THE DEBT ASSIGNMENT. MANNER OF EXTINGUISHING THE OBLIGATIONAL LEGAL RELATION IN THE CURRENT PERIOD

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Abstract: *It is well-known that the commercial operations are characterized by expediency. Still, the expediency principle can only be respected if the debtor of the price payment obligation has sufficient liquidities available. In the contrary case, there is a risk of major disturbances of the economic operations. In order to surpass such obstacles, the debtor of the payment obligation has at his disposal a series of legal institutions, known in the doctrine under the name of legal forms of payment, by means of which he can extinguish the initial pecuniary obligation.*

Thus, in the category of legal forms of payment, among others, is included the assignment of the debt, which makes the object of our analysis.

Keywords: *payment, assignment of debt, legal forms of payment, contract, creditor, debtor, assignor, assignee, assigned debtor*

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The debt assignment is that onerous title contract[2] by virtue of which the creditor transfers the liability right he has with respect to a person, into the patrimony of another person. The parties of this legal relations, having as effect the assignment of a debt, are called *assignor*, *assignee* and *assigned*

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2 In commerce, all operations performed by professionals are presumed to be onerous. It is true that in the civil law legal relations the debt assignment contract may also be with free title;

debtor. The assignor is the person remising the debt, the assignee is the person receiving it, and the assigned debtor is the bearer of the payment obligation.

Following this legal operation, the debt assigned remains unchanged, preserving both its character and its guarantees and accessories, in existence at the moment of concluding the debt assignment contract[3]. What changes is only the initial creditor, who is now replaced with the assignee in the debt assignment contract.

Considering that in the international trade relations there is the possibility that a series of commercial contracts were concluded for medium or long term, before the date of 01 October 2011 – date of entering into effect of the new civil code, contracts whose duration was subsequently extended, they remain subject – if the law governing the contract is the Romanian law - to the Civil Code of 1865. Therefore, hereinafter, we shall analyze the debt assignment both from the regulatory perspective of the old, and of the new, civil code.

Thus, the Romanian Civil Code of 1865 regulated the assignment of debt in art. 1391-1398 and, respectively, art. 1402-1404. As can be seen, the debt assignment was regulated by the lawmaker in Title V, called "About sales", fact which makes the regulation expressly target only the assignment by onerous title, as a sale-purchase operation[4]. Still, the assignment can also be performed by means of other legal operations by onerous title, such as the contract of exchange, of life annuity etc., but also through contracts with free title, such as the case of donation.

In what concerns us, considering the specific of our research, we shall consider only the debt assignment contract by onerous title.

In this sense, we mention that even though the main function of the debt assignment contract is to transfer the liability into the patrimony of another person, in the French doctrine and jurisprudence[5] at the end of the 20th century and the beginning of the 21st century it was stated that *a debt assignment contract can also have the function of payment of a debt* that the

3 L. Pop, op. cit. page 223;

4 The debt assignment is regulated in the French law also under sale, art. 1689-1701; In the German law, also at sale, art. 398, 404, 407-412; In the Austrian law, it is handled at the novation by changing the creditor, art. 1392. The institution of the debt assignment is regulated in the Anglo-Saxon legal system (common law) under the formula of the assignment of rights;

5 Ph. Malaurie, L. Aynès, Ph. Stoffel-Munck, *Cours de droit civile. Les obligations*, Cujans, Paris 1999-2000, page 728;

primary creditor (the assignor) has towards the assignee, who thus becomes the new creditor of the debtor from the initial legal relation, called assigned debtor, *thus extinguishing the debt that the assignor had towards the assignee*.

At the same time, the debt assignment, in certain situations, may also have the function of guarantee of execution of a liability right[6], in the sense that the liability being assigned by the assignor originates from another obligational legal relation, in which he has the capacity of creditor towards a third party and it is destined to guarantee the execution of the liability right that the assignee has towards the assignor. Such an assignment is performed without receiving anything else in exchange and without the intention to gratify the assignee[7].

Practically, by means of such an operation (debt assignment), the debt that the assignor has towards a third party is made unavailable until the moment of payment of the debt he has towards the assignee.

Validity conditions of the debt assignment. Given that the debt assignment is a reciprocal and consensual contract, in principle, a sale-purchase contract[8], it must fulfill all validity conditions of a sale-purchase contract, respectively, of substance and of form, such as valid, uncorrupted and freely expressed consent, the legal capacity of the assignor and of the assignee, a determined object, a licit and moral cause, and the form required by law, *ad validitatem*.

All born debts, both pecuniary and of another nature – *with the exceptions established by law*[9] - can make the object of the assignment contract. Still, in the doctrine, the issue of future and possible debts was raised, in the sense of their making of the object of such a contract. The majority opinion[10] expressed

6 In the French law, the operation is called fiduciary assignment. See, in this sense, Cl. Witz, *La fiducie en droit privé française*, Economica Publishing House, Paris, 1981;

7 L. Pop, *Tratat de drept civil. Obligațiile*, vol. I Regimul juridic general, C.H. Beck Publishing House, Bucharest, 2006, page 225;

8 C. Hamangiu, I. Rosetti-Bălănescu, Al. Băicoianu, *Tratat de drept civil român*, vol. II, All Publishing House, Bucharest, 1996, pag. 484-516; B. Starck, H. Roland, L. Boyer, *Droit civil. Obligations 2. Contract.* Litec, Paris 1989 pag. 55-346;

9 F. X. Licari, *L'incessibilité conventionelle des créances*, Revue de jurisprudence commerciale, février 2002, page 66; Thus, the parties to the legal relation from which the debt is born can stipulate that the debt cannot be assigned, in the conditions when a patrimonial or moral interest is justified. Still, in commercial matters, any clauses temporarily forbidding the debt assignment are null; in this sense, Ph. Malaurie, L. Aynès, Ph. Stoffel-Munck, op. cit. page 731; Cass. Civ. I, decision of 20 March 2001, in M. D. Bocșan, in P. R. no. 2/2001, page 201;

10 In the French doctrine and jurisprudence, such debates occurred;

in the sense that the object of the debt assignment can also be composed by future or possible liabilities, related to the provisions of art. 1130 para. 1 of the French Civ. C., which has as correspondent art. 965 of the Romanian Civ. C. (1865), according to which *future things can make the object of an obligation*.

As a consequence, from the perspective of the substance of the contract, the debt assignment being a consensual contract, it is validly concluded by the mere agreement of will of the parties, respectively, of the assignor and assignee. The consent of the assigned debtor is not necessary because he is a third party to such a contract. In what concerns the conditions of form of the debt assignment contract, they are taken over from the contract through which the debt assignment is performed.

Thus, when the debt assignment is usually a sale-purchase contract, reciprocal and consensual, the conditions of substance and form are taken from such a contract. However, if we are in the presence of a debt assignment by free title, we are in the presence of a liberality, situation when the substance and form conditions of the contract are those from the donation contract.

Opposability to third parties. According to the legal dispositions, the debt assignment produces effects between the assignor and assignee from the moment of concluding the assignment contract. Still, the operation presents interest both for the assigned debtor, who is part of the initial legal relation, but he is a third party in the debt assignment relation, as well as for the assignor's creditors (unsecured creditors), who see their guarantee diminished with the removal of the assigned debt from the assignor's patrimony.

Therefore, for opposability to third parties, according to art. 1393 of the civil code of 1865, the debt assignment[11] must be notified to the assigned debtor or the debt must be accepted by him by means of an authentic document.

In what concerns the first manner of publicity of the debt assignment, respectively, the notification, the law does not establish a term within which the notification of the assigned debtor must be performed. However, it is in the assignee's interest – the person who gained the debt at the moment of concluding the assignment contract – to notify the assigned debtor regarding the taking over of the liability by assignment, in a term as short as possible, in order to be able to satisfy his debt before any other person.

11 Art. 1393 Civ. C. (1865) The assignee cannot oppose his right to a third party until he has notified the assignment to the debtor. The acceptance of the assignment, made by the debtor in an authentic document, will have the same effect;

The notification is usually made at the home of seat of the assigned debtor or of the person having the duty to perform the payment of the debt[12]. In case of plurality of debtors, for opposability, the notification of the assignment must be made to each of them, separately.

Regarding the second manner of publicity, respectively, the acceptance of the debt by the assigned debtor, we agree with the opinion expressed in the doctrine, according to which, the expression "acceptance of the debt" has, in reality, the meaning of "recognition" of the debt assignment contract[13].

In what concerns the form of the document by means of which the debt is recognized, even though the law[14] uses the expression *"authentic document"*, the doctrine and jurisprudence have unanimously accepted that the debt assignment can also be recognized by means of a document under private signature or even tacitly[15].

Still, in the situation of recognizing the assignment by means of an authentic document, it is opposable to all interested parties, while in case of recognition through a document under private signature or tacitly, the opposability refers only to the assigned debtor. In the same direction is the viewpoint of the doctrine and jurisprudence, which maintained the exigency of the legal dispositions of the authentic document by means of which the debt assignment is recognized, in order to be opposable to third parties[16].

In what concerns the publicity of the debt assignment contract, starting with year 1999, in the national legislation[17], a regulation was adopted, for the completion of the legal regime applicable to security interests.

According to this legal text, the collateral was constituted by means of a contract in written form, which had to be subjected to publicity by registration

12 Fr. Terré, Ph. Simler, Yv. Lequette, *Droit civil. Les obligations*, Dalloz, Paris, 1999, page 1189;

13 L. Pop, op. cit. page 229;

14 The Civil Code of 1865;

15 T. R. Popescu, P. Anca, *Teoria generală a obligațiilor*, Stiințifică Publishing House, Bucharest, 1968, page 388; Fr. Terre, Ph. Simler, Yv. Lequette, op. cit., pag. 1119-1120; Supreme Tribunal, civil section, *decision* no. 1421/1962, in C. D. 1962, page 343;

16 J. Flour, J. L. Aubert, Yv. Flour, E. Savaux, *Droit civil. Les obligations 3, Le rapport d'obligation*, Armand Colin, Paris, 1999, page 213;

17 Title VI of Law no. 99/1999 on certain measures for the acceleration of the economic reform. The provisions of this regulation produced effects until the date of entering into effect of the new Civil Code, date on which, through art. 230, letter u) of Law no. 71/2011 for the enforcement of the new civil code, they were abrogated, as a consequence of their inclusion in Title XI of the new civil code, called "Privileges and collateral";

in the Electronic Archive for Secured Transactions, which is an electronically archived data- and information base.

According to the provisions of art. 2 of Title VI of Law 99/1999, all debt assignments were subjected to registration in the Electronic Archive for Secured Transactions, even if the assignment did not have as purpose the guaranteeing of the fulfilment of an obligation.

With the entering into effect of this normative act, the provisions of art. 1393 of the Civ. C. (1865) were not abrogated, neither implicitly, nor expressly, reason why the provisions of these two regulations should have been corroborated in the matter of the publicity of the debt assignment contracts.

Thus, from the analysis of the two legal texts we referred to, it is derived that the publicity of the debt assignments could be performed through any of the regulated modalities, respectively, its notification or acceptance by the assigned debtor, or by registration in the Electronic Archive.

Still, we believe that the text of art. 99 of Law no. 99/1999 presents importance only in the hypothesis when the debt was successively assigned to others, because it established the priority order or the rank of the assignments.

Thus, if some of the assignments were notified or accepted by the assigned debtor and others were registered in the Electronic Archive, the registered assignments had priority, and, among them, priority rank towards the third parties was given to the assignment that was registered first.

Still, whenever we are in the presence of a debt assignment whose purpose was that of security interest, Law no. 99/1999 established, for its opposability, the obligation of notifying the assignment to the assigned debtor, by the assignee.

In other words, in order to ensure the opposability of the assignment of such a debt to the assigned debtor, it was necessary that he was notified by the assignee, by means of one of the manners indicated in art. 85 of Title VI of Law no. 99/1999.

Debt assignments excepted from the publicity formality

Even though the publicity of the debt assignment established by the civil code is imposed for opposability both to the assigned debtor and to third parties, there are, still, exceptions from this rule.

Given that these exceptions refer to assignments of both civil nature, mentioned by art. 1394 Civ. C. (1865), and of commercial nature, considering our research, we will only refer to those of a commercial nature [18].

Thus, in the matter of the *credit instrument*, the regulation in the matter brought forth simplified forms of transferring the debt incorporated therein. As known, characteristic to credit instruments is the fact that the document establishing them incorporated the afferent debt right, reason for which the legitimate holder of the instrument is also the holder of the debt right incorporated in the instrument.

As effect of this indissoluble link between the liability right and the instrument in which it is incorporated, other characteristics are derived, specific only to the credit instruments, respectively, literality and autonomy.

Literality refers to the existence, extent and nature of the liability right incorporated in the instruments, as well as to the correlative debt, by means of the mentions existing in the document establishing the instrument. At the same time, literality also represents that capacity of the instrument by virtue of which priority is given to the declared will of the parties, recorded in the instrument, and its content cannot be modified, but only completed with those elements referred to in the content of the respective instrument.

The *autonomy* of the instrument refers to its capacity by virtue of which each holder gains an own right, autonomous from the right of the predecessors, reason why to the right gained by the legitimate holder cannot be opposed the exceptions which could be invoked in relation to the prior holders.

According to the manner of circulation, the debt instruments are divided into three categories, respectively bearer, nominative and to order instruments.

The bearer instruments are characterized by the fact that in their content are indicated the debtor and the extent of his obligation and the assignment is performed by the simple remittance of the instrument.

The nominative instrument is that credit instrument in the content of which the name of the creditor is mentioned and its transfer by assignment presupposes the registration of the new holder on the instruments, as well as in the register of the issuer, accompanied by the remittance of the document establishing the title of the assignee.

18 In the meaning of the new civil code, the commercial legal relations were called relations between professionals;

The instrument to order is that document establishing a debt, characterized by the fact that it is transferred through endorsement from the assignor to the assignee, respectively, the assignor's signature on the overleaf of the instrument, concomitantly with mentioning the name of the assignee on the same side of the instrument, followed by its remittance to the new holder.

This procedure of assignment of debts, by endorsement, is specific both to the bill of exchange and the promissory note, as well as to the cheque and the warrant.

In the French law, apart from the usual debt assignment, a simplified manner thereof is also seen, regulated by the "Dailly" Law of 02 January 1981, modified by the Bank Law of 01.24.1984, according to which an entrepreneur (professional), legal entity or individual, can assign the debts he has against its customers, in favor of the bank, in order to obtain a loan[19].

The procedure by means of which such assignment is performed consists in the assignor transferring to the assignee of the list containing a series of mandatory mentions, such as the name of the bank, the individualization of the amount, signed by the assignor and dated by the assignee. The effect of giving the list to the assignee is the transmission of the debts to the assignee, of full right, with all their accessories and, at the same time, the assignment becomes opposable both to third parties and to the assigned debtor.[20]

Still, as security measure, the assignee can always notify the assignment to the assigned debtor.[21]

In the situation of a possible conflict between the assignees of the same debt, preference will be given to the one whose gaining, according to the list, is the oldest.

The effects of the debt assignment. Effects between the parties

As any contract, the debt assignment produces, mainly, the effects of the contract whose character it gained, such as the sale-purchase, giving

19 In what we are concerned, we believe that nothing can oppose a proposal of *ferenda lex* in this sense in our country also, in the current conditions, when the need of liquidities of the economic operators is stringent, and the assets which to be assigned to guarantee bank loans are either missing or insufficient;

20 Chr. Larroumet, *Droit civil, tome 4, les obligations. Regime general,* Economica Publishing House, Paris 2000, pag. 318-336;

21 Art. 1690 of the French Civ. C., to which corresponds art. 1393 of the Romanian Civ. C. (1865);

for payment etc., but it also has specific effects, which must be analyzed, on the one hand, between the assignor and the assignee, and, on the other hand, towards third parties, also considering the assigned debtor.

Thus, the main effect between the assignor and the assignee is represented by the transfer of the debt right from the assignor to the assignee, with all accompanying accessories. Therefore, following the assignment, no new obligational legal relation is created, but the creditor in the original legal relation is replaced by the assignee.

Hence, unlike the subrogation in the rights of the creditor by means of paying the debt, when the subrogated takes over only the debt part corresponding to the value paid, in the matter of the debt assignment, the assignee takes over the entire liability, regardless of the amount paid as price thereof.

Still, according to the will of the parties, respectively the assignor and the assignee, there is a possibility that the assignor wishes to assign the debt only partially, situation when the assignor and the assignee will coexist as creditors of the same debtor, each for his part of the debt. Still, such a situation must be nuanced, in the sense that, even though, in principle, both creditors have equal rights to achieve their debt, if, by means of the assignment contract, the assignor expressly guarantees the part of the assigned debt and the solvency of the assigned debtor, priority is recognized in favor of the assignee. In the same way, by means of the partial assignment contract, the assignor may reserve the benefit of the guarantees, going to have priority in relation to the partial assignee.[22] In other order of ideas, we mention that, according to art. 1396 Civ. C. (1865), by means of the debt assignment contract, to the assignee's patrimony are transferred both the debt, at its nominal value, and its accessories, respectively, the guarantees, such as mortgages, privileges or bonds, or the accompanying interest.

With respect to interest, we must mention that the assignee is entitled to collect from the assigned debtor both the interests and all other incomes from the debt, which became due at the moment of the assignment, as well as those whose due date was before the assignment date, but have not been collected by the assignor, except for the case when the assignor reserved the latter for himself, through the assignment contract[23].

22 L. Cadiet, *Transport des créances et autresdroits incorporels, Jurisclasseurcivil, fascicule 20*, 1996, page 3;

23 Fr. Terré, Ph. Simler, Yv. Lequette, op. cit., page 1198;

In what concerns the legal actions available to the assignor, until the assignment date, regarding the assigned debt[24], they are fully transferred to the assignee, by virtue of its capacity as intervening party in the obligational legal relation, concluded between the assignor and the assigned debtor[25].

The situation is similar in what concerns the arbitration clauses inserted in the original contract concluded between the assignor and the assigned debtor, except for the situation when such a clause that a *intuitu personae* character.[26]

Basically, according to the provisions of art. 1391 Civ. C. (1865), the debt assignment contract generates an obligation to do, in the burden of the assignor, who is thus obligated to remit to the assignee the establishing document of the debt, when such a document was drafted. In the absence of fulfilling this obligation by the assignor, the assignee is entitled to refuse the fulfillment of his own obligation, respectively, of paying the contract price.

Still, we consider that, given the consensual character of the assignment contract, the debt is transferred from the assignor to the assignee with the agreement of will expressed by the assignor to this effect. Therefore, the remittance of the debt instrument by the assignor to the assignee is only an obligation to give and not a condition for the valid conclusion of the debt assignment contract.

The only condition established by law, which affects the validity of the debt assignment contract, is given by the obligation of rightful guarantee of the debt, regulated by art. 1392 Civ. C. (1865), according to which the assignor has the obligation to guarantee the valid existence of the debt in his patrimony, at the moment of selling it to the assignee. At the same time, the assignor also guarantees for the partial non-existence of the debt or for its nominal value, which, in reality, could be lower than that mentioned in the assignment contract.

Thus, the assignor's obligation to guarantee the valid existence of the debt refers only to the moment of concluding the assignment contract. Therefore, any causes occurred after this moment, such as force majeure or the

24 It is a matter of the action in claims, guarantee, indirect, Paulian, in nullity of the original contract or for its resolution;

25 P. Vasilescu and team, *Cesiunea de contract. Repere privind formarea progresivă a contractelor*, Sfera Juridică Publishing House, Cluj Napoca, 2007, pag. 271-303; Fr. Terré, Ph. Simler, Yv. Lequette, op. cit., page 1198; L. Cadiet, op. cit., page 4;

26 E. Loquin, *La cession d'une créance emporte transfert de la clause d'arbitrage*, Dalloz, no. 3/2002, page 254;

fault of the assignee, which had as consequence the destruction of the debt and accessories, does not enter the sphere of its legal guarantee.

The situation is similar also in what concerns the fulfillment of the limitation period during which one can ask in court the execution of the debt, even if the term started passing before the moment of the assignment. The argument is constituted by the fact that the assignee had the possibility to fulfill certain acts to interrupt the course of the limitation period.

In other words, the assignor does not guarantee the solvency of the assigned debtor or his guarantors or the efficiency of the other guarantees accompanying the debt, but only the valid existence of the debt in his patrimony, at the moment of selling it to the assignee.

The reasoning of the regulation in art. 1397 Civ. C. (1865) is derived from the speculative nature of the debt assignment, by virtue of which the assignor sells the debt for a price lower than the nominal price, as a consequence of the doubts he has regarding the full execution thereof, and the assignee purchases without having the certainty that he will obtain the full payment of the debt.[27]

In other words, the assignee can act against the assignor only in the situation when the debt does not validly exist in the patrimony of the latter, at the moment of the sale. In such a situation, the assignee has available the action in resolution of the assignment contract, the assignor being held to refund the price of the assignment and compensation, up to the covering pf the damage, which can be composed of the price actually paid for purchasing the debt and the difference to the nominal value of the debt, if it is proven that the assigned debtor was solvable.

A particular situation is represented by the partial non-existence of the debt right, in the assignor's patrimony, at the moment of the assignment. In such a situation, the assignee is entitled to request the resolution of the assignment contract only if he proves that he would not have contracted, had he known the reality. In the contrary case, he only has available the redhibitory action, by virtue of which he can only request and obtain the proportional reduction of the assignment price.

Still, given the residuary nature of the provisions of art. 1392 Civ. C. (1865), the contracting parties can modify the legal regime of the legal

27 B. Starck, H. Roland, L. Boyer, *Droit civil, vol. II, Obligations 2. Contrat*, Litec, Paris, 1989, page 29; R. Cabrillac, *Droit des obligations*, Dalloz, Paris, 1996, page 262;

obligation of guaranteeing the debt, situation in which they may insert clauses for the aggravation or restriction, or even exclusion, of the legal guarantee.

Still, even with the residuary nature of art. 1392 Civ. C. (1865), the legal clauses for the aggravation of the assignor's liability – by means of which, apart from the valid existence of the debt at the moment of the sale, also the obligation to guarantee for the solvency of the assigned debtor is established – have two limitations, regulated by art. 1397 and art. 1398 Civ. C.

Thus, according to art. 1398 Civ. C., if the *assignor indebted himself specially to guarantee the solvency of the assigned debtor*, his obligation of guarantee extents only to meeting the assignment price.

Hence, in case the assignment was performed for a price lower than the nominal value of the debt, even if the assignor guaranteed the solvency of the assigned debtor, the assignee cannot claim from the assignor the full value of the debt.

The second limitation, established by art. 1398 Civ. C. (1865) takes into account the situation when the *assignor undertook the obligation to guarantee the solvency of the assigned debtor.* According to this, the obligation refers only to the solvency of the assigned debtor at the moment of the debt assignment and not his future solvency, unless the parties agreed to the contrary.

Thus, in the absence of an express stipulation in the assignment contract, the assignor undertakes to guarantee the solvency of the assigned debtor, at the moment of the assignment. Still, if the assignor expressly undertook to guarantee the solvency of the assigned debtor, such as obligation puts the assignor in the situation of a guarantor of the assigned debtor.

Still, such a guarantee, assimilating the assignor to a guarantor[28] of the assigned debtor, will commit the assignor's liability for the debtor's insolvency only to the due date of the debt assigned and without the possibility that the assignor will be targeted by the assignee before he targets the assigned debtor. Such a condition regarding the targeting of the assignor recognizes in his favor a real discussion benefit.

In what concerns the clauses for the restriction of the legal guarantee, they refer to the situation when the parties agree that the assignor guarantees only the existence of the debt at the moment of the assignment, or only the existence of the accessories of the debt.

28 In French law, such a clause is called *clause de fournir et faire valoir*; J. Flour, J. L. Aubert, Yv. Flour, E. Savaux, op. cit., page 217;

In the same way, the parties may agree through the assignment contract the removal of all legal guarantees regarding the assigned debt. In such a situation, the assignor guarantees neither the valid existence of the debt in his patrimony, nor the existence of the guarantees or accessories of the assigned debt.

The existence of such an exclusion clause protects the assignor from paying damages, being held only to refund the assignment price to the assignee. Still, according to art. 1340 Civ. C. (1865), the assignor has no obligation to refund the price of the assignment, both in the situation when the assignee knew the cause for the non-existence of the debt at the moment of contracting, and in the situation when he contracted exclusively at his own risk.

However, even if in the assignment contract a clause for the limitation or exclusion of the legal guarantee was stipulated, the assignor always remains the guarantor of his own personal deeds concerning the debt, such as, for instance, the situation of collecting it from the assigned debtor prior to concluding the assignment contract.

Effects towards third parties

According to the dispositions of art. 1393 Civ. C. (1865), the debt assignment produces effects towards third parties only from the moment of fulfilling the publicity formalities, consisting of the notification made by the assigned debtor or the acceptance of the assignment by the latter.

Through the term *third parties* are designated all persons except for the assignor and the assignee, as well as their successors in rights. Still, the debt assignment presents interest only for a restricted category of third parties, such as *the assigned debtor*, *the assignees of the same debt*, in case of successive assignments and the *creditors of the assignor*.

With respect to the *assigned debtor*, the analysis sees his situation both before and after fulfilling the publicity formalities.

Thus, before performing the publicity of the debt assignment, according to the legal provisions, the debt assignment produces no effects to the assigned debtor. In such a situation, he remains the debtor of the assignor, and the payment made to him is considered discharge of liabilities. Thus, the validity of the payment of the debt depends on the date on which the assigned debtor made the payment and not on the moment of the assignment, provided that it was performed prior to its notification by the assignee or to the acceptance made by the debtor through an authentic document.

In this matter, the French jurisprudence recognized to the assignee a series of rights. Thus, he can perform acts for the interruption of the course of the term of the limitation period before notifying the assignment or he may ask payment from the assigned debtor, if he has no reasons to refuse, or he can ask the cancelation of the payment made by the assigned debtor to the assignor, if he proves that a fraudulent agreement had been concluded between them.[29]

After performing the assignment publicity, the assigned debtor remains obligated only to the assignee, reason for which any payment made to the assignor has no character of discharge of liabilities, the debtor being held to make payment to the assignee, as well. At the same time, the assigned debtor cannot oppose to the assignee the compensation for a debt born after the performing of the publicity formalities.

Through the effect of the debt assignment contract the debt is transferred from the assignor to the assignee in the condition it is at the moment of the assignment, accompanied by all positive attributes, such as the guarantees and the accessories, but also by the negative ones, such as the exceptions and the means of defense that the assigned debtor could have opposed to the assignor until the moment of publicity.

At the same time, we underline that the assigned debtor may oppose to the assignee, apart from the exceptions he could have opposed to the assignor, also the defenses born after the moment of the publicity of the debt assignment, such as the limitation period, the compensation for a debt of the assignee towards him, the total or partial debt remittance made by the assignee, the novation by changing the debtor or the delegation.

In other order of ideas, we mention that in the situation in which we currently are in the presence of a debt assignment incorporated in a credit instrument, the exceptions which the assigned debtor could oppose to the assignee are solved according to the text of the special law and not to the common law in the matter, which is the civil code.

In the light of the previous regulation, the debt assignment produced its effects to the interested third parties only after the fulfillment of the publicity obligation, according to the legal provisions, respectively, its notification to the assigned debtor or its acceptance by the latter, through authentic document, or its registration into the Electronic Archive for Secured Transactions.

29 Yv. Buffelan-Lanore, *Droit civil, Deuxiemme annee*, Armand Colin, Paris 2002, page 132;

Thus, until performing the publicity in the forms stipulated by the law, the debt assignment made by the assignor debtor of third parties, is not opposable to the latter.

In the same direction, we state that the moment of performing the publicity obligation is very important in the situation of the successive debt assignments. Thus, if the same assignor assigned the debt to several assignees, each of them becomes third party to the assignments of the others.

In such a situation, solving the conflict between the assignees if performed considering the date or the moment in the day when the publicity was performed. Thus, assignee of the debt will be the person who first notified the debt, obtained the acceptance from the debtor or registered it into the Archive. In the situation when the publicity of the assignments was performed on the same day, by notification of acceptance by the debtor, the capacity of assignee is gained by the person who mentioned the hour when the publicity was performed. If neither publicity modality indicates the hour, all assignees of the debt with identical calendar data of publicity are creditors of the assigned debtor, and they will distribute the debt among them, equally.

Under the old regulation, a particular situation was constituted by the publicity by means of registration in the Electronic Archive for Secured Transactions, in the sense that, between the publicity of the debt assignment performed by notification or acceptance by the assigned debtor and the one registered in the Electronic Archive for Secured Transactions, priority was given to that registered in the Archive. However, if there was a concurrent registration by the assignees of the same debt, whose publicity was performed through registration in the Archive, the assignment registered first had priority rank, according to art. 99 of Title VI of Law no. 199/1999.

In the light of the current legislation[30], the debt assignment was regulated, distinctly, in art. 1566-1592 N. Civ. C., without being included anymore in *sale* and it comprises two sections. A first section, comprised on articles 1566-1586, refers to the debt assignment in general, and the second, mentioned in art. 1587-1592, to the assignment of debts established through nominative, to order or bearer instruments.

Still, paragraph 3 of art. 1567 of the N. Civ. C., stated that in the situation of an assignment by onerous title, the dispositions regarding he debt assignment are completed by those applicable to the sale-purchase contract,

30 The New civil code, entered into effect on 01 November 2011;

or, as the case may be, to the legal operation by means of which the parties agreed the transfer of the debt.

Thus, even though, under the current legislation, the debt assignment was no longer regulated under sale, as traditionally done in the European continental civil law, mainly, to the assignment contract are applicable the legal dispositions regarding the sale.

In other order of ideas, we consider that the provisions of paragraph 2 of art. 1566 din N. Civ. C., on the inapplicability of the legal dispositions regarding the debt assignment to the debt transfers performed via universal transfer or with universal instrument or to the securities and financial instruments, except for the provisions of art. 1587-1591, are excessive.

We support this view because, also under the rule of the old regulation, the legal dispositions regarding the debt assignment were not applicable to the universal succession transfers or with universal transfer[31], or to the reorganizing of the legal entities by merger or division and, even less to the transfer of securities or financial instruments, which were and remain regulated through special laws.

In principle, according to the new regulation, any debt can make the object of the assignment, regardless of its object, with the limitations imposed by law.

Thus, according to art. 1569 N. Civ. C., the debts declared non-transferrable by law, such as those derived from aliment contracts, cannot make the object of the assignment; to these we consider must be added the *intuitu personae* contracts; also, debts having as object a performance other that the payment of an amount of money, cannot make the object of the assignment, provided that through the effect of the transfer the obligation does not become more onerous; or those declared non-transferrable by the parties to the original obligational legal relation, on condition that there is a legitimate interest in this sense.

Still, in what concerns the last category of non-assignable debts, respectively those declared as such through the legal document establishing the initial obligation, there is a series of exceptions making inoperable the conventional prohibition of the assignment, regulated by art. 1570 para. 1 letters a) to c) of the N. Civ. C.

31 The regulation comprised in art. 1566 para. 2 N. Civ. C. must not be confused with the assignment, by means of acts between the living, of a universality of debts, expressly established in art. 1579 N. Civ. C.;

According to the legal text stated, the conventional non-assignability clause of the debt does not produce effects in the situation when the assigned debtor consented to the debt on a date after that when he initially agreed to the inalienability; the prohibition of the debt assignment was not expressly stipulated in the document establishing the debt and the assignee could not have known about the existence of the interdiction at the moment of concluding the assignment contract.

The third exception from the principle of debt assignment is not a true exception because it refers to the interdiction to assign debts which have as objects amounts of money. Or, in this matter (of assigning pecuniary debts), the principle of the free assignability of debts only knows legal limitations. *Per a contrario*, it means that the conventional prohibition of the assignment of the pecuniary debt does not operate[32].

Even though in the texts regulating assignment its functions are not reflected, in the doctrine[33] it was underlined that such a legal relation fulfills a series of functions, such as: a) *translative*, by means of which the debt transfer is performed; b) *payment instrument*, by means of which the assignor's debt to the assignee is extinguished; c) *credit instrument,* as effect of the due date with suspensive term, until the execution of the debt afferent to the liability; d) *guarantee*, speaking of the so-called *trust-assignment,* which presupposes the immobilization of the debt in the assignee's patrimony until the execution of the obligations undertaken by the assignor to the assignee.

Considering that in what concerns the substance and form conditions of the debt assignment there are no differences from the previous regulation, we will not stop to analyze them.

What distinguishes the current regulation of the debt assignment from the previous one is its publicity.

Thus, if, according to the old regulation, for the opposability of the debt assignment, the assigned debtor had to accept the assignment through an authentic document, in the meaning of the new civil code, the acceptance of the assignment by the assigned debtor is valid and opposable through a document with certain date[34].

32 Still, the assignor will be held liable to the assigned debtor, for breaching the prohibitive agreement;

33 P. Vasilescu and team, *op.cit.*, page 150;

34 Art. 1578 para. 1 letter a) N. Civ. C.;

At the same time, compared to the previous regulation, which indicated as manner of publicity of the debt assignment the written notification sent by the assignor or assignee to the assigned debtor, the new civil code establishes expressly the support of the communication, respectively paper or electronic format, as well as the minimal mentions of the notification, respectively the identification of the assignee, of the debt and the request of payment from the assigned debtor, and in case of the partial assignment, its extent[35].

As under the old regulation, the notification sent by the assignor of the assignee to the assigned debtor produces similar effects under the norms of the current regulation, in the sense that the notification sent by the assignor to the assigned debtor forces the latter to directly execute the obligation to the assignee, from the date of communication, and in the situation of the communication being sent by the assignee, the assigned debtor has the right to request the written proof of the assignment (the sending of the assignment contract), at the same time, being entitle to suspend the execution of the payment until the moment of receiving the proof of assignment[36]. Hence, the effects of the assignment notification by the assignee are suspended, de jure, until the moment of sending the written proof of assignment to the assigned debtor[37].

As previously mentioned, when we spoke about the publicity modalities of the debt assignment regulated by the old civil code, completed with those of Law no. 99/1999, the current regulation also stipulates, for opposability to third parties, the registration into the Electronic Archive for Secured Transactions of the assignment of a universality of current or future debts[38].

As in the previous regulation, the registering of the assignment contract into the Electronic Archive, even though opposable to third parties – and the assigned debtor is a third party to the assignment contract – is not opposable to the assigned debtor, unless it is notified to him or it is accepted by him, in the conditions of the law.

Unlike the previous regulation, the new civil code states that the opposability of the debt assignment to the assigned debtor is also achieved

35 Art. 1578 para. 1 letter b) N. Civ. C.;

36 Art. 1578 para. 3 and 4 N. Civ. C.;

37 Art. 1578 para. 5 N. Civ. C.;

38 Art. 1579 N. Civ. C.;

through the petition to call to court of the latter[39], even though we cannot speak of a distinct publicity modality of the assignment.

In what concerns the opposability of the assignment to the other third parties assimilated to the assigned debtor, respectively his guarantors, art. 1581 of the new civil code established, as the previous regulation, the need to notify each of them or their acceptance of the assignment, in the same conditions as the debtor.

A last publicity modality of the debt assignment, stipulated in the new civil code, refers to its noting into the land register[40].

Even though at first sight it would be believed that this modality of publicity of the debt assignment would represent an alternative to that established by art. 1578-1581 N. Civ. C., still, in case of concurrence between them, priority is given to the one registered in the electronic archive[41], fact which makes the writing in the land register have a subsidiary nature. Given that the effects of the debt assignment contract both between the parties and between them and third parties, are similar to those in the previous regulation, we will not insist upon them. Still, we cannot conclude the analysis of the debt assignment before examining the regulations of the new civil code on the assignment of the debts established through nominative instrument, established by art. 1587-1592 N. Civ. C.

It is well known that the expression *nominative instruments* comprises a wide variety of documents seen in the commercial relations, which confer their bearer or the legal holder the right to request either a pecuniary payment, as is the case of the bills of exchange, promissory notes, cheques; or ownership over the merchandise, as is the situation of the warrant, bill of lading etc.; or company-related rights, such as the situation of the shares or bonds.

Or, as it is known, their legal regime is established through special regulations, in favor of which functions the principle of law expressed by the Latin addagio *specialia generalibus derogant*, even though the writers of the new civil code have attempted to transform it in a true regulation with

39 Art. 1580 N. Civ. C.;

40 Art. 902 para. 2, point 6 of the N. Civ. C.;

41 V. M. Nicolae, *Strămutarea ipotecii în cazul cesiunii de creanță în temeiul Codului civil*, Dreptul no. 12/2014, page 66;

constitutional character, however, contradicted by the multitude of special regulations[42] to which reference is made in its content[43].

Thus, according to art. 1587 of the N. Civ. C., two main rules are regulated in what concerns the circulation of these liabilities, respectively, in the matter of nominative, to order or carried instruments, it was established that they cannot be transferred through the simple agreement of will of the parties and in what concerns them a circulation regime is instituted, established through special laws.

Still, art. 1588 N. Civ. C. refers to a series of general rules applicable to the assignment of securities, taken from the special regulations. Thus, in the matter of nominative instruments, it was established that the assignment s mentioned both on the respective document and in the issuer's register. It is well known that the regulation refers to the closed companies, not listed on the stock exchange.

Also, in case of instruments to order, for the validity of the assignment, it is necessary to apply the approval or to endorse the instrument, operation consisting of indicating the name of the assignee, the date and the subscription of the operation. At the same time, in the matter of bearer instruments, it was established the need for their material remittance to the assignee, specifying that any contrary stipulation is considered unwritten.

In this last situation, for the validity and opposability of the assignment – *institutions which superimpose in this situation* – to the freely expressed consent of the parties is added the formality of the instrument remittance, which makes this category of instruments have an acausal nature, of the essence of which is only the freely expressed consent[44], while the remittance represents

42 As example, we refer only to art. 1587 N. Civ. C.;

43 The most eloquent example in the direction of our claim, is **art. 1** of the N. Civ. C., according to which "**Sources** of law are the law (T.N. in the sense of regulation), the customs and the **general principles of law**";

44 The reasoning considers practical situations, according to which the assignment of bearer shares is agreed, but, at the moment of the assignment (of negotiation and the agreement of will of the parties), the assignor invokes to the assignee the turning over of the shares on a date subsequent to the agreement of will, motivated by the fact that he would not have them on his person at that moment. In such a situation, the assignee is entitled to establish a proof of the assignment, either by mentioning it into the company's shares register, under the signatures of the assignor and the assignee, or by concluding a document establishing the debt assignment (assignment contract) recognized under signature by the assignor and the assignee, which unequivocally proves the validity of the assignment.

only an obligation to turn over (to remit) the instrument transferred through the assignment.

Regarding this condition imposed by art. 1588 para. 3 of the N. Civ. C., on the valid transfer of the debt incorporated into an instrument to order conditioned by the material remittance of the instrument, we believe it to be excessive, if we consider *the assignment of bearer shares*, issued by a closed company, not listed on the stick exchange. We claim this because the provision is of a nature to give the assignment contract between the parties a real character.

Or, both the old and the current civil codes stipulated that *in the category of real contracts are included* the deposit contract; the commodatum (free lease) contract; the loan contract; the lease contract; the farming contract and the guarantee contract with dispossession.

Moreover, we consider that the disposition comprised in para. 3 of art. 1588 of the N. Civ. C., according to which the assignment incorporated in a bearer instrument is sent through the material emittance of the instruments and any contrary stipulation is considered unwritten, must be corroborated with the provisions of art. 1574 para. 1 of the N. Civ. C., with respect to which the assignor has the obligation to remit to the assignee the document establishing the debt, in his possession, as well as any other documents proving the right transferred, situation in which it is derived that only the freely expressed consent of the parties is essential for the validity of the assignment of bearer instruments.

In the same order of ideas, we claim that the final thesis of art. 1588 para. 3 of the N. Civ. C., according to which any contrary stipulation is considered unwritten, is contrary to the provisions of art. 1587 para. 2 of the N. Civ. C., according to which the circulation of the debts incorporated in nominative to order and bearer instruments, as well as of other securities, is established by special laws, and only adds to the provisions of a special regulation, such as the one comprised in art. 99 of Law no. 31/1990, as subsequently modified, which does not impose any condition on the assignment of bearer shares. Or, this last legal disposition, respectively, art. 99 of Law no. 31/1990, as subsequently modified, is the one which must have enforcement priority compared to the provisions of art. 1588 para. 3, of the N. Civ. C., *related to the provisions of art. 1, final thesis of the new civil code*, which stipulated that the general principles of law – of which the principle *specialia generalibus derogant* is part– are sources of civil law.

In another order of ideas, we consider that the main trait of the securities is that the right incorporated in the instrument cannot be contested except within certain limits. Thus, once presented for payment, the assigned debtor must make the payment, without being able to invoke an exception afferent to the substance of the obligational legal relation[45], such as the relative nullity of the original contract which generated the payment obligation.

Still, the Romanian lawmaker established a series of exceptions or defenses in favor of the assigned debtor, in art. 1589, such as the invoking of: *a)* the absolute nullity of the instrument, for the situation when the original obligational legal relation would be found as absolutely null; *b)* any defenses derived from the content of the instrument, such as the lack of observance of formalism, afferent to the absence of a compulsory mention or the non-observance of the conditions afferent to transferring the title by endorsement; *c)* personal exceptions he could oppose the assignee, such as the compensation, prescription or nullity of the legal act which generated the payment obligation; *d)* gaining the instrument by defrauding the debtor, with the obligation to prove the fraud; *e)* putting the instrument in circulation without his consent or against his will. In such a situation, the assigned debtor will not be able to refuse the payment to the good-faith holder of the debt instrument[46].

Still, the only possibility of the debtor de-possessed by his instrument without the observance of the legal provisions for the avoidance of payment, is to obtain a court order in the procedure of the Presidential Ordinance and its communication to the holder of the instrument[47].

In conclusion, we can say that the debt assignment is one of the modalities of extinguishing the pecuniary obligational legal relation, which does not require the use of the debtor's liquidities.

45 L. Pop, I. F. Popa, S. I. Vidu, *Curs de drept civil. Obligațiile*, Universul Juridic Publishing House, Bucharest 2015, page 431;

46 Art. 1591 N. Civ. C.;

47 Art. 1592 N. Civ. C.;