

IMPUTATION OF PAYMENTS – LEGAL STATUS OF PAYMENT WAY OF SETTLEMENT OF THE LEGAL COMPULSORY RELATIONSHIP BETWEEN THE CONTRACTING PARTIES

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Abstract: *It is generally recognized the expediency principle defining the commercial obligations. However, one can talk about this principle only where pecuniary liability debtor has got sufficient liquidity to cover all debts. However, to avoid paying penalties, in case the debtor of payment liability hasn't got sufficient liquidity to cover the entire debt, it may agree with the creditor on which debts shall be settled by successive payments or, in the absence of a consensus, each of the parties to the legal compulsory relationship may establish- within certain limits – which debts shall be settled or the issue was left to the statutory provisions. So, the debtor of the payment liability has been made available a legal institution known in the doctrine as part of the legal forms of payment, by means of which it can extinguish the most expensive pecuniary obligations, as well as those interest-bearing liabilities or with collaterals, known as the imputation of payment . Thus, imputation of payment is subject to our analysis below.*

Keywords: *payment, imputation of payment, legal forms of payment, contract, creditor's imputation, debtor's imputation, legal imputation.*

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Imputation of payment

It is known that any debt is extinguished by full payment thereof towards the creditor. There are also situations where a debtor has several outstanding debts to the same creditor and payment made by the debtor is not sufficient to extinguish them all. In such a circumstance, it is a question of determining liabilities to be settled by such payment. In other words, it is necessary to determine on which of the debts is made the imputation of payment. Settlement of such problem presents practical interest especially if those debts are interest bearing or they are guaranteed because, in the debtor's point of view, those debts generating the most of interest are deemed paid off, or those having collaterals established on the debtor's movable or immovable property, while the debtor is interested to pay off those debts without collaterals or those who are not interest bearing².

It is understood that, in compliance with the old Civil Code of 1864, imputation of payment was made according to the provisions of Art. 1110-1113, under which imputation of payment was both *conventiona,l* in the way that it worked following the agreement of the parties of the legal compulsory relationship, as well as *legal*, under the laws, operating under the law (*ope legis*). Regarding *conventional imputation* of payment, one can say that, taking into account that it is a convention, it operates only if the parties have so agreed, by the consent between them or by a separate document.

However, even if the parties to the legal compulsory relationship have not agreed in relation to the imputation of payment, it can be done by the debtor's or the creditor's unilateral will. Thus, in compliance with the provisions of Art. 1110 of the old Civil Code (1864), the debtor who has got several debts has the right to declare, upon payment, which of them is eligible to be extinguished by means of such payment. However, the debtor's right to make imputation of payment knows several limits, as follows:

a) debtor can not impose the creditor a fractional or partial payment; he is thus bound that, by the payment asserted by it to be made, to fully cover the debt upon which the payment is due;

² F. Terre, P. Simler, Y. Lequette, aforementioned paper, page 1258; C. Larroumet, aforementioned paper, p. 28.

b) where the debtor has two debts affected by a suspensive term stipulated in favor of the creditor, but only one of them became due, it can not impute payment on debt not yet due;

c) At the same time, the debtor can not impute payment on a debt under suspensive clauses, if it has another pure and simple debt to the same creditor³;

d) also if the debtor has to pay an interest bearing debt (*capital*) and fails to cover both the debt, as well as the interests by the payment made, it can not impute payment on the capital without the creditor's consent.

The latter solution is also incidental if the debtor has two or more interest-bearing liabilities, when payment is imputed on interests first, because the creditor can not be held to receive payment of the capital prior to being paid the related interests⁴. As concerns the creditor, it is entitled to make imputation of payment only if the debtor has not made it so before⁵. Given that the debtor does not oppose, the creditor can make unlimited imputation of payment and the debtor is required to comply with it, unless it can prove its non-opposition following the vitiation of consent⁶.

Regarding the *legal imputation of payment*, we can say that if the parties to the legal compulsory relationship have not agreed on the imputation of payment, it can be made under the law, in accordance with Article 1113 of the old Civil Code (1864), as follows:

a) when a debt became due and the other debts due to the same creditor are not outstanding, payment made by the debtor is first imputable on the debt due even if the debtor would be interested in paying off the most costly of them, but which has not become due yet;

b) moreover, if several debts fall due, imputation is made on the one which the debtor wants to pay off with priority. Debtor's interest debtor to extinguish debt with priority may be different. In a certain situation, it is interested in extinguishing the most costly debt and in another situation, the one accompanied by the most collaterals⁷;

c) also, if debts are of the same nature, they are as costly as those and at their maturity, payment will be offset against the oldest of them. Age of

3 D. Alexandresco, aforementioned paper, vol. IV, p. 532.

4 D. Alexandresco, aforementioned paper, vol. IV, p. 533-534.

5 L. Pop, aforementioned paper, p. 486.

6 Art. 1112 of the Old Civil Code.

7 F. Terre, P. Simler, Y. Lequette, aforementioned paper, p. 1260.

the debt is determined according to the date of arising the legal compulsory relationship and depending on its maturity⁸;

d) where all debts have the same length, imputation of payment is made proportionally on each of them. This legal provision is likely to infringe the principle of indivisibility of payment, because the creditor shall receive a partial payment for each of its debts.

Basically, from the analysis of Art. 1113 of the Civil Code, it follows that, as regards the imputation of payment, establishes two rules, a general and a specific one⁹. According to the *general rule*, in case of two debts of the same nature, both due, imputation of payment is made on the most costly one, and if they are similar in terms of amount, on the oldest and under the *special rule*, applying only to pecuniary debts, where such debt is interest bearing, payment is first imputed on them and only the difference, to be imputed to the outstanding capital¹⁰.

Regarding the **New Civil Code**, regulation of payment imputation is similar to the previous one. Thus, Art. 1506 of the New Civil Code establishes the rule of conventional imputation of payment. However, if the parties have not agreed on the order of debt extinguishment, the debtor is entitled, in accordance with Art. 1507 of the New Civil Code, to make imputation of payment, being obliged to charge payment only on debt due, unless agreed that it can make prepayments. If paying by bank transfer, imputation of payment is made by written instructions by the paying debtor, on the payment order.

However, if a debtor has multiple debts to the same creditor, makes a payment and does not specify on which of the payment obligations it is imputable, the latter (creditor), pursuant to Art. 1508 of the New Civil Code it may, *after receiving payment*, to indicate to the debtor such debt upon which payment is imputable. However, the creditor can not claim payment of an undue or a litigious debt. If the creditor submits to the debtor a discharging receipt for the payment made, he is required to mention which debt has been extinguished by such payment. Given that none of the parties to the legal compulsory relationship made any mentions regarding imputation of payment, the provisions of Art. 1509 of the New Civil Code shall apply, under which the imputation is made in the following order:

8 Terre, F. P. Simler, Y. Lequette, aforementioned paper, page 1261.

9 O. Căpățână, B. Ștefănescu, aforementioned paper, page 55.

10 O. Căpățână, B. Ștefănescu, aforementioned paper.

- a) debts due;
- b) unsecured debts or debts with the least collaterals;
- c) more onerous debts for the debtor;
- d) older debts if all are due and as onerous and guaranteed;
- e) proportional to the amount of debt, provided that all fall due, are similarly old, onerous and guaranteed.

In any of the above circumstances, in compliance with the provisions of the second paragraph of Art. 1509 of the New Civil Code, unless the parties agree otherwise, imputation of payment will be made first, upon the court charges and legal debt collection fees, then upon the interest rates and penalties, starting with those having the oldest maturity¹¹ and finally, upon the capital of each of the debts. In the specialized literature¹², it was considered that payment imputation rules prescribed by the Civil Code do not apply in commercial matters. As far as we are concerned, we consider that under the old regulations, the provisions on payment imputation also apply in commercial matters under the provisions of Art. 1 of the Commercial Code, under which, in trade issues, in the absence of special regulation, the provisions of the Civil Code shall apply.

At the same time, under the rule of the new civil code, the provisions regarding imputation of payment are fully applicable to commercial legal relations (or *between professionals, as they are called by the New Civil Code*) unless indicated otherwise. The solution is also shared by famous experts¹³ of national law doctrine of international trade and it is supported by arbitral practice, extending the provisions of Art. 1110-1113 of the Civil Code (1864) to the international trade agreements¹⁴, as well.

However, the solution set out previously is also provided and the UNIDROIT principles¹⁵, according to which, if at the time of payment, the debtor is bound by several debts to the same creditor, it may indicate debt deemed to extinguish, indicating that the payment is first imputed always upon expenses, then upon interest due and finally, upon the capital. In terms

11 I. Turcu, aforementioned paper, p. 430.

12 T. Popescu. (1983). *Dreptul comerțului internațional (International Trade Law)*, second edition, Bucharest: Ed. Didactică și Pedagogică, p. 58.

13 O. Căpățână, B. Ștefănescu, aforementioned paper, p. 54; D.A. Sitaru, aforementioned paper, p. 708-709.

14 S. Deleanu, aforementioned paper, p. 201.

15 Art. 6.1.12 of the UNIDROIT Principles.

of imputation of payment, we can state that the provisions of the UNIDROIT principles are identical to those of Art. 1509 of the New Romanian Civil Code.

We also assert that the UNIDROIT principles¹⁶ have similar solutions in the field of imputation of payment, both with those contained in the old Civil Code of 1864 and those of the new civil code of 2009, regarding non-imputation of payment by the debtor, in which situation the creditor is granted the possibility of payment imputation. However, the regulations provided by the UNIDROIT Principles¹⁷ is also similar to the Romanian legislation in terms of imputation of payment provided that the parties of the legal compulsory relationship either have not agreed on imputation of payment, or they have not used their unilateral rights to make imputation of payment.

Last, but not least, the UNIDROIT Principles¹⁸ provide that where none of the above circumstances are applicable in the legal compulsory relationship between the parties, imputation of payment is to be made pro rata upon all debts, the solution being the same, both as regards the provisions of Art. 1113 of the Old Civil Code and those of Art. 1509, first paragraph, letter e) of the current civil code. Moreover, we mention that the solutions provided by the UNIDROIT Principles can be also found in Art. 109 of the Principles of European Contract Law Project¹⁹.

In conclusion, we can say that, basically, the parties of the legal compulsory relationship may agree as regards the debts to be paid off by a partial payment. However, in the absence of such an agreement, the debtor is entitled to indicate, once with making a partial payment, which debt is being extinguished. Otherwise, after receiving payment, the creditor is entitled to inform the debtor which debt was extinguished by such payment.

However, if none of the parties indicated which debt is extinguished by payment made by the debtor, both the national and the European legislature have established a certain order of the debts to be extinguished.

16 Art. 6.1.12, second paragraph of the UNIDROIT Principles.

17 Art. 6.1.12, second paragraph of the UNIDROIT Principles.

18 Art. 6.1.13 of the UNIDROIT Principles.

19 R. Vartolomei, aforementioned paper, p. 30.

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