

# The Exception of Non-performance and its Role in Debt Assignments

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## Abstract

*Debt assignments have the effect of assigning a new creditor in the legal position of the creditor assignor, i.e. the right to claim, with all its accessories and warranties, in the same legal conditions, enforceable against all exceptions of the assignor, even the personal ones. Thus, the assignee is entitled to invoke the exception of breach of contract/non-performance, where the ratio of obligations originally derived from a mutually binding contract and the contractual partner refuses to fulfill the performance that was required. Invocation of exceptio non adimpleti contractus does not result in termination of the legal relationship of obligations, but only to its suspension as a means to compel the debtor to fulfill the obligation assumed.*

**Key words:** assignment of a debt/debt assignment, exception of non-performance, assignee, assignor, assigned debtor.

**J.E.L. classification:** K

## 1. Introduction

Art.1566 paragraph 1 of the New Romanian Civil Code defines the assignment of a debt as "the agreement through which the lender assignor transfers a claim to a third party transferee". It is beneficial the systematized regulation of this legal institution in Chapter I of Title VI of the New Civil Code on transmission and transformation of civil obligations, unlike the Civil Code of 1865 which included the assignment of a debt in the area of the sale and purchase contract, in art.1391-1398 and art. 1402-1404, according to its French model and the German law (art.1689-1701, French Civil Code; art. 398 BGB).

In the literature, the assignment of a debt was defined as the 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). Enlarging on this definition, it was shown that the assignment of a debt is a contract that involves, from a subjective perspective, the following legal subjects: the assignor transmitting the claim, the transferee who acquires the claim and the assigned debtor, i.e. the debtor who is obliged to perform the service which is the subject of the assignment, but a third party to the debt assignment agreement, from the perspective of the principles of binding force and the relativity of the effects of the agreement (Pop *et al*, 2012, pp.636-637). Thus, the assignment of a debt has the effect of assigning a new creditor in the legal position of the creditor assignor, i.e. the right to claim, with all its accessories and warranties, in the same legal conditions enforceable against all exceptions of the assignor, even the personal ones as we will explain below.

## 2. The role of the exception of non-performance in debt assignments

The claim of the assignment shall be regarded as a property right over a debt, i.e. a subjective property right, pursuant to which the holder can request the designated passive subject to give, do or not to do something. Thus, the claim ceded does not need to have as its object a sum of money;

on the other hand, the rights of claim with non-property character (those resulting from intuitu personae contracts) cannot be object of the assignment, except for the case of the consent of the assigned debtor, according to art.1573 paragraph 2 of the New Romanian Civil Code (Reghini, 2007, p.160).

The legal doctrine emphasized the functions performed by debt assignments (Pop *et al*, 2012, p.639) as follows:

- translational function, i.e. to transmit a claim by contract from person to person;
- payment instrument function because through a debt assignment a debt of the debtor to the creditor (the transferor to the transferee) can be paid off, as regulated by art.1493 of the New Civil Code, which provides for the debt assignment instead of performance of the obligation as a special way of making payment, being regulated by art.1492 of the New Civil Code. In legal literature it was stated that the assignment of debts is intended to produce a limitation effect (Maurie *et al*, 2010, p.796);

- credit instrument function is that, through the assignment of a claim with standstill period of execution of the claim ceded, a mobilization of the claim is made before the execution of the debt corresponding to the claim;

- function of guarantee/security of debt assignment, which in French law is called fiduciary assignment, consisting of immobilizing the claim in the assignee's property till the execution of a particular obligation of the assignor towards him (Maurie *et al*, 2010, p.797). In legal literature it was mentioned that due to this mechanism, "a single payment will extinguish two obligations: the obligation of the assignor and the obligation of the assigned debtor" (Pop, 2006, p.225). In Romanian law, this function is expressly regulated by Title VI of Law no.99/1999 and the related collateral hypothesis of the guarantee governed by art.2387 et seq. in the New Romanian Civil Code on mortgage security.

The difference between translative and fiduciary assignment lies in the legal cause of the assignment, so that the intention of the assignment's parties should be analysed: transfer of debt from the assignor/transferor to the assignee/transferee or only the provision of security through the conclusion of the transfer of debt (Vasilescu, 2012, p.34).

Art.1573 paragraph 1 of the New Civil Code stipulates the principle of mutual consent in the debt assignment, so that the assignor's and assignee's consent is sufficient for the transfer of claim; for the validity of the assignment, the assigned debtor's consent is not required because he is a third party in relation to claim transmission.

If the conditions of validity of the operation by which the assignment of debts is fulfilled, this agreement takes full effect on the transferor and transferee, without any other formality, based on the principle of binding force of the agreement. However, in legal literature it was shown that for effectiveness (efficiency) of debt assignment, it is necessary that this operation to be invoked against the assigned debtor. The time of enforcement against the assigned debtor is essential because since that moment he will be required to pay directly to the transferee (Pop *et al*, 2012, p.641).

On the other hand, advertising the debt assignment is necessary because it also interests third parties, namely: the assigned debtor, the creditors of the transferor and any subsequent assignees. Thus, the assigned debtor is subject to the legal relationship of obligations in its original condition and it is imperative for him to be notified of the occurrence of debt assignment in order to make the payment to the transferee and not to the transferor. Transferor's creditors are interested in a possible assignment of debt because the assigned right of claim is taken out of the debtor's assets and, therefore, from the general collateral, which means that these creditors cannot pursue the property value to make full use of their rights. Also, prospective assignees should not be at risk of acquiring an already assigned claim, particularly when the assignment of that claim was made for good and valuable consideration or by sale-purchase or exchange (Pop, 2006, p.228; Reghini, 2007, pp.154-155).

According to art.1578-1581 of the New Civil Code, the enforceability of debt assignment is done either through its communication, or by accepting the assignment by the assigned debtor, which replaced the debt assignment notification and acceptance as regulated by art.1393 of the Civil Code of 1865 without essential differences between the two regulations. Legal literature has defined communication as notification made in writing, indicating the ceded claim and identifying

the assignee as well as the invitation that the debt to be paid to him and not to the transferor (Vasilescu, 2012, p.36). This document conveyed to the assigned debtor must be accompanied by the written proof of the assignment for it to have effect. This communication can be filed together with the application for summons of the debtor for payment, but in this case, the assigned debtor owes no trial costs if he pays up to the first hearing. Art.1581 of the New Civil Code provides that the same formality of communication is necessary for the assignment to be enforceable against the fidejussor. This communication of the debt assignment can be done either by the transferor or by the transferee.

The same enforceable effect is produced by acceptance of the assignment by the assigned debtor, through a document done by a certain date, according to art.1578, paragraph 1, letter of the New Civil Code, unlike the previous regulation (art.1393 paragraph 2 of the Civil Code of 1865) that required the acceptance of the assignment by the assigned debtor to be made through an authentic/authorized document.

According to art.1579 of the New Civil Code, when there is an assignment of a universality of present or future claims, the enforceability of the debt assignment against third parties is achieved only by inclusion of the assignment in the electronic archive, especially since this enrollment (if there are successive assignees of the same claim) has the effect of creating a priority order among assignees, according art.1583 paragraph 2 of the New Romanian Civil Code. This registration can take the effect of enforceability in all cases of transfer of debt to third parties, but it is not sufficient to achieve enforceability against the assigned debtor, which requires acceptance or notification (Pop *et al*, 2012, pp.642-643, Reghini, 2007, pp.158-159)

Another embodiment of the enforceability of the debt assignment is its registering in the land book, according to art.902 paragraph 1 of the New Civil Code which states the necessity of registering the debt assignment in the land book, in relation to future rents.

After presenting the forms of enforceability of debt assignments, we will analyze the effects of debt assignment in order to identify the role played by the exception of non-performance of debt assignments.

The main effect of the assignment is the right of the transferor transferred to the transferee. Also, the contract including the assignment of debt can be a complex act; it produces the effects of the legal transaction done through its sale, exchange, loan, donation, etc. The effects of debt assignment must be analyzed, as follows: between the parties (between the assignor and assignee) in relation to third parties and between parties (in the case of successive assignments of the same claim or multiple assignments of the same claim).

As can be seen, the assignment of debt has the effect of assigning a new creditor in the legal position of the creditor assignor, i.e. the right to claim, with all its accessories and warranties, in the same legal conditions, enforceable against all exceptions of the assignor, even the personal ones.

Thus, the debt assignment gives the assignee/transferee the position of a creditor, becoming, as noted above, a part occurred in the original contract 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 his interest is to revert to the previous ratio of obligations. In this situation, the assignee is entitled, even more so, to invoke the exception of breach of contract/non-performance, if the ratio of obligations originally derived from a mutually binding contract and the contractual partner refuses to fulfill the performance that was required. It is obvious that the invocation of *exceptio non adimpleti contractus* does not result in termination of the legal relationship of obligations, but only in its suspension as a means to compel the debtor to fulfill the obligation assumed.

### **3. Conclusion**

If the claim of the assignment results from a mutually binding contract and the creditor transferor fails to fulfill his obligation, the assigned debtor may invoke the exception of breach of contract/non-performance against the assignor prior to acceptance or communication of the assignment because it is not binding yet.

The assignee acquires the receivable/debt as found in the transferor's property, so that the debtor can enforce to the assignee the same exceptions and defenses which could be used by the

original creditor. Under art.1582, paragraph 1 of the New Civil Code, these exemptions aim at invalidity, termination or diminished value claim and entitle the debtor to refuse, in whole or in part, the payment to the transferee, such as: exception of invalidity of the document from which the debt arose, exception of the time limit right to act prior to the assignment, exception of legal compensation, etc. Similarly, can be invoked: exception of guarantee owed to the transferor, when it was evicted from the right to whom it was sent 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 possible exceptions regarding the reduction in value of the assigned debt.

Similarly, the assigned debtor can invoke against the assignee, the exception of non-performance if the transferor has not executed the service stipulated in the mutually binding contract, in the way established in the initial legal relationship under the principle *nemo plus juris ad alium transferre potest quam ipse habet*.

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