Debt Assignment – Way of Transferring Civil Obligations

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Abstract: In the civil circuit, sometimes there is a need to transmit the right of claim from the content of a legal report. For example, a person is the holder of a claim whose enforceability is affected by a suspensive term, that is, the claim is to be honored at a certain time. However, this creditor wants to capitalize on his claim before the deadline, and finds a person (natural or legal) who is ready to wait for the deadline to be fulfilled. The creditor sells his claim to this person. In this way, he makes a transfer (assignment) of the claim.

Therefore, debt assignment is a legal transaction by which the creditor (assignor) transfers its rights and obligations on a debt to a third party (assignee), in exchange for a sum of money or other benefits. The assignee becomes the debtor's new creditor and has the right to collect payment of the debt according to the terms and conditions originally established between the debtor and the original creditor. If the claim is assigned without the debtor's consent, the debtor may refuse to pay the new creditor and challenge the validity of the assignment. It follows that it is important that the transaction is carried out in accordance with the applicable laws and regulations in this regard.

Thus, the assignment of debt, admitted in Roman law, at first by indirect means, and later also by direct means, perfected in the medieval environment, became, in the modern environment, an autonomous means of common law, through which they can transfer debt rights based on an agreement between the old creditor (assignor) and the one who replaces him (assignee).

Keywords: assignment of debt, right, obligation, creditor, debtor, third party, transferor, transferee, transfer, debt, patrimony.

INTRODUCTION

Sometimes companies fail to collect on time the receivables they have from debtors. They are forced to use an instrument called the assignment of debt so as not to affect the performance of the business.

Classically, the content of the binding legal relationship that is established between the debtor and the creditor consists of two correlative components: the creditor's right to claim from the debtor the performance he owes and the debtor's duty to perform that performance. Therefore, the debtor's right of claim is the asset element and the debt belonging to the debtor is the passive element.

These legal operations, through which the transmission on a particular basis of the elements of the obligational legal relationship - the claim and the debt - takes place, are legislated in the civil law of the Republic of Moldova through the institutions of assignment of claim and takeover of debt. The Civil Code of the Republic of Moldova regulates these institutions in Chapter III of Title I of Book Three.

BASIC CONTENT

Historical origin of the assignment of a claim

The assignment of a claim has its origins in Roman private law, being one of the many ingenuities of Roman jurisprudence. Initially, Roman law did not allow that in a vinculum iuris it was between another creditor. The transmission of a claim between vineyards was, in theory, inadmissible because the obligational relationship, both from an active point of view (creditor's right) and from a passive point of view (the debtor's performance), was strictly personal in nature. The debtor's performance was inextricably linked to the person of the creditor in receipt of the benefit, just as the creditor's right was inextricably linked to the person of the debtor to whom he was entitled to claim the benefit, so that no change of person could be made. Just as the demands of life have claimed such a replacement, the Roman jurisconsults, without denying traditional principles and without openly acknowledging the institution of assignment of claims, resorted to the application of already existing

institutions in order to practically achieve the result of the assignment. Initially, one of these institutions was novation.

The ineffectiveness of the novation served as a basis for resorting to another process, called procuratio in rem verso, which was the basis for the gradual evolution of the institution of the assignment of the claim. Thus, the assigning creditor empowered by mandate a third party (assignee) with the right to summon the debtor to court and thus to collect his claim, while being relieved of the obligation to return to him everything he had collected from the debtor. The procurator, acting on his own account but on behalf of the assignor, was qualified as procurator in rem suam. As plaintiff, the name of the assignor appeared, but the collection of the debt was made in favor of the procurator. This procedure is not a genuine assignment, since the assignor remained to be the holder of the claim until the moment of conviction of the debtor, after which the assignee acquired an independent right.

The legislation of the imperial era managed to eliminate this shortcoming, thus beginning to take shape the assignment of the claim as an autonomous institution, due to the introduction of the actio utilis suo nomine, which gives the assignee the autonomous right to demand from the debtor the payment of the claim, and the establishment of the obligation to inform the debtor about the assignment that took place excluded the possibility for the debtor to make the payment of the assignor. After these legislative innovations, the assignee the interest and could verify against the debtor the same right of claim on the basis of the assignment report, which departed from the mandate and assumed the configuration of a new institution: the assignment of a claim.

Definition

Assignment of a claim is the contract by which the creditor transmits his right of claim, for consideration or free of charge, to another person. The law provides that a transferable and sessile claim may be assigned by the holder (assignor) to a third party (assignee) on the basis of a contract, according to art. 823, para. (1) Civil Code. This operation involves three persons: the creditor transmitting the claim, called the assignor; the acquirer of the claim, called the assignee; the debtor of the assigned claim, called the assigned debtor. The parties to the assignment contract are the assignor and the assignee, the assigned debtor being a third party to the assignment contract.

Conditions of assignment of a claim

Being a contract, the assignment of a claim must meet all the conditions for the validity of contracts.

Any transferable and despicable claim may be the subject of assignment, without distinction being made between pecuniary claims and claims of a different nature and regardless of their source (act or legal fact). Assignment is possible in the case of pure and simple claims, but also in the case of claims affected by modalities, current or future claims, although opinions on the possibility of submitting future claims are contrasting. Most of the times, pecuniary claims are assigned, affected by suspensive terms (Baieș, 2015).

There are claims that cannot be assigned because they are declared inaccessible by law, given the close connection of the claim with the person of the creditor. Thus, the law prohibits the assignment of:

1. Claims relating to the collection of maintenance, compensation for damage to the life and health of the person, and other rights relating to the person of the creditor, for example, the claim for compensation for non-material damage.

2. The right of pre-emption when buying a share of the common property. When such a prohibition was introduced, the legislature started from the fact that the preferential right to purchase a share of the common property on the shares relates only to the co-owners. If the assignment of the right of pre-emption to the purchase of a share-share is admitted, the rights of the co-owners will be neglected (Cantacuzino, 1998).

3. Claims by agricultural enterprises to the state according to art. 14 para. (3) from Law no. 392 of May 13, 1999 regarding the restructuring of agricultural enterprises in the process of privatization. In court practice, cases are known when the assignment contract has been declared void on the ground of non-compliance with these provisions (6).

The provisions of art. 823 para. (4) of the Civil Code of the Republic of Moldova is without prejudice to the possibilities of the parties to declare inaccessible certain claims, in whole or in part, which is called conventional inaccessibility. Such clauses are valid if justified on a legal, serious and legitimate interest, which may be patrimonial or moral.

In the literature, it is mentioned that the question of determining the credibility or inaccessible character of a particular right cannot be solved by a formula of principle. Thus, in order to determine the assignability of a right, it is necessary to analyse its nature and features, the purpose of the grant, the conditions of the grant, the conditions of its exercise, its analogy with other rights the assignment of which is expressly permitted or prohibited.

The cause of the assignment of the claim is the objective pursued at the conclusion of the civil legal act, the interest which the parties pursue. The cause must exist, be real, licit and moral.

The assignment of a claim must not affect the rights of the debtor, nor can it make his obligation more onerous, according to art. 823, para. (2) Civil Code R.M., because, it does not affect the being of the obligation.

As the debtor is not a party to the contract, his consent is not binding. The law provides that the holder of a claim may transmit it, without the debtor's consent, to a third party, if this does not contravene the essence of the obligation, the agreement between the parties or the law.

Regarding the formal conditions, the law provides that the assignment of the claim must be concluded in the form required for the legal act on the basis of which the assigned claim arose, according to art. 824 Civil Code R.M.

Content of the contract for the assignment of a claim

The assignment contract is an agreement of will between the assignor and the assignee. The contract shall be deemed to have been concluded when the parties have agreed on all the essential clauses, in accordance with Art. 1027, para. (1) of the Civil Code of the Republic of Moldova in the form required for the legal act on the basis of which the assigned claim was born. Essential are the clauses established as such by law, which arise from the nature of the contract or on which, at the request of one of the parties, an agreement must be made. All these clauses form the content of the contract. The Civil Code of the Republic of Moldova does not expressly provide for the essential clauses of the assignment contract.

In the specialized literature it is mentioned that one of them refers to the object of the contract for the assignment of the claim. The object of the contract for assignment of the claim is the right of claim, which must be determined and individualized, which is achieved by determining the following components:

a) the object of the claim;

b) the active subject (the creditor); c) the passive subject (the debtor);

(d) the content of the claim (the actions which the debtor is obliged to commit relating to the subject-matter of the performance) and

e) the grounds for the appearance of the claim.

If the contract gives rise to several claims equivalent in size but different in legal status, it is necessary to indicate the specifics of the claim. For example, if under the contract there is a claim for the payment of an amount by way of rent and another for compensating for the damage caused to the leased asset in the same size, as well as for the payment of the redemption price of the leased asset, the amount of which is also the same, then in the contract of assignment of the receivable it is to be indicated which particular claim constitutes the object of the assignment.

The contract may contain several claims of legal quality, but with different terms of exercise. For example, the contract for the supply of goods in several equal lots may provide that the supplier acquires several claims to receive payments in equal amounts for each individual lot. By assigning one or several claims, but not all, resulting from this contract, the supplier is obliged, at the request of the new creditor, to individualize the object by indicating the term of the claim and/and the term of exercising the right, which will be another condition. of the assignment contract.

The individualization of the claim is, therefore, an essential condition of the contract of assignment, being in the immediate interest of the assignee, not of the assignor. The latter conveys the right of claim, regardless of its exact and complete description. The transferee, however, acquires the right of claim which, subsequently, he must exercise, therefore he must explain to the debtor and the court what kind of claim he has acquired. If, due to carelessness, incompetence or other reasons, the assignee did not insist on the individualization of the claim as the object of the assignment, there are no grounds to impose other persons, especially the assignor, to take care of the claim acquired by the assignee. It follows that, in the event of a dispute between the assignor

and the assignee regarding the fact which claim or which part of it was the subject of the assignment, the information provided by the assignor must be presumed to be true. It is the transferee's burden to overturn this presumption, proving the opposite.

The individualization of the object in an assignment contract can have different degrees of accuracy. In practice, there are situations when the object of the assignment contract is formulated as "all claims arising or which may arise from the credit agreement concluded between A and B". This formulation only reproduces the information about the parties of the obligation report, the content of which is formed by the unknown claims and the basis for their appearance (the credit contract). The additional information can be determined from the credit contract, actually from the assignment contract, indicating who exactly participates as the assignee and which set of creditor's rights are transferred to the assignee.

Another condition of the debt assignment contract refers to the content of the contract. Often the reference is made using the formula: The assignor transmits, and the assignee receives the claim. Sometimes the formula is used: "The transferor sells and the transferee buys" or the transferor transfers and the transferee receive someone's debts to the transferor according to the contract, or the transferor transfers to the transferee and the transferee receives from the transferor.

It is in the interest of the assignee to indicate, in the contract of assignment of the claim, the condition regarding the term and manner of delivery by the assignor of the documents establishing the existence and validity of the claim, the encumbrance. In the absence of these documents, the assignee cannot exercise the acquired right. It is important to include it in the category of documents to be submitted and documents that deny the possibility of invoking objections by the debtor.

A condition of the debt assignment is that it does not affect the debtor's rights nor make his obligation more onerous, according to para. 2 art. 823 of the Civil Code of the Republic of Moldova. Since it is difficult to foresee what objections, resulting from his relations with the transferor, the assigned debtor can raise against the transferee, it is equally difficult to determine what documents the transferor must transmit to the transferee. That is why it would be rational to include in the contract of assignment a clause obliging the assignor to grant the assignee, upon request, any help in combating the objections of the assigned debtor, including presenting the necessary documents. The transferor, who does not fulfill this obligation, may be obliged by contract to compensate the transferee for the damages caused in this way.

The transferor, for his part, is entitled to insist on the introduction of a clause in the contract according to which the transferee is obliged to bear the negative consequences alone, if he does not involve him in the lawsuit filed in relation to the objections of the transferred debtor.

It also presents the condition regarding the moment of the transfer of the assigned right according to the assignment contract. Since the claim, object of the assignment, is not a thing, art. 510 of the Civil Code cannot be applied, which establishes the principle of the tradition of the work as the moment of transfer of the ownership right. If an analogy were to be made, one would naturally have to answer the question: what does the transmission of the right mean and which external manifestations are to be qualified as transmission? Thus, at the conclusion of the assignment contract, the external manifestation is achieved by the agreement of the parties. Therefore, the task of the parties to the assignment contract is to link the transfer of the right of claim to the moment of signing the contract or the passage of a few days from the moment of payment of the value of the assigned claim. In the absence of an express provision regarding this moment, it is to be considered that the right of claim has passed at the moment of concluding the assignment contract. This position finds its foundation in art. 1027 and 1047 of the Civil Code according to which the contract is considered concluded if the parties have reached an agreement regarding its essential clauses in the form required by law or established by the parties.

Effects of debt assignment

The main effect of the debt assignment contract is the transmission of the debt right by the assignor to the assignee. Ways of transferring the claim can be with onerous title or free of charge, the assignment thus also producing the specific effects of the legal operations by which it is carried out: sale-purchase, exchange, donation, etc.

The effects produced by the assignment of debt must be viewed from two aspects: between the parties (A) and towards third parties (B).

A. Between the parties, the rule is that the assignment of the debt, right from the moment of the agreement of will, transfers to the assignee the debt itself, all the rights that the assignor had against the assigned debtor. The assignee replaces the assignor in all rights arising from the debt. The claim remains unchanged, both in terms of its nature and volume. According to the law, the debt rights are transferred to the assignee as they exist at the time of transfer (Art. 827, paragraph (1) CC of the Republic of Moldova). The only element of the obligation that changes is the creditor.

With the assignment of the claim, the guarantees and other accessory rights pass to the assignee, according to art. 827, para. (2) CC of R.M.

It should be noted that the assignee becomes a creditor for the nominal value of the claim, regardless of the price paid to the assignor, if the assignment was made for consideration. But, at the same time, he cannot acquire more rights with the transferring creditor, by virtue of the rule nemo plus iuris ad alium transferre potest quam ipse habet (no one can transfer to another more rights than he himself has). As a result, the debtor is entitled to object to the assignee all the exceptions that he was able to object to the assignor until the moment of communication of the assignment, for example: nullity, payment, prescription, resolution.

One of the important effects of debt assignment is the guarantee obligation. Thus, the law stipulates that the assignor guarantees that the clauses of the contract or other legal act from which the claim arises will not be modified without the consent of the assignee, unless the modification is provided for in the assignment contract or is made in good faith and in such way that the transferee would not reasonably have objections, according to art. 828, para. (4) Civil Code of R.M.

The rules stated above do not apply in the case of the assignment of the claim resulting from a promissory note, in which case the assignor is also responsible for the execution of the obligation by the debtor. For example, in the case of assignment of the promissory note by promissory note, the holder of the promissory note, in case of non-payment, can also exercise the right of action against the assignor (guarantor), according to art. 38 of the Bill of Exchange Law no. 1527/1993 // Official Gazette of the Republic of Moldova, no. 10, 1993).

The difference between the assignment of debt and the guaranty of a promissory note consists in the non-guarantee of the performance of the obligation by the transferor (apart from the express counter stipulation) and the guarantee of the performance of the obligations by the guarantor. Thus, according to art. 1785 para. (2) of the Civil Code of the Republic of Moldova, "the guarantor is responsible for the payment of the check, except for the persons to whom the check was sent by draft after the guarantor prohibited a new draft".

Within the relations between the two parties of the assignment contract - the assignor and the assignee - certain duties are imposed. Thus, according to art. 823 para. (3) of the Civil Code of the Republic of Moldova, the transferor is obliged to deliver to the transferee the documents related to the claim and to provide him with the information necessary to realize it.

B. To third parties. In the matter of debt assignment, third parties are all persons who did not take part in the assignment contract and are not universal successors or with universal title of the contracting parties, but for whom the execution of the assignment is of interest. They are considered to be third parties in this matter: the assigned debtor, the subsequent and successive assignees of the same claims and the assignor's creditors (Baies, 2015).

Certain formalities must be met for the assignment of debt to third parties to be enforceable. Thus, with respect to third parties, the assignment produces effects only from the moment of notification or presentation of a document regarding the assignment to the assigned debtor. By notifying the debt assignment, the debtor is informed of the identity of the new creditor and the essential clauses of the assignment contract. Until the moment when the aforementioned notification or document reaches the debtor, he is considered bound only to the assignor, being able to ignore the assignment contract, with all the consequences arising from this fact. Thus, the assignee can be opposed to the services performed by the debtor, after the assignment, for the assignor, as well as any legal act concluded after the assignment between the debtor and the assignor regarding the transferred claim, if the debtor was not aware of it at the time of the performance or the drawing up of the act, of the existence of the assignment, according to art. 831 CC of R.M.

If the assignor performed the assignment, the assigned debtor can defend himself before the assignee by invoking the receipt that confirms the execution of the obligation, even if it is dated after the assignment, but before the notification. Under the same conditions, the assigned debtor can oppose to the assignee the

compensation that he also opposes to the assignor. If, until the notification, the debt remission (debt forgiveness) operates, and the assigning creditor nevertheless assigns the claim, the assigning debtor can oppose the assignment to the debt forgiveness (Pop, 1996).

After completing the notification formalities, the assigned debtor becomes the assignee's debtor, being obliged to make payments only to him. By notifying the debt assignment, the debtor is informed of the identity of the new creditor and the essential clauses of the assignment contract.

The notice of assignment can only be withdrawn with the consent of the designated new creditor. In order for the debt assignment to produce effects vis-à-vis third parties, the actions must be taken by the parties to the assignment contract, either the assignor or the assignee. As a rule, the assignee has several interests in notifying the assigned debtor. After the notification date, the assigned debtor can oppose to the assignee all the exceptions that he was able to oppose to the assignor until the moment of communication of the assignment (art. 829 Civil Code), such as: nullity, payment, prescription, resolution.

The law does not establish any notification period. The time of notification of the assigned debtor remains at the assignee's discretion. It is still useful for the assignee to give notice of the assignment as long as third parties have not acquired any rights to the claim. The notification, as a rule, is made at the debtor's residence. If there are several joint debtors, each one must be notified, since he is only a pro parte debtor. If there are several joint creditors, it is considered that it would be more appropriate to notify each debtor separately.

The notification must not be a reproduction of the contract of assignment, but must contain its essential data, information that will enable the assigned debtor to form a correct idea about the quality of the new creditor.

The notification formality is a means of establishing a legal relationship between the assigned debtor and the assignee to whom the assigned creditor has transferred his right. Thus, the assigned debtor no longer has any obligation towards the assigning creditor, becoming a debtor of the assigned creditor. The notification is a formality that is carried out only in the person of the assigned debtor, with the aim of making him a passive subject in the transmission between the assignor and the assignee.

It is possible for an assignor to assign his claim to several assignees. In this case, a conflict arises between subsequent and successive assignees of the same assigned claims. The law provides that if a claim is assigned by the same owner several times, the creditor of the obligation is the assignee whose assignment is notified first to the debtor, according to art. 832, para. (1) CC of R.M. The first assignee will be established according to the qui prior tempore potior iure rule. This means that, among several assignees, the one who first notifies the debtor or presents him with a document regarding the assignment will have priority.

In connection with the assignment of debt, the following clarifications are required:

- the rules regarding the assignment of the claim are applied accordingly in the case of the assignment of other rights;

- The provisions of this section are applied in the appropriate manner if a claim is submitted based on the law, a court decision or a decision of the public authority.

Effects of the assignment of receivables vis-à-vis the assignor's unsecured creditors

Until the publicity formalities are fulfilled, the assignor's creditors are considered third parties to the assignment between their debtor, who is the assignor, and the assignee. The assignment is not against them and they can pursue the assignor's claim against the assigned debtor, which is part of their general pledge. Unsecured creditors are interested in the assignment of debt, especially when it is free of charge. After making the assignment public, the respective right of claim comes out of the transferor's patrimony, diminishing their general pledge and causing damage to the unsecured creditors. When the debt assignment becomes objectionable to them, they can request its revocation through the revocation action, also known as the Paulian action, if their interests have been defrauded (Pop, 1996).

Importance of debt assignment

Debt assignment has practical utility both for the creditor (assignor) and for a third party acquirer (assignee). The assignment of debt with onerous title gives the creditor, in the event of suspension of the execution of the debt and his need for financial means, the possibility to assign the debt against its value or to pay it to his own creditor.

The transferee, in turn, has some advantages, since he can acquire at a price lower than its nominal value, especially in the case where the claim is doubtful.

In practice, recourse is made to the assignment of receivables with onerous title when the execution of the receivable is affected by a suspensive term and cannot be requested before the expiration of this term, and the creditor, who needs liquidity, can assign it, immediately collecting its value or paying it to his creditor.

Distinguishing the assignment of debt from other legal operations of transformation or transmission of obligations

Assignment of debt is similar to subrogation and assumption of debt in that they are legal operations of transmission of obligations, which do not affect the obligation, but transmit it as it was born and as it exists in the patrimony of the original subjects of the legal relationship.

Assignment of debt, like subrogation, changes the active element of the obligation relationship. However, they differ in that, in the case of subrogation, the initiative belongs to a third party who pays the creditor and is subrogated in his rights against the debtor. In the case of debt assignment, the initiative to transfer the right belongs to the assigning creditor, who transfers to the assignee, for a fee or free of charge, a claim against a third party.

The assignment of debt differs from the assumption of debt, because it transfers the active element - the right to claim, and the assumption of debt transmits the passive element of the obligation relationship - the debt.

Assignment of debt differs from novation in that it is a transmission, and novation, a transformation of the obligation. As a result of the novation, the original obligation is extinguished and replaced by a new obligation.

Both institutions, assignment of debt and assignment of contract, have the effect of a transfer, but they differ substantially. The assignment of debt transfers a debt right, and the assignment of the contract, a contractual position, namely a set of rights and obligations belonging to a party in the contract. For example, in the case of assignment of the lease by the lessee, the test acquires the rights and obligations arising from the lease agreement. Lease assignment can only take place with the consent of the other contracting party, the lessor.

The assignment of debt can take place in any obligation relationship born from the contract, unilateral legal act or legal fact, and the assignment of the contract is only possible in the case of synalagmatic contracts.

CONCLUSION

The assignment of debt has the following legal characteristics: it involves three participants: the creditor who transfers the debt, called the assignor; the acquirer of the claim, called assignee; the debtor of the assigned debt, called the assigned debtor; it is achieved by concluding a debt assignment contract between the transferor and the transferee, which produces legal effects on a third party, the assigned debtor; the essential function of the assignment consists in the transmission of a claim from the assignor to the assignee, definitively and irrevocably; (Pop, 2006) the claim is transferred as found in the transferor's patrimony, preserving its nature and characteristics; it can be both paid and free. If it is for a fee, it represents sale-purchase, exchange, life annuity, payment, and if it is free of charge, it represents a donation contract (Baias, 2014).

Currently, there is insufficient legal certainty as to which national law applies when determining who owns a claim after it has been assigned cross-border, as the substantive rules of many states governing the third-party effects of assignments claims are divergent.

Adopting uniform conflict of law rules will remove the legal risks and potential systemic consequences of cross-border debt transactions, enabling cross-border investment, access to cheaper credit and deeper market integration. This will help to increase legal certainty across the EU.

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