

The Valences Of Derivative Action at The National and International Level

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Abstract: Derivative action is a means of guaranteeing the execution of obligations placed by the legislator at the disposal of the creditor who has a certain and enforceable claim, through which he can exercise the rights and actions of his debtor in the event that the latter neglects or refuses to do so. It may happen that a debtor does not exercise his rights towards his own debtor or otherwise omits to defend his rights and legitimate interests, due to absence, negligence, disinterest, due to a feared or imminent insolvency, or even because he intends to harm his creditors by not performing his obligations. In contractual relations, the creditor and the debtor could stipulate a right of the creditor to obtain information from the debtor regarding the evolution of the exercise of its rights vis-à-vis third parties if the debtor begins to commit non-performance of the contract towards the creditor. Therefore, when the debtor neglects to exercise an action that belongs to him, the creditor can exercise that power of attorney with or without filing an action in court, indirectly, obliquely, on behalf of his debtor. It is certain that the object of the derivative action is limited to patrimonial rights and actions (given the fact that it is a measure by which the common guarantee of creditors is desired) and which are not closely related to the person of the debtor. Thus, the creditor will not be able to exercise, for example, the action to abolish or reduce the maintenance pension, the divorce action, the action to annul the marriage, etc. Thus, in this work, comparative elements between the jurisdictions that regulate the institution of derivative action are proposed for research. Also, the similarities that we noticed during the research of the given theme are also analyzed. These proposals were interspersed with the objective of the given paper – better understanding of the subject by paying special attention to the comparison procedure, as we consider this method of effective research.

Keywords: comparative analysis, oblique/derivative action, civil law, national and international level, obligations, subrogation.

INTRODUCTORY NOTIONS

The oblique action represents a means of protecting the rights of the creditor, being a mechanism for recovering claims, following the non-execution or improper execution of the contracted obligations. The origin of oblique action is obscure. In Rome there was a collective civil bankruptcy procedure, called *venditio bonorum*; a representative of the creditors acted on behalf of all and exercised the actions of the bankrupt. The bankruptcy estate was sold in its entirety to the same acquirer. The acquirer of the estate was considered the successor in rights of the bankrupt and had all his rights and actions.

In the specialized literature, the oblique action is defined as "the right of the creditor (oblique creditor) to exercise, in court or without its competition, the subjective rights of his debtor, who refuses or omits to exercise them to the detriment of the first, against by a third party (oblique debtor)" (Baies, 2015). Another important definition would be that given by the modernized Civil Code of the Republic of Moldova, published in 2019 in which. In accordance with art. 892 para. (1), the oblique action represents "the action of the creditor whose claim is certain, liquid and enforceable, in the name of his debtor and independently of his will, exercises his rights and actions in the event that the debtor, to the detriment of the creditor, refuses or omits to exercise".

If we were to generalize all the definitions listed above and propose one of our own, we can state that the oblique action is the civil action through which the creditor can exercise the rights and actions of the debtor or, when he refuses or neglects to exercise them. As a relevant example, we still propose solving a case, because we consider it effective to understand a subject by introducing the practical element in any subject addressed:

Example 1: We have three joint-stock companies: A, B and C. If the joint-stock company A has to recover an amount of money from the joint-stock company B, which in turn has to recover a debt from the joint-stock company C, firm A will be able to address firm C through the oblique action.

The doctrine assimilates it as a measure to preserve the debtor's patrimony and to prevent his eventual insolvency, thus ensuring and maintaining the chances of creditors to realize their claims. We can claim that

the role of the oblique action was born from the need "to reconcile two opposing legitimate interests: the interest of the debtor to manage his own affairs and the interest of the creditor to be protected against the inertia of his debtor" (Stătescu, 2008), and the field of application follows from the definition of the indirect action, the creditors being able to exercise through the indirect action all the debtor's patrimonial rights and actions, the civil status actions of the person being excluded, these being personal actions.

The Civil Code of Lithuania defines the indirect action in art. 6.68 para. (1) as the right of the creditor who has a certain and enforceable claim to exercise the rights of the debtor by filing a lawsuit on behalf of the debtor in case he hesitates to exercise these rights on its own or refuses to do so at the expense of the creditor's rights.

According to the doctrinaires C.Stătescu and C.Bârsan, the oblique action is that legal means by which the creditor exercises the rights and actions of his debtor, when he refuses or neglects to exercise them (Stătescu, 2000).

APPLICATION CRITERIA AND CONDITIONS

The law empowers a creditor to intervene in the legal sphere of his debtor only upon the meeting of certain conditions regarding the creditor and his claim as well as those regarding the debtor's situation and the subjective right exercised obliquely. The Romanian Civil Code provides that, in order to be able to file an oblique action, the following conditions must be met: conditions vis-à-vis the inactive debtor, conditions vis-à-vis the indirect creditor's claim.

1. Conditions relating to the creditor

a) Creditor status – Art. 892 paragraph (1) of the Civil Code of the Republic of Moldova grants legal power of attorney only to the creditor of the holder of the subjective right exercised obliquely. And vice versa, a co-owner cannot exercise, in this simple capacity, the rights of another co-owner over the same property; there is no creditor-debtor relationship between the co-owners.

b) The characteristics of the creditor's claim acting obliquely – The text of art. 892 paragraph (1) imposes the requirement of a certain, liquid and enforceable claim of the creditor acting obliquely.

– The *certainty of the claim* is expressed by the fact that it exists: no doubt or no objection can be attributed to it. Conversely, an uncertain receivable would be, for example, one affected by the condition. However, it is not necessary for the indirect creditor to hold an enforceable title that would confirm his claim with certainty, especially since the indirect action is not a measure to enforce the indirect creditor's claim, but only a "prelude to an enforcement measure "

– *Liquidity* of the claim signifies the idea that its amount (extent) is determined precisely. For example, in the case of the obligation to pay compensation for the damage suffered by the creditor, the amount must be determined definitively by the court, because otherwise it would not be possible to enforce the obligation.

– *Payability* implies that the debt is already due, the term for its execution has expired. Accordingly, the claim in question cannot be affected by any term.

If the relatedness requirements are met, the cross-action could be examined in a lawsuit with the creditor's action against the dormant debtor. Finally, the additions introduced to the Civil Code of the Republic of Moldova from March 1, 2019 promote the tendency to expand the area of protection granted by the oblique action: art. 731 par.(3) gives the pledge creditor a specific oblique action to defend the asset pledged by third parties. It protects the interest in kind of the pledge creditor both as the holder of the secured claim and as the holder of the real right of pledge; Art. 195 gives the partner, who is not a creditor of the company, an oblique action in repairing the damage caused to the company. This is what better protects the company and the other partners, because the damage will not be repaired to the partner who acts obliquely, but to the inert company itself.

c) Absence of the proportionality test – the size of the claim is irrelevant – the question arose whether the creditor's legal power of attorney is limited to the value of his own claim or whether he can claim the entire debt from the third party, even if it exceeds his claim.

Example 2: The creditor owes \$50,000 and the third-party debtor owes \$80,000. The oblique creditor can advance the oblique action only in relation to the amount of \$50 thousand if we start from the principle that it is not an action without interest, because the creditor's interest only extends up to \$50 thousand. This

reasoning, however, is not accurate. The debtor has, or could have, several creditors who will enter into competition with the one of them who exercises the oblique action. The latter therefore has the interest to determine the return to the heritage of as many assets as possible. But this is not an obligation, he can choose to act obliquely only within the limits of his own claim.

French jurisprudence also rejects the argument that the creditor's claim or the subjective right exercised have a reduced value (Civil Code of France).

2. Conditions towards the inactive debtor

The debtor can be any subject of law, even the state (Law Conseil D'etat 20 Oct. 2000). In order to justify the creditor's oblique action, the debtor must be inactive, i.e. not initiate the action that he can initiate ("the debtor refuses or omits to exercise them" — art. 892 paragraph (1) of the Civil Code of the Republic Moldova). The mere fact that the debtor has granted powers to an agent to exercise the subjective right does not remove his inertia if the agent fails to fulfill his mandate. The inertia of the principal equals the inertia of the principal himself.

After the creditor has started the action, the debtor can take it over, thus the debtor becomes its owner; the creditor can stay in the process, alongside the debtor, to protect his own interests.

Example 3: A is a manufacturer and has a contract with B (importer), who in turn has a contract with C (distributor). If B fails to enforce the contract with A, this renders C's action against B for forced delivery of the goods under the distribution contract impossible to succeed. Thus, C will be able to enforce the contract between A and B to bring the goods into B's estate and possession, and pursue them.

DEFINING ELEMENTS OF OBLIQUE ACTION

1. The indirect creditor has the right to claim the realization of a subjective right that does not belong to him;
2. The realized subjective right, real or debt, enjoys legal actions;
3. The debtor refuses or omits to exercise the subjective right in question;
4. That passivity damages the obligee.

The conditions for exercising the oblique action are deduced from art. 892 of the Civil Code of the Republic of Moldova, according to which:

1. The claim must be certain, liquid and enforceable;
2. The creditor acts on behalf of his debtor and independently of his will;
3. The debtor, to the detriment of the creditor, refuses or omits to perform his obligations;
4. The claim must still be liquid and payable at the latest at the time of the examination of the action;
5. The oblique action cannot be the subject of extrajudicial enforcement, that is, this action can only exist through action in the court of law.

According to art. 1560 para. (1) of the Civil Code of Romania by virtue of the oblique action, "the creditor whose claim is disputed and enforceable can exercise the debtor's rights and actions when they, to the detriment of the creditor, refuse or neglect to exercise them".

APLICACION DOMAIN

All the debtor's rights and actions can be exercised by his creditors, except for strictly personal ones, but the existence of a general limit must be noted, in the sense that, in this way, creditors can only exercise the debtor's patrimonial rights and actions. The debtor's extra-patrimonial rights and actions cannot be exercised through indirect action, such as: the right to name, the right to a pseudonym, the right to honor, etc. The doctrine emphasized the fact that only the rights already born or entered into the debtor's patrimony can be exercised by the creditors, obliquely; they cannot substitute him in order to create new rights or to modify existing rights in his patrimony (Crețu, 2006).

By way of oblique action:

- can exercise the rights and patrimonial actions of the debtor;

– cannot exercise non-patrimonial rights and actions, such as:

1. parental rights;
2. the divorce action;
3. action to annul the marriage;
4. revocation of a donation for ingratitude, etc.

– the debtor can exercise rights against third parties, susceptible to legal action, such as:

1. the right to claim an asset owned by the debtor;
2. the right to demand payment of a claim belonging to the debtor;
3. the right to request the return of an unpaid payment.

– can exercise debtor's rights that are susceptible to extrajudicial exercise, such as:

1. measures to preserve some rights in the heritage;
2. providing evidence;
3. fulfillment of some publicity formalities (registration in the electronic archive of movable real guarantees, tabulation of a right in the land register);
4. fulfillment of information formalities on the debtor's account;
5. exercising the oblique action times
6. taking some insurance measures.

EXCEPTIONS – EXCLUSIVELY PERSONAL PROPERTY RIGHTS AND ACTIONS

-The scope of the indirect action is only in the scope of the debtor's patrimonial rights and actions; extra-patrimonial rights and actions are foreign to the general pledge of creditors and are therefore not liable to be exercised obliquely. As we know, it is not allowed for the creditor to replace the debtor in the administration of his patrimony. As a result, the debtor is the only one in a position to conclude acts of administration and acts of disposition regarding his assets and rights. Two more are added to these limits:

– The patrimonial rights and actions that are strictly related to the person of the debtor cannot be exercised indirectly by his creditors. This limitation of the right to apply the oblique action is expressly provided in the Civil Code of the Republic of Moldova, where it is ordered that the rights and actions of the debtor can be exercised "except for those that are exclusively personal". It is about those rights and actions, which are closely related to the person of the debtor and the exercise of which is left by law to his free discretion for "personal moral and family considerations".

– Intangible patrimonial rights – creditors cannot exercise or realize, obliquely, the patrimonial rights of the debtor that are imperceptible, such as: the right to housing, the right to use, the right to receive a scholarship, the right to own property for personal use and household items needed by the debtor and his family, as well as objects of religious worship if there are not more of the same kind, etc.

EFFECTS OF OBLIQUE ACTION

The oblique action does not deprive the debtor at any stage of the independent exercise of the action or, as the case may be, of concluding a transaction contract. In particular, it is interested in its procedural quality and the effects of the final judgment against the inactive debtor.

The indirect creditor assumes the capacity of representative of the inert debtor. The court must subpoena the inactive debtor in the process because the process decides on his rights and assets. Although an express text is missing in the matter of examination of oblique actions, the citation of the debtor is required based on art. 6 ECtHR (right to a fair trial). In practice, this requirement is satisfied whenever the oblique action is examined in connection with the action of the oblique creditor against the inactive debtor for the satisfaction of his endangered debt".

1. The effects towards the creditor who exercises the oblique action – The creditor indirectly exercises the rights of his debtor; he does not exercise a right of his own. Therefore, the effects of the oblique action are produced in the debtor's patrimony and in the general pledge of the creditors. This means that the result obtained benefits all the creditors of the negligent debtor and not only the one who exercised the action.

2. Effects of the indirect action against the third party defendant – The third party can invoke, for example, the compensation of his debt against a claim he has against the plaintiff's debtor, even if that claim arose after the introduction of the indirect action. Also, the third party can oppose the transaction with the debtor after this date. The defendant can only object to the creditor the exceptions that can be objected to the debtor; he does not have the right to rely, in defense, on the exceptions born from his relations with the creditor; such exceptions may be opposed to the creditor only when he acts in his own name to realize a right of his own against the defendant.

3. The effects of the oblique action against the passive debtor – The problem that arises in connection with the effects of the oblique action against the passive debtor is that of knowing whether or not the court decision by which the case is resolved is opposable to the debtor; in other words, this judgment has or does not have res judicata authority against the debtor. The answer depends on whether or not the debtor was subpoenaed. If he was brought into the case, the final and irrevocable judgment has, without a doubt, authority over him, being opposable to him. In the second situation, when the debtor has not been brought into the case or process, opinions are divided. Some argue that the judgment rendered has equal authority over the debtor. According to other authors, the debtor who was not brought into the case must be considered a third party to the decision issued by the court, which will not be against him.

4. The effects towards the other creditors and the passive debtor – The issue that needs to be resolved is whether or not the judgment pronounced in the settlement of an oblique action promoted by a creditor is opposable to the other creditors of the same debtor. In order to formulate a thorough answer, we must distinguish between the situation in which the action was admitted and that in which it was rejected. If the court's decision is to admit the oblique action, it benefits all the debtor's creditors, even if they did not intervene in the process. In the situation where the decision is rejected, i.e. unfavorable to the creditors, the opinions are different. In an opinion, it is appreciated that it is opposable to the other creditors by their debtor who, as a rule, participates in the process. In the second opinion, it is stated that the solution depends exclusively on the circumstance of whether the debtor was included in the case. In the hypothesis in which it was introduced in the case and the court's decision is to reject it, it will have working power, judged both against the debtor and in relation to all creditors and; on the contrary, if the debtor has not been brought into the case, the judgment rejecting the oblique action, by virtue of the principle of relativity of the res judicata, will not be opposable neither to the debtor nor to his other creditors, with the exception of the plaintiff creditor (http://jurisprudenta.csj.md/search_col_civil.php?id=56151).

LEGAL NATURE OF OBLIQUE ACTION

The discussion of the legal nature of the oblique action in French, Italian and Romanian law, and the refusal, in these systems, to assimilate it to a legal representation, consists in the rule that the creditor introduces the oblique action in his own name and not in the name of the inert debtor. However, a good part of the doctrine claims that, in essence, the mechanism consists of an "objective representation" (Didier, 2001). Jean Carbonnier wrote that "the creditor represents his debtor and that the oblique action is not an action of his own that would belong personally to the creditor" (Carbonnier, 2000). The law on the modernization of the Civil Code of the Republic of Moldova diminished this debate, specifying, in art. 892 paragraph (4), that the indirect creditor is a legal representative of the inert debtor, but under the conditions and limits provided by art. 892-894, and not all-encompassing as a parent or guardian.

The doctrinal debate is fueled by a confusion: some authors analyze the effects of the oblique action on the part of the inert debtor, for whom the exercise of his right has a transformative effect, it changes the composition of his patrimony, instead of a debt, he will, as a result, own an asset or money obtained from the third party under the claim; other authors move the analysis of the oblique action to the side of the oblique creditor and have only to note that his claim is not capitalized in this way, but only paves the way for a successful capitalization in the future (Brenner, 1999).

The specification is not only of theoretical importance, but also of procedural importance, because it explains why the third party cannot object to the creditor with exceptions regarding his claim against the inactive

debtor, apart from the absence of the necessary conditions to act obliquely (legitimization relationship). The third party can only raise the exceptions specific to its relationship with the inert debtor (own creditor), such as the lateness exception regarding the subjective right exercised obliquely, but it cannot raise the exceptions specific to the relationship between the indirect creditor and the inert debtor. These latter exceptions are to be discussed in a possible trial between the oblique creditor and the inert debtor. Therefore, by its nature the oblique action is less than a measure to enforce the debt of the oblique creditor, but more than a measure to secure the debt of the oblique creditor. It is prior to execution (https://animus.md/adnotari/892/#_ftn5), an act that prepares the ground for it.

And the Italian doctrine recognizes the complex nature of oblique action, protecting several contradictory interests simultaneously (Cesare , 2020), and its purpose is to acquire useful, economically advantageous results in the debtor's patrimony; it grants a power of legal substitution in its own interest; this power integrates a potestative right, namely a substitute potestative right (Cesare , 2020).

CONCLUSIONS

In conclusion, we consider that in the context of the accession to the market economy for most of the signatory states to the European Convention on Human Rights, the oblique action represents an additional and effective guarantee of the protection of creditors' rights, which allows the removal of uncertainty and the reduction of hesitations of individuals and legal entities, in in general, as well as economic agents, in particular, regarding the inclusion in the legal relations that have as their material object the unsecured debt. Considering the evolving character of the European Convention, the introduction of the oblique action is an imperative, necessary for adapting to the existing reality in the socioeconomic order of the High Contracting Parties. In this sense, we believe that the most effective way would be to indicate the need for the respective amendment of the legislative framework by means of general measures.

Also, only the rights actually existing in the debtor's patrimony are susceptible of exercise by oblique action by his creditors. Therefore, the debtor is exclusively able to conclude acts of disposition and acts of administration regarding his assets and rights. It can be said that the scope of the oblique action is circumscribed to the sphere of patrimonial rights that are part of the category of real rights or debt rights. Potestative patrimonial rights (consist in the power that their owner has to intervene, through his unilateral will, in legal situations in which the interests of other persons are also present, who have the obligation to obey) cannot be exercised obliquely by creditors of the holders of these rights. And this all the more so as the power rights have, most often, a personal character, their exercise being in the exclusive power of the debtor.

BIBLIOGRAPHY

1. The Civil Code of the Republic of Moldova of 06.06.2002, in the Official Gazette of the Republic of Moldova no. 82-86 of 22.06.2002, modernized by Law no. 133 of 15.11.2018 on the modernization of the Civil Code and the modification of some legislative acts, in the Gazette Official of the Republic of Moldova no. 467-479 of 14.12.2018. Published in the Official Monitor of the Republic of Moldova no. 66-75 of 01.03.2019.
2. The Civil Code of Romania from 17.07.2009. In the Official Gazette of Romania no. 505 of 15.07.2011 – <https://www.codulcivil.ro>
3. Civil Code of France – <https://www.fd.ulisboa.pt/wp-content/uploads/2014/12/Codigo-Civil-Frances-French-Civil-Code-english-version.pdf>
4. Civil Code of Lithuania, 18 July 2000 No VIII-1864, Vilnius, Last amended on 23 December 2010, No XI-1254 – <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/87072/98918/F821662156/LTU87072%20ENG.pdf>
5. European Convention on Human Rights – https://www.echr.coe.int/documents/convention_ron.pdf
6. Law No. 133 of 15-11-2018 regarding the modernization of the Civil Code and the amendment of some legislative acts - https://www.legis.md/cautare/getResults?doc_id=34327&lang=ro
7. Closing of the Civil, Commercial and Administrative Litigation Panel of the Supreme Court of Justice of May 13, 2020. File no. 2ra-551/20 – http://jurisprudenta.csj.md/search_col_civil.php?id=56151
8. in French jurisprudence, Conseil D'etat Law 20 Oct. 2000, req. no 192851, D. 2001 – <https://www.labase-lextenso.fr/jurisprudence/CETATEXT000008082669>
9. Cesare Massimo Bianca, "Diritto civile". Responsibilities (Vol. 5)" – 3 dicembre 2020, Edición en Italiano de Terza Edizione.
10. Cesare Massimo Bianca, "Diritto civile". Responsibilities (Vol. 5)" – 3 dicembre 2020, Edición en Italiano de Terza Edizione.
11. Stătescu, C., Bîrsan, C., Civil Law. The general theory of obligations", 9th Edition, revised and added, Hamangiu Publishing House, 2008.

12. Brenner, C., "L'acte conservatoire", LGDJ, 1999, p. 352. F. Greau, "Répertoire de droit civil", l'Université Paris-Est Créteil (Paris 12), p. 70 - <https://www.studocu.com/row/document/open-university-of-mauritius/bahons-law-and-management/force-majeur/38152094>
13. Crețu I., Commentary on art. 599, in the Commentary on the Civil Code of the Republic of Moldova, Chisinau, ARC Publishing House, 2006.
14. Henri, Léon and Jean Mazeaud, "Leçons de droit civil". Tome II, Premier volume, Obligations: general theory", ed. 2nd, p. 843.
15. Carbonnier, J., "Droit civil, t. 4: Les obligations", PUF, Paris, 2000.
16. Cazac, O., Annotation to art. 892 [online]. Annotated Civil Code [cited April 11, 2021] – https://animus.md/adnotari/892/#_ftn5
17. Didier, Ph., "From representation en droit privé", LGDJ, Paris, 2000.
18. Baieș, S., Mițu, Gh., Cazac, O., Cebotari, V., Brumă, S., Robu, O., Crețu, I., Tabuncic, T., Cara, A., „Drept civil. The General Theory of Obligations: Handbook." Chisinau, Tipografia Centrală, 2015.
19. Stătescu., C., Bîrsan., C., Civil law. The general theory of obligations", All Beck, Bucharest, 2000.