

THE EFFECTS OF THE ASSIGNMENT OF THE DEBT WITHIN THE FORCED EXECUTION

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Abstract

Enforcement, considered as a component part of the civil process, must provide the participants with the guarantees they benefit from at the trial stage, obviously, adapted to the context and specificity of this procedure. The enforcement appeal represents the legal mechanism through which both the creditor and the debtor can submit to the analysis of the court, more precisely, the enforcement court, the irregularities produced in this procedural stage. The assignment of the claim that is the object of the forced execution produces specific effects in this procedural stage considering also the special regulations existing in this matter, determined by the specifics of the enforceable title underlying the request for enforcement.

Taking into account the fact that the assignment of the claim determines the change of the creditor's person, it is understandable that the effects produced are major for the debtor, but also for the forced execution, viewed as a whole. Next, the institution of the assignment of the debt, as it is regulated by the Romanian Civil Code, will be briefly presented, but also its effects, in forced execution, by reference to the time when the assignment takes place and by reference to the notification or non-notification of the debtor regarding the assignment, in one of the ways provided by law.

Keywords: *assignment, debt, notification, execution, enforcement.*

1. Introduction

The Civil code regulates in the content of article 1566 assignment of the claim as a way of transmitting the claim. Thus, the assignment of a claim is the agreement by which the assigning creditor transmits to the assignee a claim against a third party, the debtor. Being a contract, the assignment of a claim must meet the general conditions of validity of any contract.¹

Following an assignment of a claim, according to art. 1568 Civil Code, the following are transferred to the assignee: a) all the rights that the assignor has in connection with the assigned claim; b) the guarantee rights and all the other accessories of the assigned claim. Therefore, although apparently, in the case of the assignment of a claim, only the active subject of the legal relationship changes, as will be shown below, effects may also occur on the object of the assignment when it concerns a claim arising from a credit agreement with a consumer.

2. Opposability of the assignment to the debtor

The legislator provided a condition to ensure the enforceability of the assignment to the debtor, taking into account the fact that the debtor is not a party to the contract by which the claim was transmitted.

According to art. 1578 Civil Code, the debtor is required to pay the assignee from the moment he either accepts the assignment by a document with a certain date, or receives a written communication of the assignment, on paper or in electronic format, showing

the identity of the assignee, identifies reasonably assigned the assigned claim and the debtor is required to pay the assignee. In the case of a partial assignment, the extent of the assignment must also be indicated. Before accepting or receiving the communication, the debtor can only be released by paying the initial creditor.

The acceptance of the assignment by the debtor, through a document with a certain date, or the notification of the debtor regarding the assignment of the receivable occurred, determines the effects of the assignment also towards the debtor, and not only towards the parties of the assignment contract. Before carrying out the formalities of opposition, according to art. 1575 Civil Code, the assignment of debt produces effects between the assignor and the assignee, and the latter can claim everything that the assignor receives from the debtor. It should be noted that the transferee cannot claim payment from the assigned debtor directly, but has the possibility to request from the transferor everything he receives from the assigned debtor, in theory, the voluntary payments made by the debtor. The latter conclusion follows from the fact that, as regards the relationship between the transferor and the transferee, the effects occur from the time the transfer is concluded, so that after that time the transferor could no longer request a possible enforcement of the debtor.

Following the completion of the aforementioned enforceability formalities, the debtor may oppose to the assignee all the means of defense that he could have invoked against the assignor. Thus, he can oppose the payment made to the assignor before the assignment has become opposable to him, regardless of whether or

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¹ Gabriel Boroi, Mona-Maria Pivniceru, Carla Alexandra Anghelescu, Bogdan Nazat, Ioana Nicolae, Tudor-Vlad Rădulescu, Civil Law Files, 3rd Edition, Hamangiu Publishing House 2018, Bucharest.

not he is aware of the existence of other assignments, as well as any other cause of extinction of obligations occurred before that moment (art. 1582 Civil Code).

3. Assignment of a claim occurred prior to the start of the enforcement procedure

The assignment of a debt can take place both before the beginning of the debtor's forced execution, but also after. In the first case, respectively of the assignment of the claim prior to the beginning of the forced execution, in the national jurisprudence it is often encountered the case when, by way of contesting the execution, the debtor invokes the lack of creditor quality of the assignee. In such situations, two opinions emerged. Before submitting to the attention of the two opinions, as a preliminary point, it must be pointed out that contesting the lack of creditor status of the assignee, in relation to the lack of enforceability, is equivalent to contesting the enforcement itself, and the deadline for filing the enforcement appeal is the one provided by art. 715, paragraph 1, Code of Civil Procedure².

Returning, the first of the opinions materializes in the rejection as unfounded of this criticism considering the arguments that will be presented below. Thus, it is considered that, without requesting the annulment of the assignment of a claim, between the assignor and the assignee it is valid and produces its effects, the main effect being that of transferring the claim from the assignor's assets to that of the assignee. Therefore, since the transfer of the claim has taken place, the new creditor is the transferee. Reference is also made to the fact that the non-opposability of the assignment to the assigned debtor does not amount to the non-existence or invalidity of the assignment. Considering that according to art. 645 paragraph 1 of the Code of Civil Procedure, the debtor and the creditor are parties in the enforcement phase, it is unfounded to invoke the annulment of enforcement acts performed based on the enforcement request made by the current creditor, even in the absence carrying out the formalities of opposability of the assignment of claim against the debtor. Furthermore, also as an argument in the sense of rejecting the enforcement appeal for this reason, respectively the lack of creditor status of the transferee,

are the provisions of art. 704 Code of Civil Procedure, according to which failure to comply with the enforcement itself or any act of execution attracts the nullity of the illegal act, as well as of the subsequent execution acts, the provisions of art. 174 and the following being applicable accordingly. According to art.175 paragraph 1 of the Code of Civil Procedure The procedural act is struck by nullity if by non-compliance with the legal requirement an injury has been brought to the party which cannot be removed except by its abolition. In most cases, the debtor cannot prove an injury caused by the failure to carry out the formalities opposable the assignment, prior to the start of the enforcement procedure, given that he does not prove that he wished to pay or paid the outstanding debt to the initial creditor, respectively, to the assignor. According to art. 1578 Civil Code, before accepting or receiving the communication, the debtor can only be released by paying the transferor. Moreover, even if the debtor proves such payment of the debt to the assignor, he could invoke by way of the enforcement appeal the provisions of art. 1582 paragraph 1 of the Civil Code, whose provisions have been seen previously.

It should be mentioned that, within this opinion, there is not considered to be a case of nullity, unconditioned by the existence of an injury, among those provided in art. 176 Code of Civil Procedure

In this situation it should be pointed out that according to art. 1580 Civil Code, when the assignment is communicated together with the action filed against the debtor, he cannot be ordered to pay the costs if he pays by the first term, unless, at the time of the assignment, the debtor was already late. Based on this principle, it could be concluded that if the debtor is communicated for the first time the assignment of the claim together with the enforcement documents³, and the debtor pays within a reasonable time at this time, he could no longer be obliged to the eventual execution expenses incurred, a conclusion which is in contradiction with the provisions of art. 670 of the Code of Civil Procedure, which, in essence, does not absolve the debtor from the payment of enforcement costs even if he has executed the obligation immediately or within the term granted by law. It should be noted, however, that in the latter situation, the legislator provided that the debtor will be required to bear only the expenses for the enforcement acts actually performed, as well as the

² According to art. 715 Code of Civil Procedure, Unless otherwise provided by law, the appeal regarding the actual enforcement may be made within 15 days from the date when:

1. the appellant has become aware of the enforcement act he is challenging;
2. the interested party has received the communication or, as the case may be, the notification regarding the establishment of the seizure. If the attachment is established on periodic income, the term of appeal for the debtor begins at the latest on the date of the first withholding of this income by the seized third party.
3. the debtor contesting the enforcement itself has received the enforcement order or the summons or from the date on which he became aware of the first enforcement order, in cases where he has not received the enforcement order and the summons or enforcement is made without summon.

³ According to art. 667 and art. 668 Code of Civil Procedure 1) If the request for execution has been approved, the bailiff will communicate to the debtor a copy of the conclusion given under the conditions of art. 666, together with a copy, certified by the executor for conformity with the original, of the enforceable title and, unless the law provides otherwise, a summons (2) Communication of the enforceable title and summons, unless the law provides that the execution is made without summons or without communication of the enforceable title to the debtor, it is provided under the sanction of nullity of execution. The debtor will be summoned to fulfill his obligation, immediately or within the term granted by law, with the indication that, otherwise, enforcement will continue.

fee of the bailiff and, if applicable, the creditor's lawyer, in proportion to the activity of these.

In the second outlined opinion, it is noted that the lack of enforceability before the start of enforcement, does not give the transferee the right to request enforcement of the debtor, lacking the status of creditor. Therefore, not being a creditor, the transferee does not have a certain, liquid and due claim against the debtor on the basis of which to request enforcement. Also, in the enforcement appeal is invoked, in many cases, the nullity of the decision approving the forced execution based on art. 666 paragraph 5 point 4 or 7 of the Code of Civil Procedure, the impediment consisting precisely in the lack of the quality of creditor of the one who formulated the request for forced execution. Considering the chronological order of solving the request for approval of the forced execution, respectively, of a possible contestation to the execution, obviously, if the court invested with the request for approval of the forced execution rejects the request in the absence of proof of communication of the assignment of the claim to the debtor, this aspect could no longer be the subject of the enforcement appeal for the simple reason that in the absence of the approval of the enforcement it is not possible to proceed with the procedure, the debtor not being notified about the start of the enforcement. On the other hand, if the court of execution admits the request for approval of the forced execution, this fact does not determine an inadmissibility of the invocation of the lack of creditor quality of the one who initiated the forced execution, by way of contesting the execution, the provisions of art. 712 par. 3 Civil Procedure Code⁴, being edifying in this case.

Regarding the fact that the enforcement court invested with solving the request for approval of enforcement could analyze whether the debtor was notified of the transfer, during the Meeting of the presidents of the civil sections of the courts of appeal - Court of Appeal Cluj, 13-14 October 2016 and the meeting of the representatives of the Superior Council of Magistracy with the presidents of the civil sections of the High Court of Cassation and Justice and the courts of appeal - Pitești, November 14-15, 2019, it was established that the enforcement court is obliged to verify the assigned debtor, under the sanction of rejecting the application for approval pursuant to art. 666 paragraph (5) § 4 C. proc. civ., at least in the event that the assignment of the debt was concluded after the entry into force of the new Civil Code. The right to claim payment from the assigned debtor cannot be justified in the transferee's patrimony, as a right really relative to the assigned debtor, in the absence of a prior communication, reason for which, in case of an

assignment before the bailiff, the proof of communication the assignment must be submitted to the enforcement file. In its turn, the enforcement court, in order to ascertain the quality of the assignee of the current creditor of the assigned debtor, must have it at its disposal, in the file formed for the approval of the forced execution, together with the enforcement request, the enforceable title and the assignment. In the absence of notification to the debtor, not having the right to claim payment, although the claim was assigned to him, the assignee has even less the right to claim a forced payment, through the enforcement procedure initiated by notifying the bailiff.

4. Assignment of a claim during enforcement

In the second situation analyzed, the assignment of the claim occurs during the enforcement, the hypothesis being that in which the original creditor started the enforcement, and subsequently the assignment of the claim occurred, the assignee taking over as creditor. In this case more clarification is needed. Thus, if the approval of the enforcement was admitted in relation to the original creditor, respectively the assignor, a new approval of the enforcement would not be necessary, taking into account the person of the transferee, without any legal provision imposing this. Moreover, High Court of Cassation and Justice, by a decision of the panel for the resolution of certain legal issues⁵, established that the amendment of the original parts of the legal act constituting an enforceable title does not affect the substance of the enforceable title, the assignee's position being that of a true private successor, which thus takes over all the rights that the assignor had in connection with the claim.

However, the opposite opinion was also presented in the doctrine, in the sense that it is necessary to approve the forced execution also in relation to the new creditor⁶.

On the other hand, with regard to the possible formulation of an enforcement appeal requesting the annulment of the enforcement acts performed in relation to the person of the transferee, it should be noted that the formulation period will start to run from the moment the debtor will be notified of the first enforcement acts in which the new creditor is mentioned. This conclusion is undoubtedly clear from the provisions of art. 715 Code of Civil Procedure. Even if this ground of appeal concerns enforcement itself, it cannot be ignored that the debtor was not notified of the change of the person of the previous creditor.

⁴ Also, after the beginning of the forced execution, those interested or injured can request, by way of the contestation to the execution, also the annulment of the conclusion by which the request for approval of the forced execution was admitted, if it was given without fulfilling the legal conditions.

⁵ HCCJ, Panel for resolving legal issues, Decision no. 3/14.04.2014 (Official Gazette No. 437/16.06.2014).

⁶ Curierul Judiciar Magazine, no. 11/2019, Assignment of bank receivables in the forced execution phase of debtors. The need to go through a new procedure for approving the forced execution by the new creditor, Asist. univ. dr. Răzvan Scafeș, Faculty of Law, University of Craiova.

Another aspect is to establish whether the opposability of the assignment is achieved through the very notification issued by the bailiff and in which the name of the assignee is mentioned. Considering the provisions of art. 1578 paragraph 1 letter b) of the Civil Code, it is noted that from the notification it is necessary: to be able to identify the entity of the assignee and, reasonably, the assigned claim and to ask the debtor to pay the assignee. Therefore, if the notice issued by the bailiff contains all these elements and is sent in writing to the debtor, even if the summons does not emanate from the creditor, it could produce the effects of a notification on the assignment of the claim, respectively the opposability of the assignment to the debtor. However, the aspects previously analyzed in the case of the assignment before the start of the forced execution, are valid, in the sense that in this case at least one execution act was issued, respectively the summons / notification of setting up the seizure, and at the time of issuance, the assignment was not opposable to the debtor.

If the writ of execution consists of a credit agreement for consumers and the provisions of Emergency Ordinance no. 50/2010 are applicable, there are other effects and rules for notification of the assignment of the claim resulting from this contract, rules presented in Article 70⁷. Therefore, the rules in the case of the assignment of a claim arising from a credit agreement granted to a consumer are different, precisely for the purpose of effective consumer protection. First of all, it is noted that the legislator has established who can be the assignee, only receivables resulting from non-performing credit agreements for which the creditor declared the early maturity or initiated the foreclosure procedure, can be assigned to entities carrying out the activity of debt recovery. Therefore, if the assignment of a debt occurred during

the forced execution, then the assignee may also be an entity whose object of activity is the recovery of receivables. Also regarding the entities having as object the activity of debt recovery, the legislator established the fact that it is forbidden to charge commissions, interest and penalty interest, except for the legal penalty interest, by them⁸.

Regarding the notification of the assignment of a debt to the debtor, there are special rules resulting from the provisions set out above. All these rules are issued in order to protect the consumer. Infringement of any of the above rules may be invoked by way of an enforcement appeal in support of the assignee's lack of creditor status.

It should also be mentioned that although according to art. 713 second paragraph of the Code of Civil Procedure⁹, regarding the forced executions started after the entry into force of Law no. 310/2018 by which amendments were made to the Code of Civil Procedure, in principle, no criticism can be made on the merits of the right contained in the writ of execution, this does not mean that the debtor could not invoke the lack of creditor status of the assignee because the writ of execution is not represented by the assignment contract.

5. Conclusions

The assignment of the claim that is the object of the forced execution produces effects both on the level of the material law, but also on the level of the procedural law, if the forced execution was started for the recovery of the claim and if a possible opposition to enforcement was formulated. Compliance with the formalities of opposability of the assignment of debt to the debtor is necessary both to respect the rights of the

⁷ (1) In cases where the credit agreement itself or only the receivables resulting from a credit agreement are assigned, the consumer has the right to invoke against the assignee, any means of defense to which he could resort (2) Credit agreements and receivables resulting from them may be assigned only to creditors, as defined in art. 7 pt. 5. (3) By exception from the provisions of par. (2), receivables resulting from credit agreements may also be assigned to entities whose object of activity is the issuance of securitized financial instruments based on a portfolio of receivables, in accordance with the provisions of Law no. (4) By exception from the provisions of par. (2), the receivables resulting from the non-performing credit agreements, for which the creditor declared the early maturity or initiated the enforcement procedure of the consumer, may be assigned to entities carrying out the debt recovery activity, as defined in art. 7 pt. 17. Further, according to art. 71 (1) The consumer is informed about the assignment provided in art. 70. The assignment, individually or within a receivables portfolio, becomes opposable to the consumer by the notification addressed to him by the assignor. (3) The assignment shall be notified by the assignor to the consumer, within 10 calendar days from the conclusion of the assignment contract, by registered letter with acknowledgment of receipt. (4) The notification shall be written in writing, in a clear, visible and easy-to-read language, the font used being Times New Roman, minimum size 12, on paper, and shall mention at least the following: a) name and contact details, including the telephone number, fax, e-mail of the creditor, of the entity that will collect from the consumer the amounts for the repayment of the credit after the assignment, as well as and, as the case may be, of its representative in Romania, b) the name of the original creditor from whom the claim was taken over, c) the date on which the assignment was made; d) the amount of the amount due and the documents attesting this amount, e) the accounts in which the payments will be made. (5) In addition to the obligations provided in par. (4), the entities carrying out the debt recovery activity shall warn the consumer about: a) the term in which the consumer contacts the entity carrying out the debt recovery activity. This period may not be less than 5 working days from the date of receipt of the notification by the consumer, b) the consumer's right to send to the entity carrying out the debt recovery activity a complaint of the existence of the debt or its amount within 30 calendar days c) the consumer's right to receive a reply within 15 calendar days to the appeal, d) the consumer's right to go directly to court if he disputes the existence of the debt or its amount; that the non-challenge by the consumer, within 30 calendar days, of the debt does not constitute an acknowledgment of the amount by him and does not deprive the consumer of the right to go to court (6) Representatives of the entities carrying out the activity of debt recovery declines its identity and, where appropriate, legitimizes itself when addressing consumers.

⁸ Art. 71² letter b) Emergency Ordinance no. 50/2010: It is prohibited: b) the collection of commissions, interests and penalizing interests, except for the legal penalizing interests, by the debt recovery entities.

⁹ If enforcement is effected on the basis of an enforceable title other than a judgment, grounds of fact or law regarding the substance of the right contained in the enforceable title may be invoked in the enforcement appeal only if the law does not provide in relation to that enforceable title a procedural way for its abolition, including a common law action.

assigned debtor, but also to avoid legal action, especially enforcement appeals, which generate other costs for the parties, but also, possibly, the delay in clarifying the legal situation between the parties.

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