC norms that deal with the supply contract, when no special norm is in place in connection with the latter (Art.1771). We see this article as applying primarily to the contract for the supply of goods. The rule is also inferred, at least in what regards the applicability of the seller's obligation for other contracts involving the transfer of right, from the regulation of the sale (*see* Art.1651 of the NCC).

(iv). Chapter IV "The Repurchase Contract"

[Impact] The repurchase contract is currently regulated under the Commercial Code, which is to be repealed upon the coming into force of the NCC. NCC takes a part of the existing norms and introduces new ones, inspired from the ICC, whose previous form was in fact the source of inspiration for the Commercial Code.

According to the Statement of Reasons, the new provisions in the NCC are to make up the substantive law for the special regulations that may provide for this type of operations, such as the stock market regulations, for instance. On this point, the impact of this regulation is not one of current relevance.

[Art.1772-1776] The repurchase contract is defined as the contract whereby the buyer purchases upon immediate payment, securities and debt securities traded on the market and, at the same time, undertakes to resell to the seller securities of the same species, at a certain date, in exchange for an established sum of money (Art.1772 para.(1)). It thus transposes in current terms the definition of the repurchase under Art.74 para.(1) of the Commercial Code. An express mention would have been advisable that the buyer buys the debt securities/securities from the seller (and not from a third party).

Art.1772 para.(2), brings an innovation as compared to the Commercial Code, consistent with current realities, namely "perfecting" the contract by fulfilling the necessary formalities for transferring the

¹²² From a terminological perspective, the regulation is not unitary, using alternatively either "mechanism" or "method" for determining the price.

registered securities, issued in intangible form, in addition to the mere remittance (handover of securities) provided in the initial text of al Art.74 para.(2) of the Commercial Code.¹²³

Unless otherwise provided, the ancillary rights conferred by the securities and debt securities subject to the repurchase, as well as the interests and dividends having reached maturity during the repurchase term, shall be with the buyer (Art.1773). This text rephrases the current provision (Art.74 para.(4) of the Commercial Code) on the transfer of ancillary rights, which is applicable if the parties do not provide otherwise.

A novelty as compared to the current provisions of the Commercial Code is the instituted obligation on the part of the buyer to exercise the option attached to the securities transferred to buyer (Art.1774). Thus, in the course of the repurchase term, the buyer is bound to exercise the “option” on behalf of the seller, if such right is conferred by the securities, according to the special law (Art.1774 para.(1)). The seller must provide the necessary funds to the purchaser no later than 3 days before the option term expires. If the seller fails to meet this obligation, the buyer shall have to sell the right of option for and on behalf of the seller (Art.1774 para.(2)).

As to Art.1744, our understanding is that the “option” may, for instance, consist of the right to subscribe new shares (for example, under to the preference right to the share capital increase), or of “put/call option” clauses, recognized by the capital market legislation, however the rights conferred by such legal provisions are generally non-transferrable. From this standpoint, the final thesis of Art.1774 para.(2) on selling the option, seems to be applicable to special situations from the capital market’s field. Nevertheless, as it fails to provide a legal definition for "option", the regulation is defective, and any interpretation of the text is bound to reservation. Even if one chose to overlook the ambiguous nature of the norm, there still are other uncertainties, such as the moment of the transfer of the securities acquired by the seller further to exercising the option (the maturity of the option term or that of the repurchase contract?).

According to Art.1775, also a new regulation, if during the repurchase term payments are to be made in relation to the debt securities and securities contemplated by the repurchase contract, the seller must provide to the buyer, at least 3 days prior to the maturity date, the necessary amounts for making such payments. Otherwise, the purchaser may proceed with the forced liquidation of the contract.¹²⁴ Therefore the lawmaker considered, for regulatory purposes, the case of the partial non-payment of the securities, the payment being incumbent on the seller, as the ultimate beneficiary of the securities of the same species.

¹²³ The Draft IL is expected to replace expression “shall be perfected by way of handover” with “shall be concluded by remittance”, which, at least in what concerns the chosen verb, is more appropriate (although employed in practice, the verb “to perfect” does not have a legal definition).

¹²⁴ The concept of "forced liquidation of contract" does not have a legal definition nor is it customary in doctrine or practice. It follows from the CDEP Table that the intention was to provide the customer with an instrument for pursuing the forced execution of the seller in view of obtaining the necessary amounts to cover the payments. However, this aspect does not follow from the text.

The settlement of the repurchase contract shall be carried out on the second business day following the maturity date (Art.1776 para.(1)). We understand that the securities are resold upon maturity, as per the definition of the repurchase contract at Art.1772 of the NCC, and that the “contract liquidation” date, a concept that is not legally instituted, is the maturity date of the mutual payment obligations, including the obligation to pay the resale price.

As to the settlement of balances and renewal of the repurchase, Art.1776 para.(2) reiterates Art.76 of the Commercial Code. Thus, if upon maturity the parties settle the balances by way of payment and renew the repurchase contract in connection with securities which are different in terms of quality, species or price, then the parties are considered to have concluded a new contract.

(v). Chapter V “The Lease Contract”

[Art.1777-1850] The regulation of the current lease agreement in the NCC is divided into 3 sections, namely Section 1-“General Provisions”, Section 2-“Particular Rules in the Matter of Dwelling Rental” and Section 3-“Particular Rules in the Matter of Land Lease”. According to Art.1778 para.(2), the norms laid down in the general provisions section on lease shall apply accordingly to the dwelling rental and land lease, if consistent with the specific rules provided for these contracts.

[Impact] The amendments brought by the NCC in the matter of lease are, for the most part, theoretical. This is why we do not expect any significant impact of an institutional, human resources or financial/budgetary nature upon the implementation of these new norms.

Overall, the NCC maintains a large part of the current regulation on lease, the new texts most often consisting in codifications of doctrine and practice. Some notable changes brought by the NCC in the matter of lease are:

- Specific rules are laid down for the lease of premises intended for the activity of a professional;
- Following the ICC example, the NCC regulates a maximum lease term, which cannot exceed 30 years (49 years according to the NCC Draft IL);
- The NCC institutes rules for establishing the duration of a lease which does not have a contractually determined term;
- New rules are regulated for determining the rent payment date, unless established by the parties in the contract;
- The authenticated notarized lease contract or the one registered with the competent fiscal authority shall operate as an enforcement order with respect to rent payment and the obligation to return the asset.

As a general comment, we note the NCC legislator’s tendency of compensating the absence of certain contractual clauses with relevant legal provisions. Thus, as we shall outline below, we consider that there is a lack of uniformity to the new provisions on the lease term, but that the statutory regulation of the rent payment date is beneficial.

(a) Section 1 “General provisions”

[Art.1777-1823] This section establishes the general norms in the matter of lease, by resuming and updating the current regulation under CC, codifying the doctrine, as well as by adapting certain foreign legal provisions, most often from ICC.

1. Content of the Contract

[Art.1777-1785] Following the doctrinal example Art.1777 redefines the concept of lease, previously regulated under Art.1411 CC, as the contract whereby a party, referred to as lessor, undertakes to provide to the other party, referred to as lessee, the use of an asset for a certain period of time, in exchange for a price, referred to as rent. A novelty in the structure of this regulation is the elimination of the "lease of works", *i.e.* the contractor agreement, from the chapter dedicated to the lease contract, the contractor agreement being given a distinct regulation, in accord with the doctrinal recommendations.

Art.1778 para.(1) repeats the current regulation under Art.1413 CC, defining the lease types, namely the rental - the lease of movable and immovable assets, and the land lease - the lease of agricultural assets. As stated in the introductory comments to this chapter, Art.1778 para.(2) institutes the rule already acknowledged by the doctrine according to which the general provisions in lease matters shall also apply, to the extent they are compatible, to dwelling rental and land lease.

According to Art.1778 para.(3), the lease of premises intended for the exercise of a profession or undertaking is subject to the general provisions in matters of lease, as well as to the provisions of Art.1824 and Art.1828-1831. The NCC Draft IL is envisaged to replace the phrase “intended for the exercise of a profession or undertaking” with “intended for the exercise of a professional’s activity”. The amendment is a welcome terminological clarification, as the concept of professional is given a statutory regulation under Art.3 of the NCC. In this line of approach, the purpose of this norm is to assimilate professionals (having the meaning ascribed by of Art.3 of the NCC) to individual tenants, parties to the dwelling rental agreements, to secure increased stability for the right to use the premises of a professional nature.

Art.1779 codifies the doctrine, providing that all assets, both movable and immovable, may be subject to lease, if not otherwise lawfully provided or attested by their nature.

As to the price of the lease, it is accepted the doctrinal principle according to which fixing the rent in cash is not of the essence of the lease. Thus, the rent may be fixed in cash, and in any other goods or performances (Art.1780 para.(1)). According to Art.1780 para.(2), the provisions on the fixing of the sale price are also applicable to the rent, accordingly. In our opinion, the reference norm under Art.1780 para.(2) is too general and not recommendable from a clarity standpoint; a precise listing of the articles referred to is, thus, more adequate.¹²⁵

¹²⁵ To determine the rent, one may enforce Art.1661 – Determinable Price, Art.1662 – Determination of the Price by a Third Party, and Art.1664 – Lack of an Express Determination of the Price (*i.e.* para.(1) on the price determined as per the circumstances and para.(2) on the price normally charged by the seller). In our opinion, Art.1663 on determining the price as

Art.1781 codifies doctrine, establishing the consensualism of the lease contract which shall be deemed concluded once the parties agreed on the asset and price.

Art.1782 inserts new rules on the settlement of the conflict between lessees in case of successive leases. Thus, in case the object of the lease is an immovable asset, the person that registered his right with the land book shall have priority, in case the object is a movable asset, the conflict shall be settled in favor of the lessee that first fulfilled such formalities, and in the case of all other assets, in favor of the lessee that first took possession over the use of the asset; the provisions of Art.1275 (on the successive transfer of a movable asset) shall apply accordingly.¹²⁶

As a novelty, Art.1783 of the NCC regulates the maximum term of the lease, which may not exceed 30 years. Should the parties stipulate a longer term, such term shall be *de jure* decreased to 30 years. The NCC Draft IL proposes an extension of such term to 49 years, most likely to harmonize this regulation with the laws on concessions.

Following the pattern under the ICC, Art.1785 of the NCC regulates the rules for establishing the term of the lease without a contractually determined term, if established that the parties did not intend to enter into a contract with undetermined term. The wording of Art.1785 reveals that the rule of establishing the term according to customary practices has priority (this hypothesis is not taken over from the ICC),¹²⁷ and, in the absence of customary practices, the lease shall be deemed concluded: a) for one year, in the case of unfurnished housings or premises for exercising a profession or undertaking;¹²⁸ b) for a term corresponding to the unit of time for which the rent was computed, in case of movable assets or furnished rooms or apartments; c) the term of the immovable asset's lease, in case of movable assets provided to the lessee for the use of an immovable asset.

per the weight of the sold object appears not to be subject to the reference norm. As to the determinable rent (similarly to the determinable price regulated under Art.1661), or rent's determination by a third party appointed by the parties (Art.1662 para.(1)), doctrine acknowledges such hypotheses in matters of lease. We also deem feasible the regulation on the rent's determination by the court, in case such rent is not determined by the third party appointed by the parties, similarly to Art.1662 para.(2), para.(3), however the terms regulated under Art.1662 (6 months for the determination of the price by the expert appointed by the parties, or one year for declaring the nullity of the sale, should the price not be determined according to the specified procedure) appear not to be reasonable in matters of lease, as time is of the essence. From this standpoint, the rent's procedure of determination by a third party with the help of the court should have been subject to a special regulation in the chapter on lease.

¹²⁶ Para.(3) contains an inadequate wording: "entered into the use of the asset ". Art.1275 partially overlaps Art.1782; we deem that the reference norm should have been avoided (especially that Art.1275 addresses the transfer of ownership).

¹²⁷ We express our doubts on the immediate enforcement of this rule, taking into account that the customary practices on the term of the lease are not consolidated, however we do not exclude the possibility that this text may find applicability in the future.

¹²⁸ The Draft IL replaces the wording "exercise of a profession or undertaking" by "exercise of the activity of a professional", the concept of professional being lawfully defined under Art.3 of the NCC.

Art.1783 and Art.1785 of the NCC are regulated as per the pattern laid down under Art.1573 and Art.1574 of the ICC.¹²⁹ In our opinion, the Romanian lawmaker took over only the form, and not the substance of ICC's norms.

According to European doctrine, Art.1573 of the NCC establishes, in fact, a rule laid down under the ICC, providing that leases on undetermined term are not permitted. Art.1574 of the ICC strengthens this rule by establishing certain legal terms for the leases whose term is provided by the parties as unlimited. Consequently, the Italian regulation presumes, on an absolute basis, that the parties did not enter into a contract for an undetermined term, for the very fact that this clause is not valid. The new Art.1785 of the NCC regulates the legal term of the contracts whose conclusion is presumed not to have been intended for an undetermined term, which hypothesis, consequently, differs from the Italian regulation, while the NCC agrees, in fact, to the conclusion of leases for an undetermined term, as revealed by the very wording of Art.1785 (subject to the maximum term of the lease regulated under Art.1783 of the NCC).¹³⁰

The Italian regulation is logical, its main rule being that leases for an undetermined term are not permitted. On the other hand, the provisions of the NCC on the term of the lease are inconsistent, as they set legal terms for leases without a contractually determined term (Art.1785), permit the conclusion of lease contracts for an undetermined term (*see*, for instance, Art.1785, Art.1810, Art.1816), and, at the same time, they enact a maximum legal term for leases (Art.1783), devoiding the concept of lease for an undetermined term of any meaning, although the notion is still used by the lawmaker.

Furthermore, the ICC (Art.1597) also regulates the tacit relocation, making a special reference to the situation of the leases concluded for a lawfully determined term according to Art.1574 of the ICC (corresponding to Art.1785 of the NCC), and the extension shall be made for the same term. Nevertheless, according to Art.1810 para.(2) of the NCC, after applying the tacit relocation mechanism, the new lease shall be deemed concluded for an undetermined term.¹³¹ The strict rules established under Art.1785 appear to be undermined by the occurrence of the tacit relocation enforcing a new lease contract for an undetermined term.

In our opinion, a simpler way was to establish, in all cases of lease concluded without a provision of the term, the presumption that the contract was concluded for an undetermined term. Thus, the parties are protected in such cases by the applicability of Art.1816 of the NCC which regulates the unilateral termination of the contracts concluded for an undetermined term.

¹²⁹ Taking into account that the two articles address the term of the lease, a unitary regulation would have been proper, *i.e.* two consecutive articles, as with the ICC.

¹³⁰ We estimate that, in practice, in the case of a lease contract which contains no clause on the term, it shall be difficult to prove whether the parties intended to enter into a contract with undetermined term.

¹³¹ In our case, should a furnished apartment be leased with the payment of the rent for one month (Art.1785 let.b)), and the term of the lease is not provided, the lease shall be deemed concluded for one month, and, subsequent to the lapse of such period, the contract shall turn into a contract for an undetermined term, by virtue of the legal provisions on the tacit relocation.

According to Art.1784 para.(1), the provisions on the incapacities provided under Art.1654 and Art.1655 are applicable to the lease accordingly. Consequently, the lease shall be applied the sale incapacities specific to certain categories of persons which, based on a contract or as a result of the exercise of a position or holding of a capacity, are authorized to perform acts of administration with respect to other person's assets. It is our understating that the applying of the provisions of Art.1654 on incapacities of purchasing to matters of lease shall mean that such persons holding administration powers may not be granted the lease of assets under their administration. The applying of Art.1655 on incapacities of selling appears to be more complicated. In addition to the difficulties triggered by the construal of this article in relation to the very sale contract, we deem that the proper application of the norm in matters of lease may not be construed as entailing a change of the incapacity of selling own assets into an incapacity of granting the lease over own assets, especially that Art.1655 refers to a singular payment to be made from the administered patrimony, and not to successive payments such as the rent. As this delicate matter of incapacities is concerned, we deem that the reference norms should be avoided, the first option being a special regulation for the specific case at hand.

According to Art.1784 para.(2), the provisions of Art.1643 (in fact, Art.1653) shall be applicable, by analogy, including the case of a dispute over the ownership right over the asset to be subject to the lease.¹³²

Moreover, as a novelty it is provided that, in the absence of a different legal provision, leases concluded by the persons that, according to law, may only conclude acts of administration, shall not exceed 5 years (Art.1784 para.(3)).

2. Lessor's Obligations

[Art.1786-1795] The NCC keeps the regulation of Art.1420 of the CC on the lessor's main obligations, *i.e.* obligation to hand over, maintain the asset under a proper condition of use and to secure the peaceful and quiet enjoyment throughout the full term of the lease (Art.1786).

As to the asset handover, in addition to Art.1421 item 1 of the CC, NCC codifies doctrinal opinions and provides that the handover obligation shall cover the asset's accessories (Art.1787).

Para.(1) of Art.1788 unitary reiterates the lessor's obligation to perform the repairs necessary to maintain the asset in proper use condition throughout the full term of the lease, as per destination (Art.1420 item 2, Art.1421 item 2 of the CC). The NCC codifies doctrine with respect to the lessee's obligation to perform tenantable repairs, whose requirement arises out of the common use of the asset, which obligation is now expressly regulated only for the lease of immovable assets (Art.1788 para.(2)).

According to Art.1788 para.(3), if the lessor, although notified, fails to perform the necessary repairs, the lessee may perform such repairs, and the lessor shall be bound to repay, in addition to the amounts

¹³² As to this legal text, we noticed a clerical error regarding the reference norm which, in fact, refers to Art.1653 on the incapacities of purchasing litigious rights (and not to Art.1643 on the partial loss of the asset subject to restitution). Nevertheless, this error was emphasized in the Draft IL which proposes the correction of the clerical error, for which reason we shall not insist on this issue.

incurred by the lessee, interest calculated from the day the expenses were incurred. The doctrinal approach applying Art.1077 of the CC in such matters, concluding that the lessee shall have to request permission from the court prior to performing the repairs on account of the lessor, is thus amended.

In case of emergency, the lessee may also notify the lessor after the initiation of the repairs incumbent on the latter, as the case of urgent repairs performed without the permit of the court was also supported by doctrine. In this case, the interest on the incurred amounts may start to run only upon the notification date (para.(3)).¹³³

Art.1789 establishes in detail the lessor's obligation of securing the quiet and peaceful use of the asset; the lessor shall have to refrain from any act which would prevent, decrease or impede such use. In fact, Romanian doctrine construed the current regulation in the same fashion.

The NCC reiterates lessor's obligation of providing warranty against defects in a similar form as with current Art.1422 item 1 of the CC. The NCC establishes the doctrinal rule according to which the warranty shall survive, irrespective whether the defects existed before or occurred during the lease, taking into account that the lessor's obligation to provide the warranty (unlike the seller's obligation) is successive (Art.1790 para.(1)). Moreover, the codification of doctrine regulates the lessor's obligation of not being liable for the apparent defects upon the conclusion of the contract, unless such defects caused injuries to life, health or safety of the lessee (Art.1790 para.(2)).

The NCC Draft IL improves para.(2) of Art.1790, adding the rule that the lessor shall not be liable for the apparent defects which the lessee failed to claim under the conditions of Art.1690 para.(3) in matters of sale, and, consequently, immediately after the handover, in accordance with the lessor's obligation of handing over the asset in a proper use condition (Art.1787 of the NCC).

As to the effects of the warranty against defects, the NCC legislates the doctrinal approach on the lessee's right to request a *pro rata* decrease in the rent or even the termination of the contract, if the defects are so serious that, if he had been aware of them, the lessee would not have taken the asset under lease (Art.1791 para.(1)), and reiterates the current provision (Art.1085, Art.1422 item 2 of the CC) on the bad-faith lessor's obligation to indemnify when such defects cause a damage to the lessee (Art.1791 para.(2)).

Similarly to the matters of sale, the NCC assimilates the warranty for the lack of agreed qualities with the matters of warranty against hidden defects (Art.1792).

The NCC keeps the current provision (Art.1426 of the CC) according to which the lessor shall not be bound to warrant the lessee against the nuisance caused by the act of a third party which claims no right over the asset (Art.1793 thesis I). The NCC no longer reiterates the provision on the lessee's possibility of defending by way of possessory actions, on his behalf; nevertheless, this right is acknowledged to the lessee under Art.949 para.(2) of the NCC.

¹³³ Although the permit of the court is no longer required for the lessee to perform the repairs incumbent upon the lessor, no legal regulation was enacted for the amount of the interest (for instance, NBR's reference interest), for which reason, lessee shall still have to address to the court to be awarded comminatory damages. In addition, a useful provision would be that the lessee be able to withhold the amounts due by lessor from the rent.

As a novelty, the warranty shall be due if nuisances occurring prior to the asset's handover prevent the lessee from taking it over, in which case, the provisions of Art.1794 para.(2) shall be applicable (on the lessee's right to request a decrease in the rent or contract termination) (Art.1793 thesis II).

In case of *de jure* nuisances caused by a third party, the lessor shall have to defend the lessee even in the absence of a *de facto* nuisance, similarly to the lessee's obligation to defend the lessor against the usurpations provided under Art.1433 of the CC (para.(1) thesis I). If the lessee is prevented, in full or in part, from using the asset, the lessor shall have to indemnify him for the damages arising out of such cause, which provision is compliant with the doctrinal approach that acknowledges the lessee's right to damages in such situation (Art.1794 para.(1) thesis II).

The NCC provides that, irrespective of the seriousness of the nuisance, lessee shall be entitled to request a *pro rata* decrease in the rent if he notifies the lessor, and the latter fails to remove the same at once (Art.1794 para.(2) thesis I).¹³⁴ The provision is a reiteration of the norm under Art.1427 of the CC, supplemented by the lessee's obligation to notify the lessor, in accord with doctrine.

According to Art.1794 para.(2) thesis II, should the nuisance be so serious that, if he had known it, the lessee would not have entered into the contract, he may terminate the contract under the conditions provided by the law. We find this regulation lacunar and incomplete. As the termination of the contract in such matters is concerned, knowing or not knowing the reason for the nuisance is less important; other circumstances are essential, such as the loss or essential decrease in the use due to nuisance. In our opinion, the NCC chose for a regulation similar to the one in matters of sale, although, in the case at hand, not the ownership, but the use is protected, and unreasonably omitted to expressly regulate lessee's right to request the termination of the contract, if the latter may not be performed, or if the use of the good was decreased to a great extent.

If he was aware of the cause of eviction upon the conclusion of the contract, the lessee shall not be entitled to damages (Art.1794 para.(3)).

Under the name of "Impleader of the Lessor", Art.1795 para.(1) reiterates the norm established under Art.1428 of the CC, providing that, should the lessee be sued by a third party claiming a right (including easement) over the asset, and there is the risk of losing, in full, or in part, the use over the asset, he shall be entitled to request that the lessor be brought in the trial, under the conditions of the civil procedure code.

We infer from the heading of the article that the alternative solution under Art.1428 of the CC, *i.e.* the motion for interpleader, was not explicitly reiterated although, in consideration of the nuisance's features, it may prove to be more applied in practice. In addition, the text fails to address the lessor's liability to the lessee, if the latter chooses not to notify/bring him in the trial. According to doctrine, in such situation, the lessor shall not be liable for the damages caused to the lessee by the *de jure*

¹³⁴ We deem that the wording "irrespective of the seriousness of the nuisance" is questionable, as it may be construed in the sense that lessee may claim the decrease of the rent, even if there is no actual nuisance of the use, which would be an excessive sanction against the lessor.

nuisance, if he may attest to the fact that he would have had the proper means to dismiss the third party's claims.

Art.1795 para.(2) reiterates the rule under Art.1433 item 2 of the CC (on lessee's obligation to defend the lessor against usurpations) and codifies doctrine, in the sense that lessee shall be bound to indemnify the lessor for all the damages incurred as a result of lessee's failure to notify the nuisance. As a novelty, the lessee shall not be bound to pay indemnifications if he attests to the fact that the lessor could not have won the case or, although he was aware of the nuisance, failed to act.

Art.1794-1795 mentioned above merge both the lessor's obligation to provide warranty against *de jure* nuisances caused by a third party, and lessee's obligation to protect the lessor from such usurpations, which obligations are separately addressed by the current regulation, and by doctrine, resulting in an incomplete regulation. In our opinion the lessee's obligation to defend the lessor against usurpations should have been regulated under the subsection on the lessee's obligations.

Finally, the NCC fails to address the contractual amendment of the obligation to provide warranty against defects or nuisances of use. We believe that the silence kept by the NCC on this issue does not mean an invalidation of certain clauses of aggravation, limitation or exemption from liability, previously acknowledged by Romanian doctrine as well. As a result, we deem that an express provision on the possibility to conventionally change liability would have been useful, considering the lawmaker's intention of providing a comprehensive regulation under the NCC. Moreover, the ICC, which is the source of inspiration for many novelties in matters of lease, includes a norm on the conventional limitation of lessor's liability (Art.1579 of the ICC).

3. Lessee's Obligations

[Art.1796-1804] Art.1796 legislates an extended regulation of lessee's main obligations, which are: a) to take over the asset granted on lease (of a doctrinal inspiration); b) to pay the rent in the amount and term provided under the contract (corresponding to Art.1429 item 2 of the CC); c) to use the asset with due care and diligence (corresponding to Art.1429 item 1 of the CC); d) to return the asset upon the termination, for any reason, of the lease contract (again, a regulation inspired by doctrine). As to the obligation regulated under Art.1796 let.c), the NCC chose to replace the wording "reasonable owner" by "with due care and diligence", to reflect the doctrine's construal in the sense that the fault of the lessee shall be assessed as per the abstract model of the careful and diligent person.

In general, the rent payment date is the date stipulated by the contractual parties, which rule is implied by Art.1797 para.(1). The text establishes date determination rules, when the parties failed to provide for the date in the contract. In such circumstance, the date shall be mainly established in accordance with the practices,¹³⁵ and, in subsidiary, for certain terms provided under Art.1797 para.(2) NCC, depending on contract duration. The rent shall be paid: a) in advance, for the entire duration of the contract, if such duration does not exceed one month; b) on the first business day of each month, if the

¹³⁵ As we have mentioned on various occasions, since lease practices are not consolidated, this text is unlikely to apply right away, but it might prove useful in the future.

duration of lease agreement exceeds one month, but is less than one year; c) on the first business day of each quarter, if the duration of the lease agreement is at least one year.

Under the law, lease agreements concluded in authenticated notarized form, as well as those concluded under a private instrument and registered with the fiscal bodies¹³⁶ are enforcement orders for the rent payment upon the terms and in the ways established in the contract (Art.1798).¹³⁷

Art.1799 reiterates and rephrases the existing Art.1429 CC on lessee's obligations regarding the use of the asset. Thus, the lessee shall use the leased asset with prudence and diligence, in accordance with its contractual purpose, or, in the absence thereof, under the purpose presumed based on certain circumstances, such as asset type, its previous purpose and the purpose for which the lessee is currently using it. We believe that the purpose "for which the lessee is currently using it" may leave room for abuse. The lawmaker most likely intended to refer to other contractual elements that might lead to presume the purpose (for example, the lessee is a lawyer, therefore the immovable asset is leased for a law office). Although we have no doubts that the practice shall establish an appropriate interpretation, a clear wording would have been advisable.

If the lessee changes the form or the purpose of the asset or uses it abusively, the lessor has the right to terminate the contract (similarly to the current regulation under Art.1430 of the CC). It codifies the doctrinal opinions stating that, in such circumstance, the lessor also has the right to request damages, alternatively or cumulatively (Art.1800).

Art.1801, as a novelty fostered by doctrinal orientation, establishes the lessee's obligation to send to the lessor a notice providing for the necessity to make the repairs incumbent on the latter, on penalty of paying damages and incurring any other expenses. The text is consistent with Art.1788 para.(3) NCC.

Art.1802 maintains the rule upholding that tenantable repairs shall be incumbent on the lessee (similarly to Art.1421 item 2 CC). The same issue is provided for under Art.1788 para.(2) NCC, therefore we consider Art.1802 redundant.

As regards the non-use of the asset in case of urgent repairs, the NCC reiterates and rephrases the current provisions of Art.1425 CC, except for the existing term of 40 days considered acceptable for the fulfillment of repairs by the lessor, which has been reduced to 10 days, in compliance with nowadays realities (Art.1803).

¹³⁶ In regard to the registration of the lease contract with the fiscal bodies, we would like to point out that such registration is compulsory only for lessors-individuals, for taxation purposes. Legal entities do not have to fulfill such registration, as their lease incomes are reflected by the accounting books and they shall only need to register the financial statements containing relevant information as to such contracts. By consequence, the phrase "registered with the fiscal bodies" must be construed in a broad sense, as including any means by which the lease contract is taken into account upon the calculation of the tax due to the state budget, including for legal entities. However, in this case the enforceable nature of the lease contract executed by legal entity lessors must be either presumed (pursuant to a legal text), or proven by a series of documents, such as the actual contract, accounting entries, balance sheet items, and even the proof of registration with the fiscal bodies. To avoid such a situation, the fiscal rules may be supplemented, so as to grant legal entities the right to chose direct registration of the lease contracts with the fiscal bodies, without any fiscal consequences (currently, this is not possible due to the lack of legal grounds).

¹³⁷ Under the NCC Draft IL, this Art.1798 is supplemented with the "terms and modalities established [...] under the law", in the absence of contractual terms, most likely in consideration of Art.1797 NCC.

As a novelty, it provides for the lessee's obligation to allow the examination of the asset by the lessor, as well as the access of certain persons with whom the lessor wishes to enter contractual relationships on the ownership or use of the asset, provided that the lessee shall not be unreasonably hindered from using of the asset (Art.1804).

4. *Sublease and Assignment of Lease Contract*

[Art.1805-1808] NCC codifies in a series of articles the doctrine relating to sub-lease and the assignment of lease contract.

Under Art.1805 NCC, the lessee is entitled to sublease and assign the contract, if this option was not expressly prohibited to him, similarly with the current Art.1418 CC, providing for rental of immovable assets. Thesis II of Art.1805 expressly establishes the rule under which sublease or assignment of immovable assets shall only be permitted with the lessor's written consent.

In accordance with Art.1806 para.(1), the interdiction to sublease implies the interdiction of assignment, and not vice versa. The interdiction to sublease and the interdiction of assignment shall be construed as referring to total or partial sublease/assignment (Art.1806 para.(2)).

Among the sublease effects, NCC provides for a direct action of the lessor against sublessor, up to the amount of the lease owed by the latter to the main lessee, and for the performance of the other obligations undertaken pursuant to the sublease contract (Art.1807 para.(1) thesis I, para.(3)). The lessor's right shall subsist even if the sublessee pays the lease in advance and even when the receivable having as object the rent owed pursuant to the sublease was assigned by the main lessee (Art.1807 para.(1) thesis II, para.(2)).

Unlike the current doctrinal opinion stating that the assignment of lease contract is a mere assignment of the right of use, not of the obligation to pay a lease, the NCC provides for the assignment of the entire contract. Thus, under Art.1808, as a result of lease assignment, the assignor acquires the rights and shall be held liable for the lessee's obligations arising from the lease contract, the NCC provisions on contract assignment being also applicable in this case.

5. *Expiry of the term and tacit relocation*

[Art.1809-1810] Pursuant to Art.1809, the expiry of the lease term shall entail the *de jure* cessation of the contract, similarly with the current legislation (Art.1436 item 1 CC).

As a novelty, according to Art.1809 para.(2)-(3), the contract concluded for a determined term and acknowledged by an authentic or private instrument, registered with the relevant fiscal body, shall represent, pursuant to the law, an enforcement order upon the expiry of the term.¹³⁸

Similarly with Art.1437 CC, Art.1810 provides for tacit relocation, which shall result in lease renewal, in compliance with the old lease requirements, including warranties, with the amendment that the new lease shall be considered concluded for undetermined term, unless the law or the parties' agreement provide otherwise.

¹³⁸ As regards the registration of the contract with the relevant fiscal body, see our footnote regarding Art.1798 NCC.

6. Transfer of Leased Asset

[Art.1811-1815] If the leased asset is transferred, the lease contract shall be enforceable against the acquirer pursuant to the order of priority established by Art.1811 NCC: a) in the case of immovable assets registered with the land book, if the lease was noted with the land book; b) in the case of immovable assets unregistered with the land book, if the exact date of the lease is previous to the exact date of transfer; c) in the case of immovable assets subject to publicity formalities, if the lessee fulfilled such formalities; d) in the case of other movable assets, if upon transfer the asset is used by the lessee. The current regulation (Art.1441 CC) expressly and specifically referred to immovable assets and only established the rule on the enforceability of lease contracts concluded by authenticated instrument or private instrument with an endorsed date.

Cessation of the lease in case of transfer shall take place when the lease contract provided for such cessation cause (Art.1812 para.(1)).¹³⁹ The solution was also implied by Art.1441 CC. Under Art.1812 para.(2), if the lease contract stated the cessation thereof in case of transfer, the lease shall remain enforceable against the acquirer, even after the lessee was notified on the transfer, for a term twice as long as the notice term applicable to the unilateral termination of the contract, pursuant to Art.1816 para.(2). The term is the main element of novelty in the new regulation, Art.1443 CC confining to make reference to the prior notice term established on the basis of the local customs.

Unlike the current norm (Art.1442 CC), the new regulation establishes that the lessor (or acquirer) shall not owe damages to the lessee in this situation, unless he fails to comply with the special prior notice term provided under para.(2) (Art.1812 para.(3)).

In the relationships between the lessee and the acquirer, if the lease contract is enforceable against the acquirer, pursuant to Art.1811, the acquirer shall subrogate to all lessor's rights and obligations arising from the lease (Art.1813 para.(1)).

Moreover, the NCC establishes the rule of joint liability of the acquirer and initial lessor, if the aforementioned fails to observe the lease (Art.1813 para.(2)). The NCC Draft IL proposes the removal of joint liability and replacement of the norm so as to only provide for the obligation of the initial lessor to be held liable for the injuries caused to the lessee prior to transfer. We welcome this amendment, as the joint liability of the initial lessor and acquirer is not a suitable solution since, under Art.1813 para.(1), the acquirer shall subrogate to all lessor's rights and obligations.

In our view, the aforementioned legal provision should have further regulated the liability of the initial lessor when the lease contract is not enforceable against the acquirer pursuant to Art.1811 (and does not fall under Art.1812) and the latter invokes unenforceability. In this case, according to the doctrine, the lessor has the obligation to observe the contract, in other words, to indemnify the lessee for any prejudice, similarly with Art.1813 para.(2), as amended by the NCC Draft IL.

The acquirer shall subrogate to the rights arising from the warranties established by the lessee to secure the fulfillment of his obligations to the lessor's benefit (Art.1814).

¹³⁹ The Draft IL chose a clearer wording of this paragraph, which is not different on the merits from the current solution.

The payment of the rent in advance and the assignment of the receivable regarding the lease shall not be enforceable against the acquirer, unless they were subject to the publicity formalities provided under the law, before the transfer became enforceable against the lessee, or if the payment in advance or the assignment was known by the acquirer in any other way (Art.1815).¹⁴⁰

7. Cessation of contract

[Art.1816-1823] Art.1816 establishes the unilateral termination of the contract at the initiative of one of the parties. According to para.(1)-(2), if the lease term was not specified, any of the parties may terminate the contract unilaterally, by notice, in compliance with the prior notice term established by law or, in the absence thereof, by customs. The regulation is similar to Art.1436 item 2 CC, except that it introduces the precedence of the prior notice term established by the law and secondly of the prior notice term established in accordance with the customs (“the local customs” according to the current regulation). Although the text fails to mention it expressly, the prior notice term may be established by the parties’ agreement, in which case it will have priority.

Pursuant to Art.1816 para.(3), upon the fulfillment of the prior notice term, the obligation to restate the asset becomes due and the “*lease contract concluded under the conditions provided by Art.1809 para.(2) or para.(3)*”, shall be regarded as an enforcement order in relation thereto.

The failure to perform the obligations arising from the contract shall entitle the injured party to rescind the lease and receive damages, as the case may be, in accordance with the law (Art.1817). This wording is not exactly the most appropriate one, as it presumes the prejudice caused to the other party, without making reference to the person who failed to perform, but the NCC Draft IL considers the amendment of this article.¹⁴¹ Under the new rule, contract rescission is no longer conditional upon the failure to perform the “main” obligations, which lead to rescission according to the current regulation (Art.1439 item 2 CC). Such omission is however addressed by the regulation on the framework matter of rescission, according to which the creditor of the obligation shall not have the right to rescind if the non-performance is insignificant, with the exception of repeated non-performances (Art.1551 para.(1) NCC).

NCC maintains the current rules (Art.1423 CC) on the total or partial impossibility of using the asset, supplementing them in compliance with the doctrinal reading. Thus, the lease shall cease *de jure* if the asset was entirely destroyed, or if it may no longer be used in accordance with its established purpose, therefore, regardless of the fact that such impossibility of use is owed to the fortuitous case (similarly with Art.1423 CC) or to one of the parties’ negligence (doctrinal reading) (Art.1818 para.(1)). However, it maintains the alternative solution of rescission, or of *pro rata* reduction of the lease, in case of partial impossibility of use (Art.1818 para.(2)). Separately, it states the applicability

¹⁴⁰ The Draft IL proposes a more detailed wording, in that it expressly mentions the publicity formalities by registration with the archives or the land book, as the case may be, depending on the lease object, thus avoiding the interpretation according to which this article would only apply to the lease of immovable assets.

¹⁴¹ The Draft IL amends this article, proposing the following wording, which is more appropriate: “When, without a reason, one of the contractual parties fails to perform his obligations arising hereunder, the other party has the right to rescind the lease and receive damages, as the case may be, pursuant to the law”.

of the rules regarding repairs, when the asset is just deteriorated, in which case the lease shall continue (Art.1818 para.(3)). According to the doctrine, if the total/partial impossibility of using the asset is fortuitous, the lessee shall not be entitled to damages (Art.1818 para.(4)).

Cancellation of the lessor's title shall entail the *de jure* cessation of the contract, pursuant to the doctrinal solution (Art.1819 para.(1)). As a novelty, a provision is introduced to confer protection to the lessee acting in good faith, based on the apparent owner theory. Thus, the lease shall remain effective even *after* the cancellation of the lessor's title, throughout the term stipulated by the parties (similarly with the derogation admitted by the doctrine and practice), without exceeding one year from the cancellation of the lessor's title (Art.1819 para.(2)).

Under Art.1820 para.(1), the death of the lessor/lessee shall not entail the cessation of lease, similarly with the current norm (Art.1440 CC para.(1)). The NCC innovates by Art.1820 para.(2) stating that, in the case of lease agreements concluded for a determined term, the lessee's heirs may unilaterally terminate the contract, 60 days after they acknowledged the lessor's death and the existence of the lease.

Similarly with Art.1431 CC, the lessee has the obligation to restate the asset as he received it, presumably in the state corresponding to its purpose, except when the asset was destroyed or deteriorated due to its age (Art.1821 para.(1),(2)). The text no longer refers to the destruction or deterioration caused by force majeure, which is implied, or to the restitution obligation, under the reception inventory. Besides, the obligation to draft an inventory was not mandatorily provided by the current norm either, and the parties would have the option to draft such inventory, in the future, as the case may be, to prove the state of the asset upon delivery and the content of restitution obligation. Art.1821 para.(3) also provides that the place of restitution of the movable assets is the place of delivery.

As regards the lessee's liability for the deterioration of the rented asset, the hypothesis provided by Art.1822 is not substantially different from the previous provisions of Art.1434-1435 CC. As a novelty, it is expressly codified the lessee's liability for the deeds of the third parties to whom he granted access to the asset (not only for family members and sublessees, as provided by the current regulation).

So far, the solution for the improvements made by the lessee was taken from the general matter of obligations. Art.1823 NCC provides for explicit rules on the parties' rights and obligations regarding the asset restitution, particularly for the improvements made by the lessee depending on the type of works and on lessor's prior consent. Thus, the lessor has the right to keep the added and autonomous works performed on the asset throughout the lease term. In these circumstances, the lessor shall only pay indemnifications if the lessee's works were performed with his prior consent (para.(1)). If the works were performed without the lessor's prior consent, the latter may choose to request the lessee to bring the asset to its initial state and pay indemnifications for any prejudice caused to the asset by the lessee (para.(2)), and the latter may not claim the right of retention (para.(3)).

Under Art.1823 para.(4), "the provisions of Art.1788 para.(3)-(4) shall remain applicable in this case as well". The reference norm is flawed, in our opinion. The two texts to which reference is made concern the lessee's right to make the necessary repairs (which are normally incumbent on the lessor),

in case of lessor's inaction, or in case of emergency. The necessary repairs are works designed to maintain the asset in a state appropriate for use, not improvements brought to the asset as per Art.1823. It is only logical that, under specifically provided circumstances (Art.1788 para.(3)-(4)), the lessor may not ascribe to the lessee the absence of consent to the necessary repairs, nor can he ask the lessee to bring the asset to its initial state (pursuant to Art. 1823 para.(2)), as the necessary repairs have the very purpose to bring the asset in such state. Although we do not exclude the idea that the necessary repairs should bring additional value to the asset, by a certain level of "improvement", we deem that such reference can create confusion in practice, and therefore a text envisaged for the particular situation of improvements would be preferable.

(b) Section 2 "Particular Rules on Dwelling Rental"

[Impact] The impact of this regulation is insignificant, for the section basically reiterates the legal provisions of Dwelling Law No.114/1996, currently in force. The NCC Draft IL expressly repeals Art.21-33 of Law No.114/1996 and Art.12, Art.14-25, Art.32 para.(2) and Art.43-44 of GEO No.40/1999.

[Art.1824-1835] Art.1824 establishes rules on the unilateral termination of the rental contract made by the tenant or lessor without determining the prior notice term. The prior notice term in such cases is established both as a fixed and as a minimum term, based on the sequence of lease payments. Thus, under para.(1), the unilateral termination by the tenant shall be made by a notification to provide for a prior notice term which shall not be less than $\frac{1}{4}$ of the term established for the rent payment. As regards the unilateral termination of the contract by the lessor, the latter shall grant a prior notice term which shall not be less than 60 days, if the rent payment term was established for one month or more, or 15 days, when the rent payment term established is less than one month (para.(2)).

In case of a rental contract executed for a determined term, unilateral termination is allowed to the tenant by exception. By consequence, a minimum prior notice term is regulated for dwelling rental contracts executed for a determined term. Pursuant to Art.1825 para.(1), the tenant (sometimes referred to as "lessee" in said article, to the detriment of the regulatory unity) may unilaterally terminate the contract by notification, in observance of a prior notice term of at least 60 days. The same text provides for an implicit interdiction of contractual clauses to the contrary, which are deemed to be unwritten.

Pursuant to Art.1825 para.(2), if the rental contract is executed for a determined term, and the contract provides that the lessor may unilaterally terminate the contract in order to satisfy his own or his family housing needs, the notice term provided under Art.1824 para.(2) shall be applicable for such termination.

Pursuant to the model of Art.22 of Law No.114/1996 laying down the contractual clauses which are absolutely null and void, the NCC regulates a series of prohibited clauses, and the sanction applied by the NCC lawmaker is that they shall be qualified as unwritten clauses (Art.1826). Briefly, unwritten clauses are the following: (a) clauses imposing a particular insurer for the insurance to be concluded by the tenant, (b) clauses providing the joint or indivisible liability of the tenants from various apartments of the same real estate, in case of deterioration of the common parts in the real estate, (c) the tenant undertakes to acknowledge/pay in advance the tenantable repairs, based on the lessor's

estimates, (d) clauses entitling the lessor to diminish or remove, without equivalent consideration, the services it undertook to carry out under the contract.

Art.1827 regulates the tenant's statutory right to terminate the rental contract, notwithstanding any contractual provisions under which he waived such right, if the real estate has defects representing a threat to health or bodily integrity (para.(1)). The tenant is also entitled to damages if such defects were unknown to him upon the execution date of the contract (para.(2)).

Pursuant to Art.1828 the tenant has, at equal terms, a right of preference upon the execution of a new dwelling rental contract, provided that he carried out all obligations arising from the prior lease (para.(1)).¹⁴²

Pursuant to Art.1828 para.(2), the provisions regarding the preemption right as regards sale shall apply accordingly. Note should be made as to the inconsistent phrasing of the tenant's right, as "right of preference"/"preemption right", which needs to be corrected.¹⁴³ As regards the substance implications of the reference norm, the "appropriate" application of the norms on preemption right in relation to sale raises serious questions. Is it necessary for the landlord to execute with a third party a rental contract subject to a condition precedent, merely with the purpose of offering the tenant a new rental contract with the same terms as the one already executed with the third party? What is the price to be deposited by the tenant for the new contract to operate, i.e. the first rent? Are the provisions on the registration of the tenant's preemption right in the land book applicable, if the leased asset is a real estate? In our opinion, the exercise of the preemption right in the matter of sale is a complex procedure, which, beyond the criticism that it may be subject of, is devised for a different situation, and therefore it is unsuited for the lessor-tenant relation in the matter of housing lease. The aforementioned parties merely renew an already existing contractual relation, under the quantifiable conditions of the market.

Art.1829 enshrines the tenant's right to use the common parts and installations of the buildings with several apartments, as well as the obligation thereof to contribute to the expenses for lighting, heating, cleaning of common parts and installations, as well as any other expenses established under the law on his account.

The termination of the contract may be obtained by the party injured due to the other party's failure to perform its obligations (Art.1830). The criticism on the wording under this article is similar to the one under Art.1817, but we shall not resume it, since the NCC Draft IL is considering a change of the

¹⁴² According to transitional provisions of the Draft IL, the lessee's right of preference provided at Art.1828 applies for any lease contract concluded in relation to the same dwelling or a part thereof as follows: a) after no more than 3 months as of the termination of the lease contract, if its duration was higher than 1 year; b) after no more than 1 month as of the termination of the lease contract, if its duration was higher or equal to 1 month; c) after no more than 3 days as of the termination of the lease contract, if its duration was smaller than 1 month. We recommend the amendment of this text by replacing the preposition "after" by "within" for the sake of clarity. Also, considering the substantial character of the norm, we recommend the insertion of this text in the body of the norm, *i.e.* Art.1828 NCC.

¹⁴³ The doctrine previously stipulated the differences between the two notions, but there is no unilateral approach in this sense. In the absence of a generally applicable legal definition on the right of preference, Art.1828 of the NCC deepens the confusion between the two types of rights.

norm.¹⁴⁴ Unlike Art.1817, which is the framework norm as regards the lease, Art.1830 no longer reiterates the parties' possibility to claim damages upon termination, which cannot be interpreted as a distinction between the two norms, since the right to the full repair of the damage can be exercised pursuant to general law rules. By consequence, we deem this provision to be redundant, in view of the existent provision with general applicability (Art.1817), as well as the rules on rescission and termination.

Para.(2) under Art.1830 regulates a truly particular norm on this matter (representing an adaptation of Art.24 let.(b) of Law No.114/1996), i.e. the lessor's right to request the termination of the rental contract if the tenant, the members of his family or other persons having access to the dwelling with the tenant's permission have a behavior rendering impossible the cohabitation with the other persons residing in the same real estate or in nearby real estates, or preventing the regular use of the dwelling or of its common parts.

Similarly to Art.25 of Law No.114/1996, the eviction of the tenant is made pursuant to a court judgment, which, unlike the current regulation, is no longer characterized as "irrevocable", in line with the new NCPC relevant regulations (Art.1831 para.(1)). The tenant has the obligation to pay the rent provided under the contract until the actual vacation of the dwelling, and to repair the damages of any kind caused to the lessor until such date (Art.1831 para.(2)).

As a novelty, Art.1832 provides that other persons cohabiting with the tenant (in the absence of an interdiction to this effect), shall be held liable jointly with same, throughout the use, for any of the obligations arising from the contract, and the termination of the contract and the court judgment concerning the tenant's eviction shall be enforceable against them.

Under Art.1833, the NCC lawmaker resumes stricter rules as those generally provided for lease, in relation to sublease and assignment of the rental contract, according to the model provided by Art.26 of Law No.114/1996 (dealing only with sublease). Hence, the tenant may assign the rental contract or may sublease the dwelling only with the written consent of the lessor. If not otherwise stipulated, it is established that the assignee, respectively the sublessee, and the tenant shall be held liable jointly for the obligations undertaken towards the lessor under the rental contract.

In case of tenant's death, it is established, as a principle, the rule of the termination *de jure* of the rental contract, within 30 days as of the death (as of the registration of death, pursuant to the NCC Draft IL) (Art.1834 para.(1)). The rule is different as to the current provision under para.3 of Art.27 of Law No.114/1996, stipulating that the rental contract shall continue for the benefit of the surviving spouse, of the descendants and ascendants, if same cohabited with the tenant, and of other persons who cohabited with the tenant for at least 1 year. The NCC Draft IL reinstates, by inserting new paragraphs (2)-(3) under Art.1834, the ascendants' and descendants' right of choosing to continue the rental contract, but only if they are mentioned in such contract and if they cohabited with the tenant, stipulating certain rules on appointing one of them as "signatory" of the new contract, in lieu of the

¹⁴⁴ The NCC Draft IL proposes the amendment of this article, suggesting the following wording: "If either party of the rental contract unreasonably fails to carry out its obligations arising therefrom, the other party is entitled to terminate said contract".

deceased tenant. The surviving spouse’s locative right was regulated separately under Art.323 of NCC, and the NCC Draft IL also introduced a reference norm to this effect (the new Art.1834 para.(2)).

Pursuant to Art.1834 para.(2), the sublease agreed by the tenant ceases on the expiry of the term provided under para.(1). According to the NCC Draft IL, the termination occurs if the sub-lease does not continue under the terms of para.(2), in which case the person appointed under para.(3) shall sign the sublease contract in lieu of the deceased tenant.

Art.1835 maintains the provisions under the special law regarding special purpose dwellings, *i.e.* social housing, necessity housing, company housing, emergency housing and protocol housing. Therefore, the existing legal texts under Law No.114/1996 on special purpose dwellings are not repealed, but they shall be supplemented by the general provisions of NCC. This article is consonant with the conclusions of the NCC Draft IL, on the articles under Law No.114/1996 which continue to be effective.

(c) Section 3 “Particular Rules on Land Lease”

[Art.1836-1850] The current regulation on the land lease contract can be found in Land Lease Law No.16/1994, supplemented by the provisions of the civil legislation to the extent where they are not contrary to said law, particularly special land lease rules provided in the CC (Art.1454 *et seq.*). The **impact** of the new regulation on land lease is quantified in the NCC Draft IL, and it consists of the express repealing of Law No.16/1994 on the date of entry into force of NCC.

[Impact] The amendments brought by the NCC in relation to land lease are less significant, hence we do not anticipate any important impact thereof at an institutional, human resources, financial/budget level.

Art.1836 includes a comprehensive listing of the assets that can make the object of a land lease, without bringing new elements as to Art.1 para.(2) of Law No.16/1994.

Art.1837 enshrines rules on land lease executed for a term which is not “determined” in the contract.¹⁴⁵ In this case, the NCC establishes the legal term of the land lease contract, *i.e.* the period necessary to harvest the fruits that the agricultural asset shall produce during the agricultural year in which the contract is executed. The new provision is similar to Art.1462-1463 of the CC pursuant to which, when leasing an estate for an undetermined period of time, such estate is considered to be leased for the period necessary for the land lessee to pick the fruits thereof and, this being considered by the doctrine to be the minimum term of the land lease.

¹⁴⁵ We have noted a certain terminological difference between the side heading and the contents of the article. Should we give priority to the text of the article, pursuant to the rules of interpretation, we shall draw the conclusion that Art.1837 is applicable provided that the parties did not agree on any clause concerning the contractual term. The side heading of Art.1837 – “land lease for an undetermined term” – seems to refer to another premise, namely that the parties have agreed on the term, establishing it as “undetermined”, which might give rise to the incorrect conclusion that Art.1837 establishes the interdiction to execute the land lease contract for an undetermined term. It is advisable to ensure the terminological correlation of the side heading/text of the article.

Similarly with Art.6 of Law No.16/1994, the written form of the land lease contract is regulated *ad validitatem* (Art.1838 para.(1)). Furthermore, the obligation to register the land lease contract with the local council having jurisdiction over the leased agricultural assets is reiterated (Art.1838 para.(2)-(3)). As a novelty, NCC establishes a civil fine decided by the court per each day of delay of the land lessee in observing his registration obligation (Art.1838 para.(2), thesis II). As regards this last text, we would like to point out that applying such civil fines by the court, within a regular judicial proceeding, can prove to be a difficult sanction instrument.

Para.(4) provides for the applicability of the land book-related provisions, as regards the registration of the land lease contract. Para.(5) under Art.1838 stipulate the land lessee's obligation to incur all the expenses related to the execution, registration and publicity of the land lease contract.

In accordance with Art.1839, the land lessee may change the category of use of the leased land, only subject to the prior written consent of the landlord and with the observance of the legal provisions (Art.20 of Law No.16/1994).

Art.1840 unifies and rephrases the special law provisions (Art.5 para.(2), Art.8 let.(h) of Law No.16/1994), emphasizing the statutory nature of the land lessee's obligation to insure the agricultural assets against the risk of losing the crop or the livestock due to natural disasters.¹⁴⁶

The current regulation (Art.1458 of the CC) on decreasing the rent in case of loss of crops is supplemented as regards the object of land lease. Therefore, if at least half of one year's crop is lost fortuitously, the land lessee may request the *pro rata* decrease of the rent, if it was established as a determined quantity of agricultural products or an amount of money determined or to be determined according to the value of an established quantity of agricultural products (Art.1841 para.(1)).

Art.1841 para.(2) stipulates that, if the land lease is executed for a term of several years, the discount shall be established only at the expiry of such lease, when the crops related to all years of use shall be set-off.

Similarly with Art.1459 of the CC, Art.1842 establishes an exception to the rule enshrined under Art.1841, in the sense that the land lessee cannot obtain the decrease if the crop loss occurred after it was harvested (para.(1)). A similar solution is established for the situation when the cause of the damage was known prior to the execution date of the contract (para.(2)).

Art.1843 establishes a similar solution to Art.1469 of the CC in relation to the risk of loss of fruits, if the land lease is payable in fruits. In this case, if fruits are lost fortuitously, the risk shall be incurred *pro rata* by both parties, except if the loss occurred after the fruits were picked, due to the culpable delay of either party to hand over/take over said fruits (para.(1)-(2)). In the latter case, the share due to the defaulting party is reduced by the lost fruits, and the other party's share remains the same, unless

¹⁴⁶ According to the transitional norms of the Draft IL, in the cases provided at Art.1841-1843 NCC, if the execution of an insurance agreement against the risk of fortuitous loss of the crop was mandatory according to the law or the land lease contract, the insurance indemnity is shared by the land lessor and the land lessee *pro rata* with the quotas in which they bore the risk of fortuitous loss of the crop. If the insurance is not concluded in accordance with the law or the land lease contract, the party who had the obligation to conclude the insurance policy is liable towards the other party for the damage thus caused.

the fruits would have been lost anyway, even if the handover and takeover had been carried out in due time (para.(2)).

For the payment of land lease in fruits, the payment obligation is set to be due on the harvesting date for the land lessee and on the notice receipt date for the land lessor (Art.1844). Unlike other price payment premises, in this case, the obligation to accept the price is regulated as mandatory for the creditor of the payment obligation, due to the risk of fruit deterioration.

Art.1845 maintains the provision under Law No.16/1994 (Art.6 para.(5) of Law No.16/1994) on the enforceable nature of the land lease contract registered with the local council for the purpose of paying the land lease. The existing norm is supplemented by the enforceability of land lease contracts executed in authenticated notarized form, pursuant to the special law (currently Law No.36/1995).

Art.1846 integrates the special law provision (Art.21¹ of Law No.16/1994) regarding land lease assignment, which is allowed, based on the written consent of the land lessor, to the land lessee's spouse participating to the operation of the leased assets or to the major descendants of the land lessee.

Art.1847 encompasses Art.22 of Law No.16/1994, establishing an interdiction to establish land lessee offices and the total or partial sublease.

The land lease contract is renewed *de jure*, for the same term, if neither party notified its refusal to the other party, in writing, with at least 6 months prior to the expiry of the term, and in case of agricultural purpose lands, at least one year prior to such term (Art.1848 para.(1)). Nonetheless, if the term of the land lease agreement is of one year or shorter, the terms under para. (1) shall be reduced to half (Art.1848 para.(2)).

Pursuant to Art.1849, the land lessee benefits from a preemption right "in relation to the leased agricultural assets", which shall be exercised pursuant to Art.1730-1739 of the NCC. By consequence, the land lessee is the holder of a legal preemption right, and thus the previously repealed regulation on land lessee's preemption right upon the transfer of the leased agricultural assets is reintroduced.

Art.1850 establishes special cases for contract cessation, *i.e.* land lessee's death, incapacity or bankruptcy.

(vi). Chapter VI "The Contractor Agreement"

[Impact] The new norms on the contractor agreement bring a series of innovations as compared to the principles regulated by the CC. It is thus worth noting the codification of doctrinal opinions, the most important of which seem to be the beneficiary's obligation to accept the work, otherwise facing certain consequences (1), as well as the general rule instituted in regard of the contractor's liability for the defects and qualities of the work, reference being made to the liability for the defects of the sold asset (2), the establishment of a statutory mortgage for the contractor to secure the payment of the price (3).

(a) Beneficiary's obligation to accept the works (1)

The codification of doctrine brings about the regulation of the beneficiary's obligation to test and accept the work, otherwise the work being deemed accepted without reserves (Art.1862). According to the NCC, the beneficiary is bound to verify, accept, or as applicable, collect the work within a

reasonable time period. In case the beneficiary does not appear for acceptance for no justified reasons or does not communicate the result of the tests, this shall qualify as an acceptance without reserves. When the work is accepted without reserves, no subsequent claim may be made as to apparent defects or apparent lack of the qualities agreed upon.

(b) Contractor's liability for the defects and qualities of the work (2)

The regulation of the contractor's liability for the defects and quality of the work is a codification of a relatively unitary doctrine (Art.1863). Whereas the contractor's liability is currently regulated solely with respect to construction works, the NCC regulation is made by reference to the warranty against the sold asset's defects, with due consideration however to every possible object of a contractor agreement (services or works).

(c) Statutory mortgage of the contractor (3)

Art.1869 NCC establishes a statutory mortgage for the contractor so as to secure the payment of the price.

Notwithstanding the improvements brought by the NCC in the area of contractor agreements, we need to also point out, if briefly, that the new norms fail to solve a series of dilemmas in law, doctrine and jurisprudence that bear on the content and effects of this type of contract: effects of the contractor agreement for intellectual work/services, transfer of ownership over the product created under the agreement (the legal basis and the moment of such transfer), status of the legal warranty for constructors and titleholders (warranty beneficiaries), the relation between the special liability of constructors and the liability rules under the general law, the issue of risk in contractor agreements and the potential conflict between the classic principles *res perit domino* and *res perit debitori* etc. Furthermore, we anticipate serious controversies to arise in respect to the connection between the general norms of the NCC and the special rules that govern the multitude of contractor agreements in modern economy. Lastly, as a general criticism, our opinion is that, despite the progress noted, the new NCC norms are rather archaic in substance and form and insufficiently adapted to present-day economic realities, as they are influenced by a frame of thinking which puts individual clients in the spotlight, overlooking the complexity and diversity of contractor agreements of current economy.

Due to the predominantly theoretical nature of the amendments, we do not identify any significant impact of an institutional, human resources or financial/budgetary nature of these norms in the implementation of the NCC.

(a) Section 1 “Common Rules for the Contractor Agreement”

1. General Provisions

[Art.1851-1856] Art.1851 para.(1) gives a general definition of the concept of contractor agreement, as the contract whereby the “contractor undertakes at his own risk to carry out a physical or intellectual work, or to provide a certain service for the beneficiary, in exchange for a price”.¹⁴⁷ In our view, the definition of the contractor agreement could render difficult the interpretation of the provision of services as part of such agreement, considering the regulation of the supply contract, defined at Art.1766 para.(1) NCC.¹⁴⁸

According to Art.1851 para.(2), the contracting of construction works shall be subject to the general regulation of the contractor agreement, save for the case when the specific rules instituted in connection with this type of contract derogate from the general provisions.

Art.1852 lays down the possibility for the contractor to enter into subcontractor agreements by which to contract with third parties (subcontractors) the performance of certain portions of the works or services initially contracted by him under a contractor agreement. A salutary change, as opposed to the current regulation (Art.1487-1489 CC), which is one by implication, the contractor’s possibility to subcontract is now expressly stipulated, save for the case when the contractor agreement provides otherwise or, when the said contractor agreement was explicitly entered into in view of the contractor’s personal qualities, therefore an *intuitu personae* contract, in which case subcontracting is not possible (para.(1)).

Art.1852 para.(2) is inspired from Art.1487 CC. Considering the establishment of two distinct legal relationships, one between the beneficiary and the contractor and the other one between the contractor and the subcontractor, the beneficiary does not have a direct action against the subcontractor, but he may however hold the contractor liable for the subcontractor’s acts.

According to Art.1853, the contractor agreement shall be governed accordingly by the incapacities to sell which are specifically applicable to persons appointed to carry out management acts, as per

¹⁴⁷ Art.1851 para.(1) is inspired from Art.2098 QCC.

¹⁴⁸ Art.1766 para.(1) NCC reads: “The supply contract is the contract whereby a party, referred to as supplier, undertakes (...) to provide certain services, on one or several subsequent dates or on a continuous basis, whereas the other party, referred to as beneficiary, undertakes to (...) accept the provision of service and to pay their price.” It may be argued that the particular element of the provision of service regulated under Art.1766 para.(1) under the NCC is the existence of a contractual period between the execution date of the service agreement and the moment when the obligations are performed. Nothing is preventing however the contractor agreement parties from establishing a contractual period for the performance of the obligation to provide the services, thus arising the possibility to mistake one of the two contracts for the other. Although the model of the definition for the contractor agreement provided under the NCC is Art.2098 of the QCC, this text and the following under the QCC regulate both the contractor agreement and the services agreement. Considering the unitary regulation of the two contracts under the QCC, and the fact that under the QCC, there is no separate regulation of another contract having as object the provision of services, there is no risk of confusion between the two different contracts, both regarding the provision of services.

Art.1655 of the NCC. In our view, the term "accordingly", is likely to generate confusion as to the implementation of this analogy.

Art.1854 explicitly regulates the price of the contractor agreement, its characteristics as well as the criteria for determining price, if not provided in the agreement. While the current provisions of the CC only refer to a fixed price (Art.1413 item 5 CC), doctrine has also developed the theory of the determinable price. However, the codification of what doctrine accepted as the determinable price is not developed, no mention being made to itemized estimate prices or others of the like, applicable to contractor agreements subject to a determinable price.

Although the NCC appears to institute the obligation for a fixed or, at least, a determinable price to be in place upon the execution of the agreement, para.(3) at Art.1854 states that, when the agreement contains no provisions in relation to the price, it may be determined "*on the basis of the work carried out and of the expenses necessary to carry out such work*".

Art.1855 constitutes a codification of the doctrinal commentaries as to the distinctions between the contractor agreement and the sale-purchase contract.¹⁴⁹ The difference between the two types of contracts lies in the interpretation of the parties' intention in what regards the principal or subsidiary role of the works contemplated by the contract, as well as in the value of the goods supplied by the contractor.

In line with some viewpoints adopted by the doctrine, Art.1856 NCC reformulates and gives general implementation to the current provision (Art.1488 CC) on the workers' direct action against the client (until now regulated solely with respect to construction contractor agreements). Thus, workers are now allowed to bring legal action directly against the beneficiary, whatever the object of the contractor agreement, up to the amount the latter owes to the contractor at the time the action is brought.¹⁵⁰

2. Obligations of the Parties

[Art.1857-1869] Art.1857 institutes the contractor's obligation to carry out the work with his own materials, unless it is otherwise stipulated. He shall be liable for the quality of the supplied materials, consistent with the liability instituted upon the seller. Furthermore, the diligence requirements on the part of the contractor are limited in the case where the materials are supplied by the beneficiary. Thus, he has obligation to use and store the materials in accordance with their intended purpose and the applicable technical provisions, and also to account to the beneficiary for the use of the materials supplied by the latter.

Art.1858 lays down the contractor's obligation to notify the beneficiary on certain potential circumstances that are exhaustively specified, which may affect the performance or quality of the work. Thus, the contractor must notify the beneficiary on the potential non-conformity of the materials supplied by the beneficiary, on the inconsistency of the latter's instructions and on the occurrence of circumstances that are beyond the contractor responsibility.

¹⁴⁹ Art.1855 is inspired from Art.2103 para.(3) QCC.

¹⁵⁰ Art.1856 is inspired from Art.1676 ICC.

According to Art.1859 para.(1), the contractor may either terminate the agreement when the beneficiary, despite having been notified by the contractor in accordance with Art.1858, fails to take the necessary measures within a timeframe consistent with the circumstances, or may continue the works at the beneficiary's risk, notwithstanding that measures have not been taken by the beneficiary, notifying him in this respect. The contractor shall be bound to terminate the agreement in the situations exhaustively specified at para. (2) of Art.1859 (the work is likely to become a threat for the health or physical integrity of individuals), otherwise bearing and risk and liability for the injuries.

In order to avoid any divergence of interpretation, we believe that deadlines should be put in place for the notification of the beneficiary, pursuant to Art.1858, in connection with inconsistencies and also for him to issue a response or remedy the situation.

The risk of the agreement shall be borne by the contractor if the asset is lost or deteriorates prior to acceptance by no fault of the beneficiary and if the materials have been supplied by the contractor (Art.1860 para.(1)). The current regulation under Art.1478 CC was reiterated in para. (1) of Art.1860 of the NCC, without including the exemption of the contractor's liability in the event that a formal notice is sent to the beneficiary on the resumption of works. The regulation should be supplemented to this effect so as not to create a loophole in the legal norms for this kind of situations.

According to Art.1860 para.(2), which resumes and reformulates the provisions of Art.1480 CC, in the case where the materials are supplied by the beneficiary, the latter shall bear the costs for redoing the work only if the loss is due to a defect of the materials. As a novelty, for the case where the loss is not due to a defect of the materials nor is it caused by the contractor's fault, the beneficiary shall be bound to supply the materials again. According to Art.1860 para. (3), after the handover the contractor's liability shall cover only the agreed defects and qualities, and not the loss or deterioration of the asset due to other causes.

The rule is instituted that the beneficiary may oversee the performance of the work and raise comments, without unreasonably hindering the contractor (Art.1861).

The codification of doctrine includes the regulation of the beneficiary's obligation to verify and accept the work, otherwise the work is to be deemed accepted without reserves (Art.1862 para.(1)). Another case when the work is deemed to be accepted without reserves is when the beneficiary fails to appear for the acceptance or to communicate the result of the tests (Art.1862 para.(2)). When the work is accepted without reserves, no subsequent claim may be made as to apparent defects or apparent lack of agreed qualities (Art.1862 para.(3)).

Art.1863 is a codification of doctrine on the general rule according to which the contractor is liable for the defects and quality of the work. Whereas the contractor's liability is currently regulated solely with respect to construction works, the NCC regulation is made by reference to the warranty against the defects of the sold asset, with due consideration however to every possible object of a contractor agreement. This is a valuable unitary regulation, as only the provisions of Decree No.167/1958 are currently in place, which cover solely the general liability.

Art.1864 para.(1) of the NCC introduces a suppletive norm which codifies doctrinal opinions as to the due date of the price in contractor agreements, while para.(2) resumes the CC provisions outlining the risks of the contractor agreement.

Art.1865 of the NCC resumes and gives general implementation, with some modifications, to the provisions of Art.1484 of the CC. Thus, whereas in the current regulation (applicable only in constructions), the contractor cannot ask a higher price without the beneficiary's consent, under the NCC, duly justified requests for price increases are accepted to the extent that such price increase is generated by works or services which the contractor could not foresee upon the execution of the agreement.

If the price is not fixed upon the execution of the agreement, being only established based on the value of the executed works or of other exhaustively specified factors, the contractor shall have to notify the beneficiary, at the latter's request, in connection with the progress of works, the services already rendered and the expenses already invoiced (Art.1866).

Art.1867 repeats the current provisions at Art.1484 of the CC (on the construction contractor agreement), instituting for all contractor agreements the rule according to which, where the price is flat, neither party may request its increase or decrease, unless it is otherwise provided. A suppletive norm is introduced which states that, unless the parties agree otherwise, the flat price is to remain unchanged even if the initially established conditions change.

Art.1868 regulates the possibility for contractors whose work has not been accepted for 6 months, provided that such work was made with materials supplied by the beneficiary or the service was rendered in connection with an asset delivered to this effect by the beneficiary, may sell the asset, acting with the care of a gratuitous agent of the beneficiary, after having first notified the beneficiary in writing in this respect (para.(1)).¹⁵¹ Having retained the price of the works and the expenses in connection with the sale, the contractor shall then deposit the price difference in favor of the beneficiary (Art.1868 para.(2)). This is not possible when the beneficiary has brought legal action against the contractor for non-performance or improper performance of the work (Art.1868 para.(3)).

A statutory mortgage on the work is established in favor of the contractor in order to secure the payment of the price. It is also worth retaining that the new regulation of the contractor's statutory mortgage for securing the payment of the price is in accord with the NCC vision in regulating the chattel mortgage (Art.1869). We further note that Art.2386 item (6) NCC also establishes a special statutory mortgage (in connection with construction works) in favor of architects and contractors, within the amount of the created added value.

Consequently, if under the current regulation (Art.1737 para.(4), Art.1742 CC), the payment of the price owed by the client to the contractor is secured by real property privilege, the NCC regulates a distinct mortgage right which is established and preserved in accordance with the law. A shortcoming of the new regulation is that it fails to address practical aspects, such as: the guaranteed amount, the moment when the mortgage may be enforced against third parties, etc. In addition, it should be further noted that this text shall not be applicable for certain types of works, such as, for instance, intellectual works, especially if they merely concern a necessity of the beneficiary.

¹⁵¹ The NCC regulation resumes with modifications and gives general implementation to Decree No.975/1965.

3. Termination of the Agreement

[Art.1870-1873] Art.1870 institutes the rule which provides that the death of the beneficiary shall not terminate the agreement, unless its performance becomes impossible or useless (Art.1870).¹⁵² This norm falls under the category of rather obsolete regulations which only consider the perspective of an individual beneficiary. There would be many such examples, but a critical analysis of this sort is not within the scope of this report.

Whereas under the current regulation (Art.1485 CC), the termination of the agreement upon the contractor's death was the rule, under the NCC, the agreement is to terminate if the contractor either dies or becomes incapable, but only for the case where the agreement was concluded in view of the contractor's personal qualities (Art.1871 para.(1)). Para.(2) and para.(3) of Art.1871 reiterate the current provisions in the sense that the beneficiary remains bound to accept the part already finished and to pay the value of the works performed and of the expenses incurred, if he is to draw benefit from such works and expenses (Art.1486 CC). Art.1871 para.(4) deals with the handover of the plans and materials prepared by the contractor, at the request of the beneficiary, in exchange for a remuneration and in observance of intellectual property rights.¹⁵³

NCC codifies the analyses of the doctrine on cases of termination of the contractor agreement by the beneficiary and contractor, respectively. Thus, according to Art.1872, the beneficiary may terminate the agreement if the term agreed for the acceptance has become evidently impossible to meet, if the work or service is not carried out as agreed and, within the term set by the beneficiary according to circumstances, the contractor fails to remedy the deficiencies uncovered and does not change thenceforth the manner in which such work or services are carried out, and if the contractor fails to carry out any other obligations incumbent on him under the law or the agreement. According to Art.1873, if the contractor is unable to start or to continue the performance of the agreement due to the beneficiary's failure to meet his own obligations, the contractor shall be entitled to terminate the agreement and claim damages, if the case.

The amendment of Art.1872-1873 is envisaged by the NCC Draft IL in the sense of circumstantiating the non-performance which serves as a ground for termination on "no justified reasons", thus making indirect reference to the provisions at Art.1555-1557 NCC which regulate the justified grounds for non-performance of contracts.

¹⁵² Art.1870 is inspired from Art.2127 QCC.

¹⁵³ Para.(1) and para.(2) of Art.1871 followed the frame of Art.379 CEO, while para.(3) and para.(4) are inspired from Art.1765 CCI.

(b) Section 2 “The Contractor Agreement for Construction Works”

[Art.1874-1880] Art.1874 institutes the statutory definition of the contractor agreement for construction works as the contractor agreement for which the law requires the issuance of building permits.

In light of the provisions of Law No.50/1991 which classifies construction works into works that require a building permit and works which do not require such permit, we believe that the legal definition given by the NCC to the construction contractor agreement casts all construction works which do not require a building permit outside the general contractual framework regulated under the NCC. In our opinion, the qualification of certain works which are in close relation with the construction contractor agreement (even if they do not require a building permit) as subject to a simple contractor agreement of works or services is inadequate. Due to the specifics of the construction works, it is imperative that the contractor’s rights and obligations, including in terms of defect liability, be subject to the legal regulations in the matter of construction contractor agreements.

Art.1875 lays down an accessory obligation on the part of the beneficiary, namely to ensure the contractor’s access to certain facilities within the property in order to perform the contracted activities. The NCC Draft IL is envisaged to introduce a new paragraph within this article which would institute the beneficiary’s obligation of obtaining all permits that are legally required for the performance of the works, accompanied by the contractor’s subsidiary obligation to provide to the beneficiary all professional information required in view of obtaining such permits.

As a novelty, Art.1876 allows the beneficiary to inspect the performance of the work being carried out, including the fulfillment of any of the contractor’s obligations under the agreement, without interfering with the normal course of the contractor’s activity (para.(1)). Unless it is provided otherwise, the beneficiary shall communicate his findings in writing to the contractor (Art.1876 para.(2)). Art.1876 para.(3) institutes a special obligation on the part of the beneficiary, *i.e.* to examine various completed parts of the work which are to be later covered by other works, as well as a procedure for convening the beneficiary in order to acknowledge such works.

NCC regulates the situation when the contractor uncovers certain errors or defects of the design works in contemplation of which the agreement was entered into; in such case the contractor shall have the obligation to communicate the findings and possible remedy proposals to the beneficiary and to the designer and request the beneficiary to take appropriate measures (Art.1877 para.(1)). The contractor may suspend the performance of works, if the beneficiary, having also consulted with the designer, fails to immediately communicate the measures taken to remedy the defects or errors indicated by the contractor or if the measures taken are inappropriate (Art.1877 para.(2)).

Art.1878 NCC establishes the provisional acceptance date as the moment of transfer of the risks related to the construction (para.(2)). Both the provisional and the final acceptance are to be carried out in accordance with the special law (Art.1878 para.(1)).¹⁵⁴

The NCC removes the difficulties identified in the doctrine as to the succession of laws in matters of defect liability, by directing towards the special law which is to govern warranty terms (in what regards both the length and the moment it starts to run) for defects of works (Art.1879 para.(1)).¹⁵⁵

In addition, certain grounds of exemption from liability for defects of the work are instituted for the contractor/architect/engineer. This regulation is justified by the fact that the architect and the engineer may also be regarded as contractors, in the sense of the contractor agreement as regulated by the NCC. Thus, the architect/engineer shall be exempted from liability for defects of the work only by proving that the defects do not result from any faulty expert opinion or plan he may have submitted or from any failure to direct or supervise the work (Art.1879 para.(2)). The contractor shall be exempted from liability only by proving that the defects result from any faulty expert opinion or plan submitted by the architect/engineer selected by the beneficiary. Similarly, the subcontractor shall be exempted from liability only by proving that the defects result from the contractor's decision or from the expert opinions or plans submitted by the architect/engineer (Art.1879 para.(3)).¹⁵⁶ Any of them may be exempted from liability by proving that the defects result from decisions imposed by the beneficiary in selecting the land or materials, or the subcontractors, experts, or the construction methods. Exemption from liability shall not operate if such defects, although foreseeable in the course of the work, were not notified to the beneficiary. The contractor shall also be entitled to terminate the agreement in accordance with Art.1859 (Art.1879 para.(4)).

The regulation to these “cases of exemption from liability” is bound to generate serious difficulties in practice as to the burden of proof and it seems to institute a sort of presumption of fault and passive solidarity on the part of those involved in the construction process.

Art.1880 establishes as starting point of the prescription term for pursuing liability for apparent defects the date of the final acceptance or, as the case may be, the expiry date of any term that may have been granted to the contractor under a final acceptance minutes to remedy any uncovered defects (para.(1)). This regulation is a novelty, the previous doctrinal opinion being to the effect that acceptance of works by the client without reserves or objections discharges the contractor and prevents the client from later asserting any apparent defects. However, we find this text to be redundant, considering the similar regulation of general import established for prescription matters (Art.2530 para.(1)).

Art.1880 para.(2) provides that the prescription term for pursuing liability for design defects starts to run at the same time with the right of action for defects in the contractor's works, save for the case when the design defects have been uncovered before, in which case the prescription term starts to run from the date they are uncovered. It is inferred from this article that it refers to hidden defects of the

¹⁵⁴ Currently, Law No.10/1995.

¹⁵⁵ Currently, Law No.10/1995.

¹⁵⁶ The Draft IL is intended to amend this article's para.(2)-(3), mainly by discarding the notion of fault which is replaced with “deficiency”, thereby instituting an objective liability which is consecrated in other texts of the NCC as well.

construction, since design works usually entail only this kind of defects; however, an explicit stipulation would have been more suitable.

We are surprised by the lawmaker's inconsistency in regulating the starting point of the prescription term in connection with construction works, by instituting particular provisions only in the case of apparent defects and (hidden) defects in design works, without explicitly stipulating the point when the prescription term in connection with the hidden defects in the constructor's works starts to run. Art.2531 of the NCC, which lays down the prescription term for pursuing liability for hidden defects also fails to clarify this aspect, as the general statutory prescription and warranty terms in this article are only to apply if no other special statutory (or conventional in the case of warranty) terms apply.

The solution previously offered by the doctrine states that the prescription term starts to run from the date the defects are uncovered within the warranty terms established by the special law (Law No.10/1995). From this perspective, it would be advisable in our view that Law No.10/1995, which is currently regulating the warranty terms in such matters (10 years from the acceptance of the work, the entire lifetime of buildings for structural frame defects) be supplemented so as to also include the provision on the start of the prescription term for pursuing liability against the contractor or other specialists involved in a particular work.

(vii). *Chapter VII "The Articles of Association"*

[Art.1881-1954] Chapter VII, Title IX, Book V of the NCC) contains the general rules in company law (Art.1887 para.(1)). The NCC regulates general provisions for all types of companies (Section 1, Art.1881-1889), and particular rules for the ordinary partnership (Section II, Art.1890-1948) and joint ventures (Section III, Art.1949-1954).

Note should be made that, due to the particular contractual nature of the company regulated under the NCC, the new provisions, although established as general rules in company law, fail to cover the limited liability company with a sole shareholder, one of the most frequent company type incorporated in Romania and whose existence has not a contractual source.

[Impact] As a general comment, we may say that the NCC innovates in this field, including as regards the ordinary partnership (the current civil partnership regulated by the CC - in French law, such partnership is known under the name "*société civile*"), where it inserts a set of new regulations, both by codifying the legal doctrine and by taking over other norms from foreign civil codes (particularly the ICC). The notable amendments brought by the NCC to the articles of association are, *inter alia*, the following:

- The scope of application of the provisions concerning the articles of association is expressly clarified to include all types of companies which are currently regulated by the Company Law No.31/1990, the cooperative companies, as well as the ordinary partnerships, the joint ventures (in French, "*sociétés en participation*") and other types of companies (Art.1888, let.i) inadvertently uses the phrase "other types of companies") regulated under special laws. Common rules are established for all companies (Art.1890-1948);
- The object of the ordinary partnership is no longer limited to non-commercial operations (except as otherwise provided by the special laws);

- The ordinary partnership may acquire legal personality by transformation into another company form, without undergoing dissolution, upon agreement of the partners (Art.1892 para.(3));
- As to the ordinary partnership, new rules are established with respect to the share capital and contributions to it, participation shares (in French, “*parts d'intérêt*”), non-compete obligations, partners’ meeting, partnership’s management, withdrawal and exclusion of partners, dissolution and winding-up, many of them inspired by the regulations governing companies;
- Taking special corporate law as a model, the NCC regulates a special nullity of the ordinary partnership, which nullity may be covered in an atypical manner, thus giving priority to the partnership’s regularization, and which has neither retroactive effects, nor it induces any risk to a good-faith third party;
- The regulation of the joint venture, as a subtype of company, is taken over from the Commercial Code.

Due to the pure theoretical nature of most of such amendments, we find no major impact of an institutional, human resources or financial/budgetary nature upon the implementation of the NCC.

Nevertheless, we note that the new regulation requires certain legislative amendments, which we did not identify as such in the NCC Draft IL.

For instance, the new regulation on the mandatory nature of the authentic form of the articles of association when immovable assets or, as the case may be, other real immovable rights are contributed (Art.1883 para.(2)), requires the amendment of the Law No.31/1990 and of other special laws including provisions on the special types of companies, as regards the form required for the articles of association. Therefore, according to Art.6 para.(6) let.a) of the Law No.31/1990 and Art.14 para.(3) of Law No.1/2005, the authenticated form of the articles of incorporation is mandatory for companies and cooperative companies only when land is among the assets contributed to the share capital. Art.204 para.(2) let.a) of the Law No.31/1990 provides the same rule for the amending deed which is aimed at increasing the share capital. The amendment is required even if one may say that the new provisions of the NCC shall be applicable to the companies irrespective of this harmonization effort, as the applicability thereof is questionable, as specified above, for the limited liability companies with a sole shareholder.

Moreover, Art.1892 para.(3) of the NCC legislates the solution on the ordinary partnership acquiring legal personality. From a formal standpoint, this option materializes in a deed amending the articles of association which shall indicate the company’s legal status, and all company’s documents shall be brought in line with the legal provisions applicable to the newly-established company (into which the ordinary partnership is transformed). We estimate that the implementation of this legislative novelty shall require the amendment of the Law No.31/1990 and of the enactments issued for the enforcement of this law (for instance, the methodological norms for the keeping of the trade registry records and making the entries), as well as of Law No.1/2005 (enactment which includes special provisions on cooperative companies as compared to the Law No.31/1990, and which are supplemented by the provisions of the Law No.31/1990), in view of clarifying the documents required to be submitted by the applicants to register the ordinary partnership as a new type of company with legal personality regulated by such laws. For instance, it has to be clarified whether the “proof attesting that payments

were made” with respect to the contributions to the share capital, which proof is required to register the respective company (Art.36 para.(2) let.b) of the Law No.31/1990), may be made by using the evidence that the respective payments were made on occasion of the ordinary partnership’s establishment, to the extent that the share capital amount of the ordinary partnership is higher than the minimum share capital required by the special law for the respective new company type.

In addition, as to the consequences of this option, *i.e.*: (a) the legal personality is acquired without the dissolution of the ordinary partnership, and (b) the partners and the newly-established company shall be jointly and severally liable for all the debts of the company arising prior to acquiring legal personality, one may inquire how shall such issues be reflected in the accounting records of the civil partnership and of the new company? From this standpoint, we anticipate the need that certain accounting instructions be issued in this regard (by the Ministry of Public Finance), followed, if applicable, by the amendment of other special laws, such as Law No.85/2006 (to address related legal issues such as whether a creditor of the ordinary partnership may request the initiation of the insolvency proceedings against the company on account of a receivable arising prior to the incorporation thereof).

In addition, as another type of impact, we deem necessary that the judges be professionally trained to know the new regulations, particularly that the provisions inserted are new to Romanian judicial practice. Thus, according to Art.1933 para.(2) of the NCC, the court called upon to rule on a request for the nullity of the ordinary partnership shall have to submit to the parties’ discussion the possibility to remedy the causes for nullity affecting the articles of association and to schedule a new hearing so that nullity be covered, even if the parties are against it.

(a) Section 1 “General Provisions”

[Art.1881-1889] The texts establish norms of an innovating nature (even if some of them are inspired by the current regulation of the CC on the civil partnership or by the Law No.31/1990), simply because of the general express applicability thereof to all types of companies, with or without legal personality.

Art.1881 defines the concept of company, by referring to both the company without legal personality (the traditional civil partnership), and to the company with legal personality (para.(3)). The former regulation of the CC, including from the perspective of the concept’s definition, referred only to the civil partnership, which has no legal personality, but, as shown in the legal literature, was meant to apply as the general rule for all company types (Art.1491, Art.1492 para.(2), Art.1513 of the CC).

According to Art.1881 para.(1) of the NCC, the articles of association shall be the contract whereby two or several persons undertake to cooperate for the performance of an activity and to make contributions in cash, in kind, in specific knowledge or in performances, with the purpose of sharing the profit or using the savings which may result. Thus, a comprehensive definition is given to all possible types of contributions and potential economic proceeds, which may consist in an increase in the shareholders’ assets, or in “savings”, *i.e.* a better management of the resources, cost reduction, etc., in our interpretation.

Art.1881 para.(2) of the NCC establishes the rule of sharing in the loss *pro rata* with the sharing in the profit distribution, “if not otherwise provided under the articles of association”, *i.e.* unless the

shareholders decided to establish an unequal share in the profit and loss, foreshadowing the regulation detailed under Art.1902.

Under the name of “conditions for the validity” of the articles of association, the NCC regulates the parties’ legal capacity (Art.1882 para.(1)), the object of the company (Art.1882 para.(2)) and the shareholders’ mandatory contribution (Art.1882 para.(3)). Thus, any individual or legal entity may be a shareholder, if not prohibited by law (Art.1882 para.(1)). In addition, the NCC provides that a spouse may become a shareholder by contributing assets that are part of the marital property only with the consent of the other spouse, the text reiterating the norm under Art.349, to which reference is made. The object of the company has to be determined and lawful, in accordance with the rule of law and the customary practices (Art.1882 para.(2)), similarly to Art.966, Art.968, Art.1492 para.(1) of the CC. Art.1882 para.(3) regulates the mandatory nature of each shareholder’s contribution to the company’s establishment and such contribution can be in cash, in kind, performances or specific knowledge.

As to the regime of contributions, the NCC establishes the rule that the contributions to a company with legal personality become assets of the company. In the companies without legal personality, contributions shall be jointly owned by the partners (this also being the conclusion already reached by the legal doctrine), except for the case when the partners expressly agreed that they will contribute only the right of use, when the contributions are jointly used by the partners (Art.1883 para.(1)).

As to the contribution of the right of use, we would like to point out that the legal doctrine maintained that this contribution must be made for a limited duration, because otherwise the right of use cannot be assessed in order to establish the partner’s quota out of the share capital. Consequently, as a general rule, we deem that a regulation on the parties’ obligation to specify the duration of this contribution is useful. We deem that, should the parties fail to regulate the duration, the rule in lease matters according to which the term thereof cannot exceed 30 years should apply (49 years, according to the NCC Draft IL) (Art.1783 of the NCC).

NCC institutes the mandatory nature of the authenticated form of the articles of association, should immovable assets, or, as the case may be, other real immovable rights be contributed (Art.1883 para.(2)). The impact of such regulation is identified in the preliminary section of this chapter.

According to Art.1883 para.(3), the transfer of the rights over the contributed assets shall be subject to the registration formalities provided by law. As a logical solution, the transfer of the right registered with the publicity registries prior to the incorporation of the company shall be subject to the (suspensive) condition of acquiring legal personality.

As a general rule, the articles of association are to be concluded in a written form, for probative purposes, if not otherwise provided by law (Art.1884 para.(1)). Art.1884 para.(2) of the NCC provides for one of the exceptions, *i.e.* that the articles of association establishing a company with legal personality shall have to be concluded in writing and shall have to outline the company’s shareholders, the contributions to the share capital, legal form, object, name and headquarters. The sanction for failing to comply with such formal requirements shall be the absolute nullity. In our opinion, this article is supplemented by Art.196 of the NCC on certain causes for a legal entity’s

nullity, which stipulates, under para.(1) let.f), another mandatory provision, *i.e.* the indication of the “subscribed and paid-in capital”.

In general, Art.1885 establishes the rule according to which the company’s duration shall be unlimited, if not otherwise provided under the articles of association (para.(1)). Should the articles of association provide for a limited duration, Art.1885 para.(2) institutes the possibility of extending the duration, at the shareholders’ discretion, prior to the expiry thereof. We consider that the company may also be deemed to have a limited duration when certain type of contributions are made; for instance, if the right of use is contributed, the duration of the contribution shall have to be regarded as limited (*see* our comment under Art.1883 para.(1)), thus entailing a limited duration of the company.

As to the liability of the founding shareholders and initial directors, the NCC generalizes certain particular provisions of the Law No.31/1990 (Art.36, Art.46, Art.47, Art.49). Thus, the founding shareholders and initial directors appointed under the articles of association shall be jointly liable for the damage caused by the failure to comply with a formal requirement of the articles of association or with a formality required to establish the company or, if applicable, to acquire legal personality (Art.1886 para.(1)). Such provisions shall also apply to the amendments of the articles of association, but only to the directors holding a valid right of representation on the date of the amendment or on the date when the formalities concerning such amendment should have been fulfilled (Art.1886 para.(2)).¹⁵⁷

According to Art.1887, regarding the scope of application, this chapter (Chapter VII, Title IX, Book V of the NCC) represents the general law as regards companies (para.(1)). As provided in the preliminary part of this chapter, the NCC norms on the articles of association may not be construed as the general law in matters concerning limited liability companies with a sole shareholder, as this type of company is not based on a contractual relation. According to para.(2), the law may regulate different types of companies in terms of form, nature or object of activity.

Art.1888 lists the legal forms (types) of companies. The companies may take the following forms: ordinary partnerships, joint ventures, general partnerships (in French, “*société en nom collectif*”), limited partnerships (in French, “*société en commandite*”), limited liability companies, joint-stock companies, partnerships limited by shares (in French, “*société en commandite par actions*”), cooperative companies, and any other types of companies expressly provided by the law. The NCC provides for particular rules only on the ordinary partnerships and joint ventures.

In principle, a company acquires legal personality if its partners so agree. According to Art.1889 para.(1) the partners may agree under the articles of association or under a separate deed to establish a company with legal personality, in compliance with the legal requirements. Art.1889 para.(2) thesis II institutes an important rule, *i.e.* that the shareholders’ liability for the company’s debts is a subsidiary, unlimited and joint liability, if not otherwise provided by the law.

¹⁵⁷ The Law No.31/1990 should be supplemented by an express provision to this end, provided that it also applies to the members of the Managing Committee (holding the right of representation, e.g., the General Manager) which have, according to the special law, the obligation to register the amendments to the articles of incorporation with the trade registry (Art.204 para.(3) of Law No.31/1990).

The company with legal personality, irrespective of its scope of business, may be established only in the form and under the conditions provided by the special law under which it acquires legal personality (Art.1889 para.(2)). As a rule, the company shall acquire legal personality by and on the date of registration with the trade registry, if not otherwise provided by law (para.(3)). This caution on the possibility of acquiring legal personality otherwise than by registration with the trade registry is welcome, from the standpoint of both the current regulations,¹⁵⁸ and of future regulations.

Probably in consideration of the period, which is sometimes long, between the date of the shareholder's agreement on the company set-up until the date of acquiring the legal personality, the lawmaker provided that the rules governing the ordinary partnership remain applicable to the relationship between the shareholders until the latter acquires legal personality (Art.1889 para.(4)).

(b) Section 2 “The Ordinary Partnership”

[Art.1890-1948] Generally speaking, we note that the NCC brings a major change to the ordinary partnership's regime, in the sense that it no longer requires that the object of this type of company should have a non-commercial nature (which probably also triggered the change in the name of “civil partnership” into “ordinary partnership”). According to the CDEP Table, this major change in perception started from the finding that the special laws have established distinct legal regimes for the civil partnerships intended to carry out commercial operations (for instance, the pension funds for the securitization of receivables or the investment funds) and such partnerships joined the legal civil circuit. In addition, it was considered that the distinction between civil partnerships and companies will lose its substance once the monistic perspective on private law is adopted under the NCC.

Consequently, the only differences between the ordinary partnerships and companies are the absence/presence of legal personality and the norms under which they are established and operate.

1. Conclusion of the Articles of Association

[Art.1890-1893] Similarly to the current doctrinal interpretation on the form of the articles of association of a civil partnership, the articles of association is not subject to specific **formal conditions**. Art.1890 stipulates two exceptions from the rule, *i.e.* the one provided under Art.1884 para.(1) (referring to the written form required to attest the existence of the articles of association and which, by itself, is not an exception from the consensual nature of the contracts), and the potential formal conditions arising out of the nature of the contributed assets. The text does not seem to be necessary, as it brings no novelty as compared to the current regulation under Art.1883-1884 of the NCC.

In the absence of a contrary provision, or if not otherwise provided by law, the amendment of the articles of association shall be performed in compliance with the provisions of the law for its valid conclusion (Art.1891). Same rule was previously inferred by the legal doctrine, based on the

¹⁵⁸ For instance, according to Art.5¹ para.(2) of Law No.51/1995, the civil professional limited liability partnership acquires legal personality as of registration with the bar of the decision issued by the local bar council in whose territorial jurisdiction the firm is located.

particular case regulated under the CC, only for the deed amending the duration of the civil partnerships (Art.1524 of the CC).

Art.1892 establishes the rule that the ordinary partnership has no legal personality (para.(1)). Art.1892 para.(2)-(3) regulate the procedure by which the ordinary partnership acquires legal personality, a procedure was also announced in the Statement of Reasons as one of the regulation novelties as regards the articles of association.¹⁵⁹ Thus, partners may choose that the ordinary partnership acquires legal status, by concluding a deed amending the articles of association and expressly indicating the legal form of the company and shall render all clauses in the articles of association compliant with the legal provisions applicable to the newly-established company (para.(2)).

The solution on the ordinary (civil) partnership acquiring legal status is not entirely new, as the Romanian doctrine previously acknowledged this possibility, considering that the lack of legal personality is specific to the nature, and not to the essence of the articles of association of a civil partnership. The novelty consists in the express regulation of the consequences of such option, *i.e.*: legal personality shall be acquired without the dissolution of the ordinary partnership, and the shareholders and the newly-established company shall be jointly and severally liable for all the company's debts arising prior to the acquirement of the legal personality (Art.1892 para.(3)). As to the impact of this amendment, please refer to our comments in the introductory section of this chapter [Chapter VII "The Articles of Association"].

Art.1893 provides, as a new element inspired by the legal doctrine, that the companies which are subject to the condition of registration under the law and remain unregistered, as well as the undeclared partnerships are assimilated with the ordinary partnerships.

2. *Effects of the Articles of Association*

I. Mutual Rights and Obligations of the Shareholders/Partners

[Art.1894-1912] Art.1894 provides rules on the formation of the share capital in the ordinary partnership. One may notice a new approach of the lawmaker in addressing the structure of the ordinary partnership. While the civil partnership has, according to the CC and other special laws, a patrimony affected to a purpose, the ordinary partnership regulated under the NCC has a share capital, similarly to that of a commercial company.

Pursuant to para.(1), the partners contribute to the formation of the partnership's share capital by contributions in cash or in kind, as the case may be. The subscribed share capital is divided into equal parts, called participation shares (in French, "*parts d'intérêt*"), which are distributed to the partners pro rata with their respective contributions, if not otherwise stipulated by law or under the articles of association (para.(2)).

¹⁵⁹ According to the Statement of Reasons, ordinary partnerships may or may not have legal personality, as their partners agree, and may acquire legal personality by registration with the trade registry. This is not the most appropriate wording, as, according to the regulation, when it acquires legal personality the ordinary partnership changes into another form of company, regulated under the special law based on which the same acquires the legal personality.

Para.(3) of Art.1894 determines that the partners may undertake to provide contributions consisting of performances or specific knowledge. Pursuant to the thesis II under para.(3), in exchange for such contribution, the partners share in, according to the articles of association, the benefits and losses and they participate to the decision-making process of the partnership. We deem this last text is ambiguous, since it may be construed that the so-called performances contribution grants to the partner the right to share in the benefits/losses and to participate to the decision-making process, although the lawmaker's intention was to point out that such contribution grant the same rights as the contributions in cash or in kind. The text seems pointless anyhow, since the problems related to the participation to profit and loss are regulated under Art.1902 of the NCC and the matters regarding the decision-making process are detailed under Art.1910 of the NCC.

Note should be made that the text of Art.1894 para.(3) is similar to Art.16 para.(5) of the Law No.31/1990, regarding contributions in labor. Similarly to this text, the lawmaker seems to intend to establish that performances contributions do not entitle the party to receive participation shares and to participate in the share capital when ordinary partnerships are concerned. Unfortunately, this important aspect can be only inferred from the topics of the text under Art.1894.

[Art.1895-1899] These texts include provisions on the regime of contributions to the share capital of ordinary partnerships.

Art.1895 regulates the “making of contributions”, which means the payment of such contributions. Therefore, each partner is liable “before the partnership and the other partners”, to make the contributions that he undertook to make, the rights awarded pursuant to the related participation shares being suspended until the contributions are made.

The contribution in assets, other than fungible assets, is made by the transfer of rights upon such assets and the actual handover thereof, in proper operating condition, according to the partnership purpose (Art.1896 para.(1)). The partner contributing with the ownership right or another real right over a certain asset is liable for making the contribution as a seller is liable before the purchaser, and the partner contributing with the right of use shall be liable for making the contribution as a lessor is liable before the lessee (Art.1896 para.(2)). The solution is similar to Art.1503 para.(2) of the CC, regulating the liability for eviction of the shareholder who contributes an ownership right, which is similar to the seller's liability, a solution that was analogically applied by the legal doctrine as regards the equivalence between the lessor's warranty obligation and the obligation of the shareholder participating with the right of use over an asset.

Art.1896 para.(3) enshrines the rule, otherwise logical, pursuant to which the contributions consisting of fungible or consumable goods may be subscribed only as contribution of ownership rights and not as a contribution of the right of use, notwithstanding any contrary stipulation under the articles of association.

Art.1897 establishes as a novelty new rules on the contribution of intangible assets, i.e. receivables, shares of a limited liability company or shares issued by other companies, bills of exchange or any other credit instruments. Actually, the partner contributing a receivable (as well as bills of exchange or other credit instruments) is liable for the existence thereof on the date of the contribution, and for collection upon the maturity date, being bound to cover the amount thereof, the legal interest which

accrues as of the maturity date and any other damages which might arise, if the receivable is not collected in whole or in part (para.(1), para.(3)). Pursuant to para.(2), the shareholder contributing with shares of a limited liability company or shares issued by another company is liable for making the contribution as a seller is liable before the purchaser.

In case of failure to make a contribution in cash, the partner owes the amount that he undertook to pay, the legal interest accrued as of the maturity date and any damages that might arise, being formally notified to this effect by operation of law; this solution is similar to the regulation under Art.1504 para.(1) of the CC (Art.1898).

Pursuant to Art.1899 of the NCC, the contribution in performances or specific knowledge is owed continuously, as long as the partner undertaking such contribution is a member of the partnership (para.(1) thesis I). Para.(1) thesis II rephrases the regulation under Art.1505 of the CC, in the sense that the partner is held liable before the partnership for all proceeds obtained from the activities that are subject-matter of the respective performances. As a rule, contributions in performances or specific knowledge are provided by the partner carrying out certain activities and, respectively, by providing information to the company for the purpose of the latter achieving its scope of business, in the manner and under the terms established in the articles of association (para.(2)). As a novelty, the failure to make the contribution in performances or specific knowledge only leaves room for filing an action for the exclusion of the respective partner, where damages can also be claimed, if applicable (para.(3)), this being one of the consequences of the fact that the contribution in performances/specific knowledge does not contribute to the formation of the share capital, and therefore cannot be subject to forced execution.

[Art.1900-1901] Art.1900 of NCC regulates, as a novelty, the regime of the participation shares, which are indivisible (para.(1)) and entitle to voting rights in the partners' meeting, if paid in full and if not otherwise stipulated under the articles of association (para.(2)). When a participation share becomes the joint property of several persons, they have the obligation to appoint a sole representative who shall exercise the related rights (para.(3)), and all co-owners shall be liable jointly to make the owed payments of their contributions(para.(4)). This regulation generalizes the provisions under the Law No.31/1990 (Art.101, Art.102).

According to the model provided by the Law No.31/1990, Art.1901 includes norms on the transfer of participation shares. Thus, the participation shares are transferred pursuant to the legal provisions and the articles of association, establishing however as mandatory the rule according to which the transfer to persons outside the partnership is allowed only with the consent of all partners (para.(1)). As a novelty, including in relation to the special regulation, the participation shares may be transferred by inheritance as well, if not otherwise stipulated under the articles of association (para.(1) final thesis).

Art.1901 para.(2) of the NCC establishes a procedure for the redemption by any partner of the participation shares obtained for valuable consideration by a third party, without the consent of all partners, within 60 days as of the date when the assignment was known or should have been known to the respective partners. If several partners exercise such right simultaneously, the participation shares are awarded pro rata with the profit participation share. Thus, it is established that ordinary partnerships have an *intuitu personae* nature. Pursuant to para.(3), in the aforementioned situation or

whenever the law requires the assignment of participation shares, the value thereof is established by an expert agreed upon by the parties to the assignment, or if such parties cannot reach an agreement, by an expert appointed by the court. Art.1901 para.(4), first thesis states that the free assignment of participation shares is assimilated to an assignment for valuable consideration which “leaves room” for the application of the provisions under para.(2) and para.(3). As regards the application of para.(3), the reference norm makes sense only as regards the situation provided under para.(2), but not in case of other situations where the law requires the assignment of participation shares.

As regards the form, the free assignment is governed by the legal regime of donations (Art.1901 para.(4), second thesis).

[Art.1902] This article codifies the rule asserted by the legal doctrine, pursuant to which the participation to the profits also involves the contribution to the **losses**, under the terms of the articles of association, of the NCC or of other applicable special laws, as the case may be (para.(1)).

Art.1902 para.(2) rephrases Art.1511 of the CC, without adding new elements as to its substance, stipulating that each partner’s participation to the profits and losses is proportional to his contribution to the share capital. The profit and loss share of the partner whose contribution consists in performances or specific knowledge is equal to that of the partner who brought the smallest contribution. The two norms are to be mandatory, as in the current legislation, but it may be agreed otherwise under the articles of association.

The NCC codifies the doctrinal conclusion pursuant to which the shareholders may participate to the profits in a different share than to the losses, provided that such differences are reasonable in the respective circumstances and that they are expressly provided in the articles of association (para.(3)). As a rule of interpretation, if the articles of association only establish the profits share, the contribution to losses shall be owed in the same proportion (para.(4)).

Art.1902 para.(5) reiterates the interdiction of the so-called “leonine clause” (Art.1513 CC), defined as a clause by which a partner is excluded from participation to the profits or losses. Such clause is deemed to be unwritten, so that its existence does not invalidate the contract where it was provided in, according to the doctrinal approach.¹⁶⁰

Art.1902 para.(6) establishes an exception from Art.1881 para.(2) (and, we might add, from Art.1902 para.(5) on the leonine clause), as regards the possibility to exempt the partner which contributed performances or specific knowledge from participating to the losses, pro rata with his respective contribution (probably considering that the same partner could also contribute cash or assets). Such exemption must, however, be stipulated expressly in the articles of association. In the past, such cause was justified by the fact that the respective partner participates to the losses by the benefits that he brings to the partnership through his services.

¹⁶⁰ The case law established that the leonine clause may trigger the nullity of the contract if it was determinant for the conclusion thereof.

[Art.1903] As a novelty, the partner’s non-compete obligation is transposed in the NCC. He cannot compete against the partnership on his own behalf or on account of a third party, and he cannot perform on his own behalf or for another any operation that could cause damage to the partnership (para.(1)). Furthermore, the partner cannot take part, in person or through a third party, to an activity that could deprive the partnership from the assets, performances or specific knowledge that the partner undertook to provide (para.(2)). The benefits arising from any activity prohibited as stipulated above are due to the partnership, and the partner may be held liable to cover the damages in this respect, if any (para.(3)).

Note should be made that the partners in a partnership contract may qualify as enterprises pursuant to Art.2 para(2) of Competition Law No.21/1996, and therefore, the non-compete obligation may fall under the scope of this special law.¹⁶¹ Pursuant to Art.2 para(1) under Law No. 21/1996, “the provisions hereof apply to the acts and facts restraining, preventing or distorting competition, committed by [...] enterprises or enterprise associations [...]”.

Law No.21/1996, as well as the implementation guidelines thereof issued by the Competition Council, determine the conditions under which the non-compete obligation may be imposed to enterprises who are partners in a joint venture, notwithstanding the legal form thereof. Pursuant to these norms, the non-compete obligation may be imposed to the mother company, i.e. the controlling company in the joint venture, and not to the minority partners. Besides, the scope of application of the non-compete obligation is limited as regards the geographical object and markets. To the extent where the ordinary partnership would not be a fully operational company, pursuant to Art.10 para.2 under Law No.21/1996, the non-compete obligation imposed to the partners shall be evaluated according to Art.5 thereof. Under certain circumstances, according to the competition-restrictive effects of the clause and the market position of the involved parties, the non-compete obligation could be incompatible with the competition rules and therefore inapplicable. On these grounds, we recommend that para.(1) under Art.1903 be supplemented by the phrase “within the scope of the special law regulating the matter of competition” or by another similar text.

[Art.1904-1905] Pursuant to Art.1904 para.(1), if not otherwise stipulated, any partner may **use the partnership’s assets** in the interest of the partnership, according to their purpose, without interfering with the other partners’ rights, similarly to Art.1517 item 2 of the CC. As a novelty, if the partner uses the partnership’s assets for his own benefit or for the benefit of a third party, without the written consent of the other partners, he shall have the obligation to reimburse to the partnership the proceeds thus obtained and to cover any possible damages (para.(2)).

Art.1905 establishes some general rules on the use of joint funds. Joint funds may be used by the partners to the extent where these are justified by the expenses incurred or to be incurred by the partners for the benefit of the partnership (para.(1)), and the partners shall be liable for any additional amounts taken out from the partnership’s resources and for “all compensation that might arise”

¹⁶¹ The term “enterprise” includes any entity carrying out an economic activity, i.e. an activity consisting of offering assets or services on a given market, notwithstanding its legal status and the manner of financing.

(para.(3)).¹⁶² The partnership's rules are, however, flexible so that it is possible to provide in the articles of association that the partners may take out a certain amount of cash from the partnership for their private expenses (para.(3)).

Art.1906 maintains a particular rule, currently regulated under Art.1506 para.(1) of the CC, in case that the partnership and any partner have a common debtor who makes a partial payment of his debts to the partnership and to the partner, debts that have the same maturity date. In this case, the partner to whom the payment was made shall allocate the received amount to extinguish his receivable and the partnership's receivable, pro rata with the ratio between these receivables. The lawmaker no longer reiterated the regulation under Art.1506 para.2 of the CC pursuant to which the rule of proportional distribution is no longer applied, if it is mentioned on the receipt that the entire amount is meant exclusively to cover the debt to the partnership.

The current regulation (Art.1506 para.(1) of the CC) refers to "due and payable" debts and not "debts having the same maturity date", such as stipulated under Art.1906 of the NCC, seriously limiting the possibility that such a situation should occur, and rendering the regulation pointless.

Art.1907 para.(1) maintains the rule under Art.1510 of the current CC pursuant to which the partner is entitled to the reimbursement of the expenses incurred for the partnership and to be indemnified for the obligations he undertook or the loss he incurred by acting in good faith in the interest of the partnership. Art.1907 para.(2) prohibits the set-off of the amounts provided under para.(1) with the partner's debts towards the partnership, or the set-off of the loss caused to the partnership, by the partner's fault, with the benefits that he brought to the partnership by various operations. It is also prohibited to set-off a third party's debt towards the partnership with the receivable thereof against a partner (para.(3)).

[Art.1908-1909] Similarly with Art.1519 of the CC, a partner may associate with a third party in relation to his own rights in the partnership, without the consent of the other partners, but the third party cannot become a partner unless he obtains such consent, which must be provided pursuant to Art.1901 (Art.1908 para.(1)).

Pursuant to Art.1908 para.(2), as a novelty, the partner may not assign his partnership-related rights, without the consent of all other partners, on sanction of applying the provisions under Art.1901 para.(2) and para.(3). We understand that the rights in the partnership are not the same with the ownership right over the participation shares, otherwise the regulation under Art.1908 para.(2) would be redundant. It is unclear however how to apply the provisions of Art.1901 para.(2) and para.(3) when the assigned right in the partnership is, for instance, the right to share in the profits for a certain period of time, and moreover, the manner in which such right will affect the interest of the partner who redeems it (will it change his quota of participation to the partnership's profits?).

¹⁶² The wording is, in our opinion, scarce. Compensation does not "arise" and only the resulting loss may be associated with such verb. Probably the intention was to use the word "damages" with the meaning of "prejudice", just like in the previous articles.

A partner cannot create security interests over his partnership-related rights to secure personal obligations or obligations of a third party, without the consent of all other partners, the sanction being the absolute nullity of the security interest (Art.1908 para.(3)).

We deem, however, that the name of “partnership-related rights” might be reconsidered, since it is used inconsistently as to the rest of the provisions on the articles of association. Thus, in most cases, the attribute “partnership-related” has the meaning of “belonging to the partnership” and not to the partners (for instance, “partnership-related patrimony” (Art.1920, Art.1935, etc.), “partnership-related creditor” (Art.1920), “partnership-related assets” (Art.104, Art.1944, Art.1948 etc.), “partnership-related debts” or “partnership-related obligations” (Art.1889, Art.1945, Art.1946, Art.1947)), while the “partnership-related rights”, pursuant to the current wording of the NCC texts, do not belong to the partnership, but to its partners.

Art.1908 para.(4) regulates the impossibility of in-kind or indirect restitution of the share due to a partner out of the joint assets of a partnership with unlimited duration before the termination of the partnership, except for cases of withdrawal or exclusion of such partner.

Pursuant to Art.1909, the beneficiary of a partner’s promise of assignment, sale, establishment of security interest or waiver of rights in the partnership is only entitled to claim compensation for the damages arising from the non-fulfillment of such promise.

[Art.1910-1912] As a novelty, similarly to the applicable corporate law provisions, Art.1910-1912 provide for rules concerning the resolutions of the partners’ meeting. Therefore, the right to participate in the process of taking collective decisions in the meeting of partners lies with all partners, even those without management rights (Art.1910 para.(1)). As regards the decision-making process, the NCC establishes that the rule of the majority of the partners’ votes is mandatory (Art.1910 para.(2)), except for decisions on the amendment of the articles of association or the appointment of a sole director, which are always taken with the consent of all partners (Art.1910 para.(3)). The obligations of a partner cannot be increased without the consent of the respective partner (Art.1910 para.(4)) and, therefore, a decision which would cause such consequences must be approved by said partner as well. Art.1910 para.(5) stipulates that any clause which is contrary to the provisions of Art.1910 is deemed to be unwritten. It may be, however, inferred that the permitted derogations from the majority rule (Art.1910 para.(2)) should not be sanctioned.

The partners’ meeting shall adopt resolutions in accordance with the rules on meetings’ convening and organization established in the articles of association and, in the absence thereof, the resolution may also be taken by consulting the partners in writing (Art.1911 para.(1)). The consent of all partners provided in the deed to be entered into by the partnership is the proof that such decision has been taken, and is an welcome derogation from the formality principles governing corporate law (Art.1911 para.(2)). This new rule is welcome, and it could be expressly extended to all company types.

In a similar manner, Art.1912 regulates an instrument to be used by a shareholder in order to challenge the resolution he opposes. The reason based on which para.(1) stipulates that only a resolution “taken with majority vote” may be challenged is unclear. Consequently, resolutions taken unanimously could not be challenged, which seems to be a fair solution. On the other hand, pursuant to its current wording, the text might lead to the conclusion that a resolution taken without the necessary majority

vote (by a “minority” of the partners) cannot be challenged, which is obviously absurd. Finally, the text does not provide the significant condition that the partner who wants to challenge the resolution should have voted against it or should not have participated in the respective meeting, similarly to Art.132 para.(2) of the Law No.31/1990.

The shareholder may challenge the resolution in court, within 15 days as of the date when it was adopted, if he was present, or as of the service date, if he was absent (this being a forfeiture term, pursuant to Art.1912 para.(2)). If the resolution was not served to the respective partner, the term shall start running as of the date when he became aware of such resolution, however not later than one year as of the date when the decision was made (Art.1912 para.(1)).

II. Partnership’s Management

[Art.1913-1919] The appointment of directors, their rules of organization, the limits of their mandate, as well as any other aspect related to partnership’s management is established pursuant to the articles of association or by separate instruments (Art.1913 para.(1)); this rule being also inferred from the CC. Pursuant to Art.1913 para.(2), directors can be partners or not, and they may be Romanian or foreign individuals or legal entities. Whereas the possibility that the civil partnership (*société civile*) be managed by a third party (i.e. which is not a partner) was acknowledged by the legal doctrine (despite the apparently restrictive wording of the CC), the management of the ordinary partnership by a legal entity is a novelty.

Art.1913 para.(3)-(4) reiterates the rules under Art.1517 para.(1) of the CC on the partners’ mutual mandate of managing one on behalf of the other in the best interest of the partnership, if not otherwise stipulated under the articles of association. Any operation carried out by any of them is valid even without the prior consent of the other partners, but these may nevertheless oppose to the respective operation in writing, prior to its completion. Pursuant to Art.1913 para.(5), such opposition is not effective against *bona fide* third parties.

Art.1914 establishes the limits and conditions for the revocation of the director’s mandate. The director may carry out any act of management in the benefit of the partnership, if the partners do not oppose (para.(1)). As regards the “partners’ opposition”, the text does not provide the conditions for the exercise of such opposition, or if it follows the rules of opposition regulated for the special situation under Art.1913 para.(3)-(4). The director may be revoked pursuant to the rules regarding the agency contract, if not provided otherwise in the articles of association (para.(2)). The rule applicable for the ordinary director, appointed subsequently to the conclusion of the articles of association was thus generalized, while for the revocation of the director appointed pursuant to the articles of association, the CC provides for a supplementary condition of legitimate grounds (Art.1514 para.(2) of the CC).

Similarly to Law No.31/1990, the NCC regulates the unenforceability of clauses limiting the management powers granted by law to the *bona fide* third parties (i.e. the third parties who were not aware of such limitations) (Art.1914 para.(3)).

Pursuant to Art.1915, directors are liable personally before the partnership for losses caused by the breach of the law, of their mandate or by their negligence in managing the partnership (para.(1)). In case there are several directors, they will be jointly liable, but as regards the relation among them, the

court may establish a liability that is pro rata with each director's negligence in committing the act that caused the respective losses (para.(2)).

As regards the case where there are multiple directors, the provisions under Art.1515-1516 of the CC are maintained, in the sense that if the powers of directors or the obligation to act jointly are not determined under the power-of-attorney, either of them may perform valid acts of management, but if the power-of-attorney imposes them to act jointly, neither of them can perform acts of management alone, even if the other directors are incapable to act (Art.1916).

Under the title of "decisions-making process", Art.1917 does nothing more than to establish an exception to the rule on the invalidity of individual acts of management, in case of joint management (Art.1916, final thesis), foreseeing however that joint management may involve unanimity or majority (similarly to the functioning of a board of directors). Thus, a decision may be taken without observing the rule of unanimity or majority in force majeure cases, when the absence of such decision might cause serious loss to the partnership.

Art.1918 provides for mandatory rules (para.(4)) on the rights of the partners who are not directors. Art.1918 para.(1) develops a thesis currently found under Art.1518 of the CC. Partners who are not directors cannot perform acts of management in relation to the partnership, or acts of disposition in relation to the assets thereof, subject to the sanction of covering the losses which might arise. The rights of *bona fide* third parties are not affected by such interdiction (a provision which is an application of the rule provided at Art.1914 para.(3) of the NCC).

Pursuant to Art.1918 para.(2), if not otherwise provided by law, any of the partners is entitled to have access to the registries and financial statements of the partnership, to be informed of its operations, and to check any partnership document without disturbing the operations thereof or affecting the other partners' rights. The information right of the partners in an ordinary partnership is an extended right (as compared to the one provided by the Law No.31/1990 to the shareholders, for instance) in consideration of the personal and private nature of the partnership.

The NCC imposes to the directors the obligation to prepare an annual report regarding the developments concerning the partnership, which shall be communicated to the partners. Any of the partners may request that the report be discussed by all partners, in which case the directors have the obligation to convene the "reunion" (the word "meeting" would have been more appropriate in this context) of the partners to this effect at the partnership's headquarters (Art.1918 para.(3)).

Although the side heading of Art.1919 is "representation in court", para.(1) seems to refer to a partnership's representation in general, a matter which is not regulated under such heading in any other text of this chapter. If this interpretation is correct, we recommend the amendment of the side heading (i.e. to "Partnership's Representation") so as to reflect the contents of the article. Thus, the partnership is represented by the directors having right of representation, of in the absence thereof, by any partner, if not stipulated in the articles of association that the right of representation is granted only to some of them (Art.1919 para.(1)). Art.1919 para.(2) refers indeed to the premise where the partnership appears before the court, and in this case it is stipulated that the "partnership stands trial" under the name provided in the articles of association or under its registered name, as the case may be, and *bona fide* third parties may use any of these names. As regards the terminology, both

“representation in court” and “the partnership stands trial” are informal and inaccurate phrases; it would be more accurate to use phrases such as “representation before the court” and respectively “the partnership shall be identified before the court” under the name of (...), etc.

III. Partners’ Obligations Towards Third Parties

[Art.1920-1924] Art.1920 para.(1) resumes, with a few amendments, the conclusion reached by the legal doctrine under the current regulation (Art.1520-1522 of the CC) as regards the obligations towards the partnership’s creditors. Thus, according to para.(1), in fulfilling the obligations towards the partnership’s creditors, each partner is liable with his own assets pro rata with his contribution to the share capital, only if the partnership’s creditor could not be satisfied from the partners’ joint assets. The current interpretation of the legal doctrine was that this liability is engaged only if the contracting partner was empowered to perform the act to which he contractually bound the partnership or if benefits resulted for the partnership. The current regulation also provides for the divisible character of the liability, with the difference brought by the NCC that the personal liability of the partners is divided to the number of partners, and not pro rata to their quota from the share capital, being assumed that the third party knows the number of partners, and not their quotas.

Art.1920 para.(2) regulates the right of the personal creditor of a partner, to the extent that he could not be satisfied from the partners’ joint assets, to ask to be returned to that debtor- partner or separated and assigned to the debtor-partner the share owed to the latter out of the partners’ joint assets, in this case Art.1939 being applicable.

We note that a clerical error has been made as regards the reference norms, since the correct reference (as it also follows from the CDEP Table) is Art.1929 NCC, concerning the rights of the excluded partner. Moreover, Art.1929 stipulates the right of the partner who loses such capacity to obtain the value of its participation shares, as jointly agreed upon by the partners or assessed by an expert or by the court, and not “the part which is due to him from the partners’ joint assets”.

To conclude, we deem that Art.1920 para.(2) must be read in the light of Art.1929 (establishing the rule in the matter of the rights owed to the partner leaving the partnership), in the sense that a personal creditor of an associate may only request the value of the part which he owes to his debtor, and not the restitution of the contributed asset or of another part of the joint assets.

We should also point out a certain degree of terminological inconsistency, in relation to the name assigned to the assets acquired by the partnership. The chapter on the articles of association uses at least four different phrases which seemingly define the same concept: “partnership-related assets” (Art.1904, Art.1943 para.(2), Art.1944 (para.(1), etc.), “joint partnership assets” (Art.1908, para.(4)), “the assets thereof [i.e. of the partnership] (Art.1918 para.(1)), and respectively “common assets of the partners” (Art.1920). We deem that the most appropriate phrase in this context is that of “partnership assets”.

[Art.1921-1922] These articles regulate special norms on the liability of apparent and secret partners. According to Art.1921 para.(1), any person claiming to be a partner or deliberately creating a convincing appearance in this respect is liable towards good-faith third parties just like a partner.

Art.1921 para.(2) regulates two cases when the partnership is held liable towards the misled third party according to para.(1). Art.1921 para.(2), first thesis, provides that the “partnership shall not be held liable towards the third party thus misled unless the latter was given enough reasons to be considered partner”. As compared to the case provided at Art.1921 para.(1), the text under para.(2) seems to introduce another hypothesis, not entirely impossible, when the misled third party is exactly the apparent partner who deemed in good faith that he is a partner. On the other hand, the lawmaker may have intended to say that “the third party was given enough reasons to deem that the apparent partner is actually a partner”, this scenario being more plausible in the context of the regulation. At any rate, we deem that the norm needs clarification.

According to Art.1921 para.(2), second thesis, the partnership is also held liable towards the misled third parties when, although being aware of the alleged partner’ dealings, it does not take reasonable measures to hinder the misleading of the third party.

Art.1922 provides that secret partners are held liable towards the good-faith third parties just as the apparent partners. This norm is also questionable. The concept of “secret partner” is not defined by the NCC and does not exist in any other text of the NCC, although we would have expected to find it at least among the provisions on the joint venture (Art.1949-1954 of the NCC). In the legal literature, the “secret partner” is the sleeping or silent partner from a joint venture, therefore a legitimate partner, liable towards third parties just as any other partner. If this were the meaning of “secret partner” as per Art.1922, the correlation with the regime of the apparent partner would not make any sense. Therefore, it is recommendable to define the concept of “apparent partner” to provide the key for the interpretation of Art.1922 of the NCC.

[Art.1923] Art.1923 establishes an interdiction against the issuance of financial instruments by the partnership, on sanction of absolute nullity both of the deeds concluded in this respect and of the financial instruments issued, if the law does not provide otherwise (para.(1)). According to para.(2), the partners, even if they are not directors, have a subsidiary joint liability towards the partnership for any damage caused to good-faith third parties who are damaged further to the infringement of the interdiction provided at para.(1). Therefore, the NCC establishes an exceptional case on the joint liability of the ordinary partnership’s partners towards third parties.

[Art.1924] This article legislates the obligation of the partners to inform third parties on their powers before executing the deed with them.

3. Loss of the Capacity of Partner

[Art.1925-1929] As a novelty, the NCC establishes norms on the loss of the capacity of partner. Art.1925 provides a list of general **cases** when the capacity of the partner is lost, i.e.: assignment of shares in the partnership (actually, the correct wording should have been “assignment of participation shares”), forced execution of such shares, death, bankruptcy, legal incapacity, withdrawal and exclusion from the partnership. We should mention that the death, the insolvency (interpreted by the legal doctrine as “bankruptcy”) and the legal incapacity of a partner are currently regulated as cases for the termination of the partnership (Art.1523 of the CC, items 3 and 4), but the new regulation takes into account the fact that, in practice, the termination of the partnership occurs, even in these cases, only if the partnership cannot survive with the remaining partners or with the heirs of the deceased

partner. The NCC also provides for special cases when the capacity of the partner may be lost, such as the cases stipulated under Art.1920 para.(2) and Art.1937.

However, the procedure according to which the forced execution of such participation shares is to be performed is unclear. In the absence of express provisions to this effect, the question is raised whether the provisions of Art.1901 of the NCC, allowing under para.(1) that the participation shares be transferred to third parties outside the partnership only with the consent of all partners, continue to be applicable. This problem could be solved by applying Art.1901, para.(1) and para.(3) of the NCC, referring to the premise that a third party might acquire participation shares, without the consent of all partners. The procedure established under Art.678 of the NCC, with the side heading "Forced execution of joint assets", might be considered *mutatis mutandis* as an alternative. Irrespective of the preferred solution, it is however recommendable to insert a clarification rule.

Art.1926 regulates the condition for withdrawal from a partnership with unlimited duration or whose articles of association provide for the right to withdraw. In such case, the withdrawing partner may leave the partnership, by notifying the latter with a "reasonable time" in advance, if he is of good faith and his withdrawal at that time does not cause an imminent loss to the partnership. The phrase "reasonable time" is elliptic and susceptible to contrary interpretations; we deem that the necessity to grant a reasonable notice term was considered, such as stipulated in other NCC texts, concerning similar premises as said article (i.e., Art. 847 para.(2) of the NCC referring to the waiver of the capacity of manager of another person's assets, as well as Art.1276 para.(2) and Art.1277 of the NCC, on the unilateral termination of the contract, etc.).

Art.1927 sets the conditions for the withdrawal from the partnership which has a limited term or having an object which can only be fulfilled within a certain term. In such case, the partner may withdraw for solid reasons, with the consent of the majority of the other partners, if not otherwise provided in the articles of association (para.(1)). If no majority consent is reached, the partner may approach the court, which, in ruling on the withdrawal, shall assess the legitimacy and solidness of the reasons, the opportunity of the withdrawal by reference to the circumstances and the good faith of the parties. In all cases, the partner is held to cover the loss which would occur further to his withdrawal (para.(2)).

According to Art.1928, at the request of a partner, the court may, for solid reasons, decide to exclude from the partnership any of the partners.

Although the side heading of Art.1929 is "The Rights of the Excluded Partner", the text is of a more general nature and it regulates the rights of a partner who loses his capacity otherwise than by assignment of or enforcement against its shares in the partnership. Therefore, Art.1929 applies to the case when the shareholder loses this capacity by death, bankruptcy, being declared legally incapable, withdrawal and exclusion from the partnership and in other cases expressly provided by the NCC (and not only by exclusion, as it erroneously follows from the side heading of this article).

Finally, such partner may obtain the value of his shares ("his participation shares", we would say, although the lawmaker seems to hesitate in providing an exact qualification for the subject matter of the assessment) as of the date when he no longer has the capacity of partner, and the other partners are held to immediately pay such value to the withdrawing partner, as soon as it is determined, plus the

legal interest accruing as of the date when he is no longer a partner (Art.1929 para.(1)). According to para.(2), if the parties do not agree on the value of the participation shares, such value shall be determined by the court under Art.1901 para.(3). For the deceased partner, it is implied that the aforementioned rights may be exercised by the heirs.

Therefore, Art.1929 establishes the rule of “indirect” restitution (i.e. restitution by giving an equivalent) of the initial contribution of the partner, respectively the value of his participation, and not the restitution in kind of the contributed asset. We deem that the parties may also agree on the restitution in kind, although Art.1929 does not reveal such possibility, by virtue of the flexibility which should characterize the rules applicable to an ordinary partnership, which cannot be more rigid than, for instance, the rules applicable to companies.¹⁶³ We also draw attention that, if the initial contribution of the partner was a contribution of the right to use an asset, the latter shall be able to claim, in the capacity of owner, the restitution of the asset; this situation does not seem to make the object of Art.1929 of the NCC either.

In our opinion, the deficiency of Art.1929 consists in that the regulation is detailed too much, to the detriment of flexibility. This also creates a norm which is insufficient.

4. Termination of the Articles of Association and Dissolution of the Partnership

[Art.1930-1940] The general cases when ordinary partnerships are terminated are subject to some special legal provisions. Thus, the articles of association is terminated and the partnership dissolved in the following cases: a) the partnership’s scope of business has been achieved or the impossibility to achieve it is indubitable; b) upon consent of all partners; c) by the court’s ruling, for legitimate and solid grounds; d) further to expiry of the partnership’s duration, except when the provisions of Art.1931 are applicable; e) nullity of the partnership; f) other cases stipulated in the articles of association. The cases under let.c), e), f) are provided as regulatory novelties, although the legal doctrine has already inferred them by interpretation.

Therefore, from the cases of termination expressly regulated by the CC for the civil partnership, the NCC eliminated the withdrawal (unilateral termination by some of the partners – Art.1523, item 5 of the CC), which is regulated as a mere loss of the legal capacity of partner (Art.1925 NCC), in line with the doctrinal approach. However, it must be said that the withdrawal of a partner may also determine the termination of the partnership if, further to this withdrawal, the number of partners falls under two.

According to para.(2), the partnership entering into dissolution proceedings shall be liquidated. The rules on the termination of ordinary partnerships are similar to the corresponding regulations from corporate law.

¹⁶³ According to Art.226 para.(3) of the Law No.31/1990, the rights of the withdrawing shareholder are established by agreement of the shareholders or by an expert appointed by them or, in case of disagreements, by the tribunal. As can be seen, the wording of this text is more flexible, and gives the shareholders the freedom to set a withdrawal package which may consist of various types of rights or benefits.

[Art.1931] Art.1931 NCC establishes rules on the tacit extension of the articles of association.¹⁶⁴ The partnership is thus tacitly prorogated when, although its duration has expired, it continues to operate and its partners continue to perform operations falling under its business scope and to behave as partners. Prorogation is valid for 1 year and may be repeated annually, if the same conditions are met. This regulation is different from Art.1524 of the CC which foresees the possibility to apply prorogation, but deals only with the proof thereof. We deem that the quoted text raises a problem, because it derogates from the provisions of Art.1884 para.(1), which requires the written form as proof of the articles of association (this requirement is to be applied with respect to the term, according to the principle of symmetrical forms and the amendments thereto).

[Art.1932-1936] As a novelty, the NCC regulates a series of rules on the nullity of the ordinary partnership. Art. 1932 para.(1) provides that the partnership's nullity may result only from the infringement of the mandatory provisions of this chapter, "stipulated on sanction of nullity" or from failure to comply with the general conditions for the validity of contracts, if the special law does not provide otherwise. According to para.(2), any contractual clause which is contrary to a mandatory provision from this chapter and whose infringement is not sanctioned by the nullity of the partnership is deemed to be unwritten.

Therefore, according to the new regulation, the nullity of the ordinary partnership occurs only as a sanction of the express, special cases of nullity provided by the NCC, and not further to the cases of virtual nullity (i.e. nullity arising from the infringement of mandatory norms for which the sanction of nullity is not expressly stipulated). Or, the NCC does not actually contain cases of express nullity which may trigger the nullity of the ordinary partnership. The only cases of nullity provided for in Chapter VII, Title IX, Book V of the NCC are those sanctioning the failure to comply with the formal conditions of the agreement by which a legal entity is being set-up (Art.1884 para.(2)) or legal deeds which exceed the provisions of the constitutional documents, i.e. the issuance of financial instruments (Art.1923 para.(1)) and the creation of security interests (Art.1908 para.(3)).

To conclude, the only cases when the partnership's nullity may be declared are those arising from the failure to comply with the general conditions for the validity of contracts, which renders the first thesis of Art. 1932 para.(1) superfluous. A possibility to correct this regulation would be to exclude the expression "stipulated on sanction of nullity" from Art. 1932 para.(1).

Art.1933 NCC regulates the regime of ordinary partnership's nullity in a manner which is similar, in terms of its remediable character, with the nullity of a company (Art.57 of the Law No.31/1990). Nullity is covered and shall not be declared if the cause of nullity has been eliminated before submissions are made on the case merits before the court (para.(1)).¹⁶⁵ The court must submit to the parties' discussion the possibility to remedy the causes of nullity which affect the articles of association and to set a due term when nullity may be covered, even if the parties oppose (para.(2)).

¹⁶⁴ The terminology is not unitary. The side heading of the article uses the term of "extension", while the body of the article contains the term of "prorogation". We recommend a harmonization of terminology.

¹⁶⁵ The expression "to cover the nullity" is not in line with NCC's terminology which refers to "confirmation" under the special provisions concerning the nullity of the contract. *See*, for instance, Art.1247 para.(4) of the NCC.

The right to file action for nullity, except for the nullity of the unlawful object of the partnership, is statute-barred 3 years after the execution date of the contract (para.(3)).

According to Art.1934 para.(1), in the case of the partnership's nullity for vitiation of consent or legal incapacity of a partner and when remedy of the respective nullity case is possible, any person concerned may submit a formal notice to the person who is entitled to claim the nullity (also informing the partnership in this respect), either in order to proceed with the remedy or in order to file the "legal action for nullity" within 6 months after submission of the formal notice, on sanction of forfeiture. According to para.(2), the partnership or any partner may, within the same term of 6 months, propose to the court vested with the "legal action for annulment" any measures to cover (confirm) the nullity, especially by redemption of the plaintiff's rights in the partnership. In this case, the court may either rule on the nullity or declare that the proposed measures are mandatory, if the latter have been previously adopted by the partnership under the conditions required for the amendment of the articles of association, but without the vote of the partner who is acting as plaintiff (para.(2)). According to para.(3), if the value of the partner's rights in the partnership is challenged, such value is determined in compliance with Art.1901 para.(3).¹⁶⁶

We deem that the reference to the redemption of "partnership-related rights" is imprecise. Pursuant to Art.1925 of the NCC, the loss of the capacity of partner occurs, among other, by the "assignment of (participation) shares in the partnership", not by the transfer of "partnership-related rights".

Art.1935 regulates the effects of nullity, also similarly to corporate law. According to para.(1), the partnership ceases as of the date when the court ruling, whereby nullity was found or, as the case may be, declared, and liquidation of the partnership's assets and liabilities was initiated, remains final (similarly to Art.58 para.(1) of the Law No.31/1990). Through the ruling declaring or finding, as the case may be, the partnership's nullity the liquidators shall also be appointed (para.(2) similarly to Art.58 para.(2) of the Law No.31/1990). As per para.(3), neither the partnership nor the partners can avail themselves of the nullity against good-faith third parties (Art.59 para.(2) of the Law No.31/1990).

As regards the liability for the partnership's nullity, Art.1936 provides that the right to file a legal action for the compensation of the loss caused by the declaring or, as the case may be, finding the partnership's nullity is statute barred after 3 years and starts to run on the date when the ruling declaring or finding nullity remains final (para.(1)). Even if the cause for nullity disappears or the partnership's nullity is remedied, this does not prevent the exercise of the right to file a legal action for indemnification for the loss triggered by the nullity. In such cases, the right to file legal action is statute-barred within 3 years since the day when nullity has been covered (para.(2)).

[Art.1937] Art.1937 provides a better systematization of the rules on the loss of the assets subscribed as contribution, which is provided under Art.1525 of the CC. According to para.(1), when one of the partners promised to contribute the ownership or the right to use an asset which was lost

¹⁶⁶ We note that there are inappropriate inconsistencies in the terminology, as the text uses both "action for nullity" and "action for annulment".