

The Effects of Debt Assignments

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Abstract

The assignment of debt takes effect between the contracting parties (assignor and assignee), without any formalities, but also between parties and in relation to third parties. Thus, the right to claim is transmitted from the transferor's property to the transferee's together with all accessories to that debt, and the rights related to warranty. Instead, the effects of the debt assignment in relation to third parties must be judged according to how the assignment became enforceable against the assigned debtor, which is different from the one done to other third parties.

Key words: debt assignment, assignee, assignor, assigned debtor, third parties

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1. Introduction

The debt assignment is a contract whereby, for good and valuable consideration or free of charge, the creditor transmits his right to claim to another person (Pop, 2006, p.223; Reghini, 2007, p.153; Vasilescu, 2012, p.33; Stătescu *et al*, 2008, p.363; Malaurie *et al*, 2010, p.795; Adam, 2004, pp.491-509; Motica *et al*, 2005, pp.209-218; Dogaru *et al*, 2009, p.486). In legal literature, it was shown that the parties to the debt assignment are, as follows: the lender *assignor/transferor* transmitting the claim, *the assignee/transferee* who acquires the claim and *the assigned debtor*, that is the debtor obliged to perform the object of the debt assignment, but who is a third party to the debt assignment contract, based on the principles of binding force and relativity of the effects of the contract (Pop *et al*, 2012, pp.636-637). Thus, a new creditor acquires the legal position of the creditor transferor, i.e. the right to claim, with its accessories and warranties under the same legal conditions.

2. The effects of debt assignments must be analyzed as mentioned, both between the contracting parties and in relation to third parties.

Between the contracting parties the effects of the debt assignment are the transmission of the claim with its accessories and the warranty obligation of the transferor. This shall take effect from the time of conclusion of the assignment, according to the principle of binding force of the contract and it is not subject to disclosure requirements of the debt assignment through which the effects of the assignment are produced only in relation to third parties.

The debt transfer consists of the transmission of the right to claim *ut singuli*, from the transferor's assets/property to the transferee's, in the way it existed before, i.e. with:

- a) all the rights that the transferor has in relation to the ceded claim;
- b) guarantee rights (fidejussion, pledge, mortgage, privilege) and
- c) all accessories, according to art.1568 of the New Romanian Civil Code. (Pop *et al*, 2012, pp.644).

According to the principle of mutual consent, this translative effect occurs at the time of the agreement of the parties, unless the assignment is done via a solemn contract. As a result of the translative effect, the debt agreement creates a specific obligation on the transferor: transmission, which is an obligation to fulfill. This obligation is related to the execution of the contract and it is

performed, according to art.1574 of the New Civil Code, by delivering the title ascertaining the claim, that is the authentic or under private signature document registering the contract that generated the ceded claim.

If the transferor does not fulfill this contractual obligation, which puts the assignee in the position of not being able to assert his rights and the assignment was made through a mutually binding contract, the transferee has the right to refuse to perform his own services (payment of the claim price), citing *exceptio non adimpleti contractus*, or to rescind the debt assignment (Reghini, 2007, p.171; Pop, 2006, p.239).

Taking into account this effect of transmission of the claim and its accessories, the debt assignment is a way to transfer the obligations that ensures the claim legal continuity because the claim that the transferor had will be left intact in the property of the assignee as the acquirer with a particular title. What changes when there is a debt assignment is only the holder of the transferred debt, i.e. the creditor. Therefore, it is appreciated that, when the assigned debt arose from a contract, the transferee becomes the „party occurred”, this position explaining the specific effects of the assignment (Reghini, 2007, pp.171-172; Vasilescu, 2008, pp.132-136).

The transferee is the new lender that will be able to request the execution of the acquired debt at face value, no matter how much he paid for it, as he will enjoy all the guarantees initially attached to the claim, that he will be able to use, if necessary (Vasilescu, 2012, p.37).

Then, the claim is transmitted to the transferee with all the ways that possibly affect it, such as: term, condition, solidarity, indivisibility, etc.

At the same time, the transmission of the claim as found in the transferor's property has as a consequence right the transmission of all actions resulting from that claim as well as the exceptions that the debtor can invoke, including the nullity action and prescription (Reghini, 2007, pp.172-173). This hypothesis has created much debate in legal doctrine and case law has provided no clear solution. Thus, most doctrinarians admit that the transferee has the right to exercise some of the actions of the transferor, such as payment and actions that protect the rights of the creditor: the guarantee action, the Paulian action and oblique action because they are transferred to the transferee together with the debt.

Also following the acquisition by the transferee of the position as party occurred, the legal doctrine admits that the enforcement order obtained by the transferor prior to the transfer is valid and will be transmitted to the transferee, its prescription being effective and ready to be fulfilled, as if the assignment had not intervened (Reghini, 2007, p.173; Pop, 2006, p.239).

Consequently, applying the principle *nemo plus juris ad alium transferre potest quam ipse habet*, after the transfer, the transferee may not claim more rights than the transferor had, nor can the assigned debtor have a more difficult or more favorable situation than that which he had had prior to the assignment.

The warranty/security obligation of the transferor to the transferee occurs when the debt assignment is made for good and valuable consideration. According to art.1585 paragraph 2 of the New Romanian Civil Code, the transferor is responsible for his current and valid existence of the claim and its accessories, but without being responsible for the ceded debtor's creditworthiness.

Thus, the transferor must insure the assignee for the existence of the claim, as determined in the assignment, referring to circumstances, such as: annulling the claim in whole or in part, through payment, compensation, etc; prescribing the action referring to the claim ceded; a discrepancy between the nominal value of the debt and the one stated in the debt assignment contract. Then, the transferor must guarantee for the validity of the claim, i.e. any grounds for invalidity or revocation of the contract from which the ceded debt arose. In legal literature, it has been shown that the transferor needs to insure the assignee about the fact that the debtor cannot invoke successfully any exception to annihilate, in whole or in part, the right of the transferee (Reghini, 2007, p.174; Pop, 2006, pp.239-240; Malaurie *et al*, 2010, p.807).

The effects of the debt assignment to third parties and between third parties: between the debt assignment parties (assignor and assignee) the assignment produces primary effects, without any formalities, according to the principle of binding force of the contract. As noted above, all other persons, except for the transferor, the transferee and their universal successors or persons with universal title, are part of the third parties, including the assigned debtor, the creditors of the assignor and other assignees of the same claim in the case of a successive assignment.

But in a debt assignment, these third parties are not absolute parties, that is complete strangers in this legal operation, but they are specific or interested parties, i.e. those persons who, without being parties or universal successors or persons with the universal title of the parties, bear some consequences of the debt assignment (Reghini, 2007, p.178; Deleanu, 2002, pp.135-144; Vasilescu, 2012, p.38).

In legal literature, it has been shown that in order to analyze the effects of the debt assignment against specific third parties, consideration should be given to the manner in which the transfer is made enforceable against the assigned debtor, which is different from that in which it is made for other parties (Pop *et al*, 2012, p.647; Malaurie *et al*, 2010, pp.800-801).

a) The effects of prior notification or acceptance:

According to art.1578 of the New Civil Code the debt assignment can become enforceable against the assigned debtor only upon acceptance or communication/notification of the assignment to him. Up to the moment of notification or acceptance through a document having a certain date, the assignment of claims is inapplicable to the assigned debtor, so that the payment made to the transferor is valid and discharging or it can preclude any other way of annulling the debt (prescription, compensation, debt relief/cancellation). On the other hand, even if the publication by notice has been performed, but it was transmitted to the ceded debtor by the transferee, the debtor is entitled to suspend payment until he is presented the documentary evidence of the transfer, according to art.1578 of the New civil Code.

b) The effects after giving notice or acceptance are set by art.1582 of the New Civil Code; from this moment on, the assigned debtor becomes the exclusive debtor in relation to the transferee, and cannot pay the transferor. Therefore, any payment made after this time to the transferor has a discharging effect and cannot be invoked to paralyze the payment request made by the transferee. In this case, the payment is not valid and the assigned debtor may request its return.

Since the transferee has acquired this claim as found in the transferor's property, the debtor may oppose the transferee the same exceptions and defenses which he could oppose to the original creditor, in accordance with art.1582 paragraph 1 of the New Civil Code, i.e. exceptions concerning invalidity, annulment or diminished value claim, and the assigned debtor is entitled to refuse, in whole or in part, its payment to the transferee, such as: the exception for revocation of the act from which the transferred debt arose, exception of prescribing the right of action prior to the transfer, exception of legal compensation, etc. (Reghini, 2007, p.179). Similarly, he can invoke: exception of the guarantee owed to the transferor, where was evicted the transferred right in exchange of the obligations which the debtor assumed corollarily against the assignor; exception of payments made to the transferor before the publication of the assignment; exception of *res judicata* and all the possible exceptions regarding the reduction in value of the debt assigned (Pop, 2006, p.245).

Another effect of the transfer after notice or acceptance is that the assigned debtor may oppose the transferee, in good faith, the payment made to an apparent creditor under the provisions of art.1582 paragraph 2 of the New Civil Code. It can be the situation of the transferor who does not communicate to the assigned debtor that there was an assignment of debt and goes on introducing himself as creditor, in which case the transferee has the right of recourse against him. It can also be about another apparent creditor holding the claim title or another means through which he may persuade the assigned debtor that he is the real holder of the claim so that the payment can be made in his favor. The only condition is that the assigned debtor to be in good faith, that is he did not know who the true holder of the claim was (Pop *et al*, 2012, p.648).

c) The effects of the assignment of debt also concern the relations between successive assignees, when the same claim is submitted by the same assignor to different persons through successive contracts (Reghini, 2007, p.181).

The conflict resolution between successive assignees will be achieved according to the time of performing the advertising action, based on the rule *prior tempore, potior jure*, regardless of the time when the debt assignment contract was signed, as follows:

- if several assignments of the same claim have been made, the claim will be acquired by the transferee who made the first notification of the assignment to the assigned debtor or the one who was the first to obtain the acceptance of the assignment as a written document with a certain date from the assigned debtor, according to art.1583 paragraph 1 of the New Civil Code, the other

assignees being evicted. Thus, for the assigned debtor, there will always be only one creditor, to whom he must behave as if he were the sole assignee; to this transferee he must make the payment and he is entitled to oppose the defenses and exceptions he had against the transferor (Vasilescu, 2012, p.39);

- according to art.1583 paragraph 2 of the New Civil Code, "in the relations between successive assignees of the same claim it is preferred the one who registered first the assignment in the archive (Arhiva Electronică de Garanții Reale Mobiliare), regardless of the date of assignment or notification to the debtor." This legal provision indicates that, in the relations between successive assignees, registering the assignment in the electronic archive is a way of advertising which exceeds notification or acceptance so that, if there is a contest between the two forms of advertising, the entry in the electronic archive will prevail the other one (Pop *et al*, 2012, p.649);

- Pending the notification or acceptance of the assignment by the debtor the previous creditors of the transferor are considered third parties in their relation to the assignment occurred between their debtor (the transferor) and the assignee. Thus, the assignment is not enforceable, so they can pursue the transferor's claim against the debtor ceded as part of their overall collateral. On the contrary, after advertising the assignment, the debt right went out of transferor's property and their general collateral. Thus, the assignment of the claim becomes enforceable; they can ask for its revocation only through Paulian action if their interests were bilked.

3. Conclusion

The assignment of debt gives the assignee the position of a creditor, becoming, as noted above, a part occurred in the contract which was initially concluded between the assignor and the assigned debtor. As a result, the transferee can exercise all the actions which belonged to the transferor, including the action for annulment, when he has the interest to revert to the situation previous to the ratio of obligations.

According to legal regulations, the debt assignment can be enforced against the assigned debtor only upon acceptance or notification of the assignment. Up to the time of notification or acceptance through a written document with a certain date, the assignment of claims is inapplicable to the assigned debtor so that the payment made by the transferor is valid and discharged or it may preclude any other way of annulling the debt (prescription, compensation, debt relief/cancellation). On the other hand, even if the publication by notice has been performed, but it was communicated to the assigned debtor by the assignee, the debtor is entitled to suspend payment until he is presented the documentary evidence of the transfer, according to art.1578 of the New Civil Code.

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