SUBROGATION – LEGAL FORM OF PAYMENT A MODALITY TO DISCHARGE THE BINDING LEGAL RELATIONSHIP

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Abstract: *By virtue of the principle of celerity that characterizes commercial obligations, the lender or the debtor of the pecuniary obligation may resort to a subrogation for the extinction of the binding legal relationship. The subrogation institution is both within the reach of the creditor and that of the debtor, and each of them may resort to such a payment method if this is in their best interest. As a consequence of the subrogation, the part of the binding legal relationship that resorted to such a method of payment is substituted (replaced) by a third party of the binding legal relationship, which basically takes over the rights and the obligations of the party it replaces. In other words, either of the parties of the binding legal relationship has at hand a legal institution known in the doctrine as being part of the legal forms of payment, through the use of which it can discharge the most costly or interest-bearing financial obligations, known as bearing the name of subrogation. Since the subrogation may be agreed both by the debtor and by the creditor, but it may also be legal, below, we shall only refer to the subrogation agreed by the debtor and to that agreed by the creditor, and the legal subrogation shall be subject to a separate analysis. Thus, in the following, the subrogation institution's analysis is to be done from the point of view of the comparative law, which concerns the old and the new civil code.*

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JEL Classification: *K 1-K 12; K 2-K 22; K 3-K 33*

Subrogation

As it is well known, the payment is that manifestation of the will of the debtor of the payment obligation, following which the assumed pecuniary obligation is executed voluntarily and in nature. In other words, the payment designates that operation by which the debtor executes voluntarily an obligation to remit an amount of money to the creditor.

From a legal point of view, the payment transaction covers a much broader range of the debtor's benefits, such as the transmission or the establishment of a right, the execution of a work, the performance of a service, the delivery of an asset, of some documents, the assignment of a claim or of some transferable securities etc.

As such, it can be argued that the discharge of a binding legal relationship can be done in other ways than by pecuniary payment, provided such a modality of creditor's achievement of the claim is accepted.

Since payment is the principal means of discharging the binding legal relationship, by the term „*legal forms of payment*", one designates all legal transactions comprising a performance from behalf of the debtor of the payment and having the effect of discharging binding legal relationships in relation to which payment was made.

In view of the specific nature of our scientific approach, we shall summarize below only the analysis of legal transactions which have as object the payment of a pecuniary payment, the consequence of which is the discharge of the original binding legal relationship.

In this respect, we argue that from among the legal transactions in which one can find a pecuniary payment which is made to discharge the binding legal relationship, we list *the payment by subrogation, the imputation of payment, the offer of payment and the consignment and the assignment of the debt*[1].

Thus, with regard to **the subrogation** - which is the object of our analysis, we can say that, from a terminological perspective, the term entered the Romanian lexicon from French, *subrogation*, which in turn took it from the Latin *subrogare*, meaning *replacement* or *substitution*.

In a broad legal sense, subrogation is of two kinds, namely, the actual subrogation, which designates the replacement, in a given patrimony, of

1 As far as the assignment is concerned, we also state that under the old rules, the Civil Code of 1865, even though it was not expressly provided for, one could make the assignment of debt, which the new civil code of 2011 regulates distinctly.

an asset with another one or of an economic value with another one, taken individually, and the personal subrogation, which in a broad sense it means replacing one person with another one in a legal relationship.

On the contrary, in a narrow legal sense, the personal subrogation is defined as being a transfer of debt made through a payment. In other words, the personal subrogation is that payment transaction of a debt, in whole or in part, by a third party on behalf of the debtor.

If the conditions of the subrogation are fulfilled, the third party who has made the payment (solvens) is subrogated to the rights of the original creditor (who received the payment), and the debtor discharged in relation to the original (subrogating) creditor by the payment made by the third party (subrogated), shall be held for payment to the latter (Mestre, 1979).

In relation to these considerations, we shall summarize, in the following, the analysis of the personal subrogation consisting in transferring the claim from the subrogating creditor to the third party paying the debt, also called the subrogated creditor.

In the civil code of 1865, the subrogation payment is regulated by articles 1106-1109, in relation to which it can be defined as that legal transaction consisting in replacing the original creditor from a binding legal relationship with another one that paid the debtor's debt, thereby acquiring the creditor's debt with all its accessories.

The new civil code regulated *the subrogation* in Title VI, Chapter II, articles 1593-1598, which makes it mainly represent a way of payment of an obligation and, alternatively, a way of transferring the debt (Terre, Simler, Lequette, 1999, p. 1408; Malaurie, Aynès, Stoffel-Munck, 1999-2000, p. 733).

Given that our scientific approach aims to analyze the legal forms of payment both from the perspective of the regulation of the old civil code and of the new civil code, we shall proceed to the analysis of each institution, in the first part, from the perspective of the previous regulation, and, in the second part, from the perspective of the current regulation.

Thus, in relation to the legal provisions governing it, the subrogation appears as a hybrid legal operation (Larroumet, 2003, pp. 338-339), meaning that, on the one hand, this is a way of discharging a debt by means of payment and, on the other hand, as a means of transmitting the original debt, with all its accessories, to the patrimony of the paying third party.

In the modern doctrine, it has been appreciated that, *in terms of business matters*, one focuses on the translative effect of the debt and it has been argued

that subrogation payment is a legal means of transmitting the debt right along with its correlated payment obligation (Malaurie, Aynès, Stoffel-Munck, 1999-2000, pp. 713-725; Larroumet, 2003, pp. 337-367).

As far as we are concerned, we, *basically*, agree with this point of view, only that we believe that *the function of discharging the original payment obligation should not be either neglected*, because, by this operation, satisfaction is given to all the parties involved, respectively to the original creditor who witnessed the cashing of his / her debt, to the debtor who so avoided his pursuit by the original creditor in order to make the payment and thus obtains a postponement of the payment, and, last, but not least, to the paying third party who subrogates in the rights of the original creditor and it thus has the opportunity to make an advantageous placement.

Under regulatory rules, subrogation in the creditor's rights by paying the debt instead of the debtor is of two kinds, namely *conventional and legal* (Pop, 1998, p. 462). In other words, in order to be in the presence of a personal subrogation in the rights of the original creditor, it is not sufficient for a third party to pay the debtor's debt, but there must be either a convention in which such a possibility is mentioned or the payment falls within one of the subrogations provided by the civil code.

Thus, while the conventional subrogation is always the result of an agreement concluded either between the paying third party and the paid creditor, or between a third party who has made available to the debtor the necessary funds or the necessary means of payment and the debtor of the binding legal relationship, the legal subrogation operates as of right, without the consent of the paid creditor or of the debtor whose debt is paid.

The subrogation agreed by the creditor or ***ex parte creditoris*** is the most common form in practice. By virtue of the consent of the original creditor to receive the payment of the debt from a person other than his / her debtor, he / she transfers to the payer's patrimony, in return for payment, the debt to his / her debtor with all the accessories and shares existing at the time of payment.

Such a legal operation is regulated by article 1107, point 1, of the civil Code (1865), according to which *„whenever the creditor, receiving the payment from another person, gives to that person his / her rights, shares, privileges or mortgages against the debtor; this subrogation must be express and done at the same time with the payment"*.

Passing on to the analysis of the invoked law, it follows that, in order to be in the presence of a subrogation agreed by the creditor, the following conditions must be met cumulatively:

a) granting consent by the original (subrogating) *creditor*, to agree with the subrogation. In order to grant his / her consent, it is necessary for the paid creditor to express himself / herself outright and directly, meaning he / she agrees with the subrogation. If the subrogating person cannot personally appear to grant his / her consent, he / she may empower a representative to do so on his / her behalf. The debtor's consent in the original legal relationship is not necessary since he / she is not a party to this convention which is to be concluded between the original creditor and the paying third party;

b) granting consent to subrogation at the same time as payment. The condition imposed by the legislator is correct, because the subrogation, as we have shown, is a transfer of a debt conditioned by its payment. As such, it is not valid as a subrogation, the agreement where the original creditor transfers the debt to the third party before the debt is paid by the latter. Such a convention could, at the very most, be qualified as a subrogation promise or assignment of debt. Nor is the convention worth subrogation under which the original creditor agrees with the paying third party to transfer the debt to him / her after the payment has been made, since, in such a situation, the original creditor no longer has a debt in his or her patrimony, as it is discharged by payment. In other words, after making the payment in the original creditor's patrimony, there is no longer any right of debt because it ceased to exist on receipt of the payment and, as a consequence, it has no longer anything else to transmit to the patrimony of the paying third party;

c) unambiguous expression of the intention of subrogation. By this condition, any intention of tacit subrogation is removed. In this case, the agreement to achieve the subrogation must not contain terms or words that generate ambiguity, such as "I assign" or "I transmit" (Pop 1998, p. 261). In the doctrine, it was appreciated that the expression that best meets the requirements of the subrogation is the following one: "*I subrogate in my rights*".

Given that the subrogation is a consensual agreement, the verbal agreement between the original creditor and the paying third party is worth subrogation, provided that acceptance is express. However, in order to protect

the subrogated person's rights, he / she must resort to the production of an evidence of the subrogation agreement in order to be able to notify it to the debtor. Without notifying the subrogation agreement and its probation, the debtor may ignore the subrogation - being defended by the principle of the validity of appearances in law - and he / she can be freely discharge by paying to the subrogate.

In such a situation, the subrogated person is interested in producing evidence of the subrogation agreement that he / she must notify to the debtor. Regarding the proof of the subrogation agreement, we maintain that it must be recorded in an authentic document or under private signature.

If a document under private signature was opted for in order to prove that the subrogation was achieved in the same time with the payment of the debt, but also for the *erga omnes* opposition, it is necessary for the document to bear a certified date, according to the express provisions of article 1182 of the civil Code.

Given that, in practice, we come across countless situations in which *the ex parte creditoris* subrogation is recorded in a handwritten or typed receipt - *appropriated under the signature of a subrogating person and a subrogated person* - which contains the payment of the debt and the subrogatory expression, the condition of the certified date stays valid for the *erga omnes* opposability.

There is only one exception to this rule, which concerns the debtor who is not a third party as to the handwritten document, which establishes the subrogatory agreement because his / her legal situation does not change by transferring the debt from the subrogating person to the subrogated person, which is why the assignment it is opposable to him / her and without bearing a certified date.

In light of **the new civil code**, according to article 1594 of the new civil Code, **the subrogation agreed by the creditor** also operates through the agreement of will achieved between the original creditor and the paying third party. The draft law does not require the debtor's consent to be necessary for the validity of the subrogating *ex parte creditoris* agreement.

However, it should be emphasized that paragraph 2 of article 1594 of the new civil Code, according to which „*the subrogation operates without the consent of the debtor and any* ***contrary stipulation*** *is considered unwritten"*, has an unfortunate wording and contrary to the provisions of article 1474, paragraph 2, of the new civil Code, as are, in fact, many of the regulations contained by the new civil Code.

Thus, according to article 1474 of the civil Code, paragraph 2, „*the creditor may refuse payment made by a third party if the nature of the obligation or* ***the agreement of the parties*** *requires that the obligation must be enforced only by the debtor*". As it can be seen, the legal provisions regarding the payment allow the parties to agree as to the person that must pay in a binding legal relationship, a convention unrecognized in the matter of conventional subrogation agreed by the creditor.

As far as we are concerned, we maintain that the phrase „or the parties' convention" contained in paragraph 2 of article 1474 should be considered unwritten. Our opinion is based on the teleological interpretation of article 1594, paragraph 2, of the final thesis and article 1474, paragraph 2, of the new civil Code, from the perspective of the rule of *lex posteriori derogate priori* law. In other respects, we argue that, out of the corroborated interpretation of article 1593, paragraph 3, the final part, and article 1594, paragraph 1, both from the new civil Code, the *ex parte creditoris* subrogation must be expressly stipulated and made at the time of payment.

As it can be seen, the new civil code has neither explicitly required that the document admitting the subrogation agreement agreed by the creditor expressly bears a certified date. However, we believe that for the avoidance of fraud of the other creditors of the debtor, it is necessary that the document proving the subrogatory agreement agreed by the creditor bears a certified date (Ghestin, Billiau, Loiseau, 2005, p. 389). Otherwise, it is only opposable to the parties to the agreement.

The subrogation agreed by debtor or ***ex parte debitoris*** is regulated by article 1107, point 2, of the civil Code (1865), and we are in its presence *"when the debtor borrows an amount of money in order to pay his / her debt and he / she subrogates the lender to the creditor's rights. In order for this subrogation to be valid, the loan document and the receipt before the court must be made, one must state in the loan document that the amount has been received in order to make the payment, and in the receipt one must state that the payment was made with the money given for it by the new creditor. This subrogation is operated without the creditor's will"*.

According to the draft law, the *ex parte debitoris* subrogation is made when the debtor borrows an amount of money in order to pay his / her debt to the original creditor and he / she subrogates the lender to his / her rights (Alexandresco, 1898, pp. 604-616; Popescu and Anca, 1968, p. 30; Larroumet, 2003, pp. 348-351; Flour, et al. pp.. 231-232).

In this case, the parts of the subrogatory legal relationship bear the name of *subrogating person* (the original debtor) and *subrogated person*, the third party from which the amount of money for the payment of the debt is borrowed.

The original creditor is not part of a, *ex parte debitori* subrogatory legal relationship, and this is precisely why his / her consent is not necessary. At the same time, the original creditor can neither refuse to pay his / her debtor's debt, and, in case he / she refuses, he / she has available the procedure of the actual payment offer followed by a note that has a liberating effect.

In the legal literature and the case-law, it was admitted that the possibility to subrogate *ex parte debitoris* belongs to any person who is obliged to pay the debt together with the debtor and not only outright and directly to him / her. Such persons, who may have the initiative of a subrogatory agreement, are the heir who accepted the succession under the inventory benefit, the guarantor or the holder of a mortgaged property.

Whenever such a person pays the debtor's debt from his / her own funds, he / she operates the legal subrogation, the payer being subrogated as of right to the paid creditor's right and actions. However, if the original debt is paid with an amount of money borrowed from a third party, the lender may be subrogated *ex parte debitoris* in the rights of the paid creditor.

Due to the fact that the *ex parte debitoris* subrogation has an exceptional character, this type of subrogation has imposed on it by the law a series of more stringent conditions than the *ex parte creditoris* subrogation.

Thus, according to the provisions of article 1107, point 2, theses II and IV, for the validity of the *ex parte debitoris* subrogation, the following conditions must be met cumulatively:

a) the document proving the loan from the subrogated person and the receipt of payment of the debt to the original creditor must be signed in an authentic form. Hence, it results the fact that such a contract which establishes the *ex parte debitoris* subrogation is an authentic document, which makes the non-compliance with the solemn form of this contract to be penalized with absolute nullity. Similarly, we argue that, if such a contract is concluded by the representatives, they must have a genuine mandate;

b) in document proving the loan, it must be clearly and unequivocally stated that the amount was borrowed for the payment of a debt to an individualized creditor;

c) in receipt containing the debt payment, which must be signed and dated by the paid creditor, it must be clearly and unequivocally stated that the payment was made with the amount borrowed from the subrogated person in this respect. As to this mention, we rally to the opinion expressed in the doctrine (Pop, 1998, p. 263), according to which such an indication must be made in the contents of the receipt in full discharge of its liabilities, for the validity of the subrogatory legal relationship. And such a mention made, even in an authentic form, but on a separate document, does not produce the effects of subrogation. At the same time, we believe that, in order to find ourselves in the presence of a subrogatory *ex parte debitoris* legal relationship, it is necessary to make the receipt in full discharge of its liabilities at the same time as the payment. If this is made after the payment, it is devoid of legal effects because, at that time, the claim was cancelled, and in the patrimony of the paid creditor there was no longer any right of claim and, consequently, there was nothing to transfer to the patrimony of the subrogate (Hamangiu and Georgean, p. 84).

In relevant doctrine and case-law (Popescu and Anca 1968, p. 301) it was stated that the subrogatory *ex parte debitoris* legal relationship can be found by a single document, which must contain the mandatory particulars stipulated by the law both for the loan and for the payment receipt.

According to **the new civil code**, according to the provisions of article 1595, **the subrogation agreed by the debtor** takes place as a result of the agreement of will between the debtor and the third-party lender who puts funds at the disposal of the holder of the pecuniary obligation for its payment, thus subrogating the lender to the rights of the original creditor.

For the validity of the agreement, the creditor's consent is not required. In the event that the latter refuses the payment, the debtor has the option of formal notice opened, which, after being validated by the court, has a liberating effect on the debtor. However, given the exceptional nature of this type of subrogation, in order to prevent creditors from being defrauded, article 1595 of the new civil Code established, as the old regulation, a series of three conditions for its validity.

Thus, according to the new regulation, it is necessary also in the previous regulation:

a) a loan document and a debt payment receipt to be drawn up, with the distinction that both the loan document and the debt payment receipt must bear a certified date;

b) to be expressly specified in the loan agreement that the debtor has borrowed the amount of money to pay the debt to the creditor;

c) the payment receipt expressly indicates that the payment has been made with the amount of money borrowed from the third party debtor, which is, thus, subrogated to the paid debtor.

As it can be seen, the only difference between the old regulation and the current one is that the latter is more permissive in that the loan document and the payment receipt do no longer have to be concluded in authentic, notary form, but it is sufficient to bear only a certified date.

In conclusion, subrogation is a legal instrument that is part of the category of legal forms of payment, on the basis of which the interested party can completely or partially extinguish a obligational legal report – usually the most expensive, and of interest, thus enabling the economic operator to continue the activity.

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