THEORETICAL AND PRACTICAL ISSUES CONCERNING THE RECOGNITION OF THE RIGHT OF A LEGAL PERSON TO BRING A DIRECT CLAIM BASED ON ART. 1856 CC

Cristian-Răzvan CERCEL[*]

Abstract

A direct claim is a situation in which, according to the law, a person, called the plaintiff, sues another person, called the defendant, with whom he is not in a contractual relationship, the former being in a contractual relationship with another person, with whom the defendant is also in a contractual relationship. In other words, the right of direct claim recognizes, in those cases expressly and restrictively provided for by law, the possibility for the creditor to claim enforcement of his claim directly from a debtor of his debtor, even though the creditor was not a party to the contract concluded between his debtor and the debtor.

Direct claim is a remedy for unfair consequences arising from the rigidity of the principle of the relativity of contract effects.

This paper aims to point out the main arguments and to present the case law on the subject, for which the right of legal persons to a direct claim based on the provisions of art. 1856 CC is recognized. The case law interpretation of the article in question shows a modern vision applied to the current economic and social reality.

Keywords: *direct claim, public procurement, worker, enterprise, legal person, natural person.*

1. Introduction

A direct claim is a civil action, expressly provided for by law, by which the creditor is entitled to bring it, claiming enforcement of his claim directly from the debtor of his debtor, although the plaintiff is not a party to the contract concluded by his own debtor with the defendant.

In this paper we will focus our attention, firstly, on the general aspects of direct claims (*i.e.*, characterization, delimitation, scope, conditions, effects etc.), and, secondly, on one of these direct claims, namely the one regulated by the provisions of art. 1856 CC.

The direct claim based on the provisions of art. 1856 CC is specific to the contract of entrepreneurship (*i.e.*, works contract) and concerns the possibility for the „worker" to act directly against the beneficiary.

Even after the entry into force of the current Civil Code, doctrine and court practice interpreted the notion of „worker" in a restrictive sense, in the sense that subcontractors, legal persons, were not recognized as having the possibility of directly suing the beneficiary of the contract.

In relatively recent court practice, however, it has been rightly concluded that this right should also be recognized for legal persons.

We believe that this vision is a topical one, which corresponds to today's economic and social needs and represents an important step in facilitating commercial relations between the parties involved in the legal relationships governing the hypothesis set out above.

This paper sets out the main arguments for recognizing the sub-contractor's right to bring a direct claim against the beneficiary. At the same time, the analysis also considers the contacts of the contractor in the field of public procurement with the specific regulations on the subject.

2. Concept, delimitations, and rationale

As stated in the previous paragraphs, the direct claim recognizes the possibility for the creditor to take legal claim directly against the debtor of his debtor, without there being a contractual relationship between them.

Before proceeding to detail the mechanism of operation of the direct claim, it is necessary to recall the principles of the effects of the civil legal act. According to the doctrine[1] , the principles of the effects of a civil

[*] PhD Candidate, Faculty of Law, „Nicolae Titulescu" University of Bucharest (e-mail: ccristianrazvan@gmail.com).

[1] See G. Boroi, C.A. Anghelescu, *Curs de drept civil. Partea Generală*, 3rd ed., revised and added, Hamangiu Publishing House, Bucharest, 2021, p. 225.

legal act are those rules of civil law which indicate how these effects are produced, *i.e.*, how, under what conditions and in relation to whom these effects are produced.

Although there is no unified point of view in the literature on the number of principles governing the effects of the legal act, we believe that there are three of them, namely: the principle of binding force [art. 1270 para. (1) CC], the principle of irrevocability [art. 1270 para. (2) CC] and the principle of the relativity of the effects of the legal act (art. 1280 CC).

For the purpose of this paper, the last principle stated, namely the principle of the relativity of the effects of the civil legal act, is of importance. This principle refers to the rule according to which a civil legal act produces effects only between the contracting parties or towards its author and without benefiting or harming third parties[2] .

From the principle of the relativity of the effects of the civil legal act, certain exceptions can be distinguished, some of which are genuine and others only apparent.

Two divergent views have emerged in the literature on the apparent or genuine nature of direct claim as an exception to the principle in question.

On the one hand, it has been argued that a direct claim is a genuine exception to the principle of the relativity of the effects of the civil legal act[3] , and on the other hand, some authors consider that a direct claim is only an apparent exception. In support of the latter view, it is stated that: *„(...) in the case of a direct claim, the plaintiff's possibility of claiming a subjective right, invoking a legal act to which he is not a party, does not arise from that legal act, but springs from the law, and the defendant does not owe the plaintiff a more onerous duty than that in the legal act to which he is a party (...) so that we are in the presence of an apparent exception to the principle of the relativity of the effects of the* civil *legal act*"[4].

As far as we are concerned, although this distinction is one of theory and principle, without much practical implication, we endorse the second view expressed.

In any case, three persons are involved in setting up the specific mechanism of the direct claim: (i) **the creditor**, who is also the holder of the direct claim; (ii) **his immediate** (direct) **debtor**, also called the **intermediate debtor**; and (iii) the **debtor of the intermediate debtor** (called the sub-debtor).

Two distinct legal relationships arise between these three persons, as follows:

- a legal relationship between the creditor and his direct debtor; and
- a legal relationship between the intermediary debtor and its debtor.

Accordingly, there is no direct legal relationship between the creditor (claimant) and the debtor of his debtor (defendant).

The direct-claim mechanism allows the creditor to take advantage of the binding force of the contract between the intermediary debtor and his co-contractor.

It has been held in the doctrine that „the *immediate effect of a direct claim is to immobilize in the assets of the intermediary debtor the claim he has against the sub-debtor, which thus becomes exclusively assigned for the payment of the direct creditor. The creditor - the holder of the direct claim - is thus able to avoid the other creditors of the intermediary debtor and obtain payment of his claim directly from the sub-debtor as debtor of* his *debtor*"[5].

Payment made directly to the creditor by the sub-debtor will have the effect of writing off the debt both to the intermediary debtor and to the creditor who sued him.

Therefore, the basis of the direct claim is conferred by the law as a result of the existence of the two distinct contracts, which create in the creditor's assets the subjective right to claim directly from the sub-debtor the performance of an obligation (*e.g.*, payment of a sum of money).

Finally, we stress that direct claim should not be confused with oblique claim, as regulated by art. 1560 CC, because, in the case of the latter, the creditor does not exercise his own subjective right, but the right of his debtor against a third party, restoring the integrity of his debtor's assets, which serves as security for the realization of his claim.

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[2] See G. Boroi, C.A. Anghelescu, *op. cit.*, p. 243.

[3] See G.T. Nicolescu, *New Civil Code. Direct Claims*, in Acta Universitatis George Bacovia, Juridica, vol. 5, issue 2/2016, *http://juridica.ugb.ro/*.

[4] See G. Boroi, C.A. Anghelescu, *op. cit.*, p. 252-253.

[5] See M. Bojincă, *Direct claim - a distinct legal mechanism for the enforcement of claims*, in Annals of „Constantin Brâncuși" University of Târgu Jiu, Legal Sciences Series, no. 1/2016, p. 8.

On the other hand, by means of a direct claim the creditor avoids the other creditors of the immediate debtor, because the claim is not realized in the latter's assets, but in the assets of the claimant.

3. Legal nature of the direct claim

The direct claim is clearly original in character and is distinguished from other apparent or genuine exceptions to the principle of the relativity of the effects of the civil legal act.

It has been rightly pointed out in the literature that in the case of a direct claim for payment, the possibility of bringing a direct claim is not transferred by contract but is expressly provided by law. Thus, the sub-debtor will incur a contractual liability because he will be liable as a result of the obligations assumed in the contract concluded with the intermediary debtor. However, the right to sue is extra-contractual, in which case the claim itself acquires a hybrid nature[6] .

4. Scope of application

In Romanian civil law, the scope of the direct claim is quite limited, because doctrine and jurisprudence have remained constant in the view of the traditionalist theory. There is currently a reluctance among legal practitioners and courts to promote and admit direct claims.

It is very likely that this reluctance also stems from the meaning of the old Civil Code, since it only covered two direct claims. However, the current Civil Code has taken a more modern and applied view of civil legal relationships and has borrowed the French model, thus adopting several types of direct claims.

To begin with, we will briefly review the direct claims currently recognized in the current configuration of positive law, and then turn our attention to the direct claim of workers in works contract.

For example, the Civil Code regulates, according to art. 1807, the direct claim of the landlord against the subtenant up to the amount of the rent that the tenant owes to the landlord.

Then, the Civil Code provides in art. 2023 CC for a direct claim by the principal against the sub-agent or the substituted agent - „*in all cases, the principal has a direct claim against the person whom the agent has substituted*".

The principal is the creditor and holder of the direct claim, the trustee is the immediate debtor of the principal and has the status of intermediary debtor, and the substitute or sub-trustee is the debtor of the debtor of the principal.

Another situation which could be qualified as a direct claim is that provided for in art. 2224 CC. Under this article, the injured party has a direct claim against the insurer in the civil liability insurance.

The direct right of claim in this case consists in the possibility for the injured party (*e.g.*, the victim of a car accident) to take claim both against the tortfeasor and against the insurer, who is a third party vis-à-vis the victim.

However, it should be noted that in this case we are not talking about two distinct contractual legal relationships, but about a contractual legal relationship (between the insured/person guilty of the tort and the insurer) and a non-contractual legal relationship, a case of tort (between the injured party and the insured/person guilty of the tort).

Most often, the notion of direct claim is related to groups of contracts, and designates the hypothesis where the extreme parties of the group of contracts can act against each other. However, direct claim is not strictly related to groups of contracts, but is also found in other matters, such as the one above.[7] We therefore consider that the claim based on the provisions of art. 2224 CC is also a genuine direct claim.

5. Direct claim based on art. 1856 CC

Art. 1856 CC has the marginal title **Direct claim of workers** and provides that - „in so far as the contractor has not paid the persons who, under a contract concluded with it, have worked providing the services or carrying out the work contracted, these persons have direct action against the beneficiary, up to the payment of the amount which the latter owes the contractor when the action is filed".

The interpretation of this article has raised some discussion both in case law and in the literature.

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[6] See D.A. Gidro, *Direct claims in civil contracts governed by the new Civil Code. Elements of comparative Law*, Universul Juridic Publishing House, Bucharest, 2018, p. 14.

[7] L. Pop, I-F. Popa, S.I. Vidu, *Civil Law Course. Obligations*, Universul Juridic Publishing House, Bucharest, 2015, p. 147.

One of these issues was whether this article opens the way for direct claim only to natural persons or also to legal persons such as subcontractors.

Two divergent views have emerged in doctrine and court practice. One part of the doctrine[8] and case law has stressed that this article only covers „workers" who are natural persons, while another part has resorted to an extensive interpretation of the provisions and considered that the notion of „persons" as rendered in the article also covers legal persons.

In concrete terms, starting from the marginal title of art. 1856 CC, it has been argued that the legislator's intention was to make direct claim available only to workers (including sub-contractors-workers), i.e., to those **natural persons** who actually carried out the activity for the provision of services or the execution of the contracted work, and, on the other hand, not to recognize the right to direct claim for certain legal persons.

This view is argued on the grounds that the text of art. 1856 CC refers to persons who have carried out an activity for the provision of services or the performance of work, so that it is not legal persons that carry out an activity (even if they have an object of activity, mentioned in the constitutive act), but people, legal persons being only some of the forms in which people carry out various activities, including economic ones, just as enterprises without legal personality are also such forms. So it is not the forms of activity that carry out the activity, but the people, so that in the area of natural persons the persons holding direct claim must be identified.

Similarly, case law[9] has also stated that the „persons" referred to in art. 1856 CC can only be the „workers" mentioned in the marginal designation of the article in question (natural persons).

In a second opinion, a contradiction was found between, on the one hand, the marginal designation and, on the other hand, the permissive wording of the article. Thus, it was held that the principle ubi lex non distinguit, nec nos distinguere debemus was applicable, as was art. 47 para. (5) of Law no. 24/2000 on the rules of legislative technique for the drafting of legislative acts, which states that: „in codes and laws of great scope, articles shall be provided with marginal names, expressing in summary form their subject matter, which have no significance of their own in the content of the regulation".

Thus, it was concluded that the concept used („persons") is of a general nature, unlike the formula used previously - in the old Civil Code, without introducing any criterion according to which it is necessary to distinguish between natural persons and legal persons who have concluded a contract with the contractor.

The subject of the discussion was the subject of analysis at the Meeting of the Presidents of the Specialized Chambers (formerly commercial) of the HCCJ and the Courts of Appeal in Constanța on 16-17 September 2021, where the two opinions were debated, with the opinion of the National Institute of Magistracy that art. 1856 CC also applies to legal persons being accepted by a majority (2 votes against, one abstention)[10] .

The relatively recent practice of the HCCJ[11] has held that „the provisions of art. 1856 CC do not distinguish between persons who, on the basis of a contract concluded with the contractor, have carried out an activity for

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[8] See V. Nemeș, G. Fierbințeanu, *Civil and Commercial Contract Law. Theory, jurisprudence, models*, 2nd ed., Hamangiu Publishing House, Bucharest, 2020, p. 238.

[9] See Bucharest CA, 5th civ. s., dec. no. 326/24.02.2021: *„(...) From the correlation of the two regulations of the direct claim of workers in the old and the current Civil Code, the Court notes that the notion of „worker", a notion specific to labour relations law, is diametrically opposed to that of professional. A worker is a person in a legal employment relationship concluded with an employer, on the basis of which the worker performs work for and under the direction of the employer in return for a fixed or variable monthly remuneration. On the other hand, the concept of professional [who operates an undertaking, according to art. 3 para. (2) CC] includes, according to art. 8 of Law no. 71/2011 implementing Law no. 287/2009 on the Civil Code, the categories of trader, entrepreneur, economic operator and any other person authorised to carry out economic or professional activities, as these concepts are provided for by law at the date of entry into force of the Civil Code (in practice, in the legislator's conception, it encompasses all these concepts listed). Thus, by definition, the worker is a natural person in a legal employment relationship with an employer (a legal person in the vast majority of cases, even a natural person in certain exceptional cases), whereas the professional is, as a rule, a legal person/corporation, subject to registration formalities in specific public registers and whose activity and internal regulation is subject to the provisions of Company Law no. 31/1990, supplemented by the specific provisions of the Civil Code or other legislation related to the professional's activity. It is true that, as the appellant claims, the legislature intended to adapt the rules governing civil legal relationships to the contemporary nature of current social relations. To that end, the current Civil Code (which entered into force on October 1, 2011) reflects the legislature's changed view of many of the civil law institutions which that Code governs. However, a change with regard to the institution of „direct claims" as regulated by art. 1856 CC cannot be observed. Given the exceptional nature of these claims from the principle of the relativity of the effects of contracts, as explained above, the interpretation of the normative hypotheses of „direct claims" must be restrictive. However, in such an interpretative context, the appellant's contentions that the hypothesis of application of art. 1856 CC also covers companies or professionals, as has been pointed out, cannot be accepted de lege lata»*.

[10] See *http://inm-lex.ro/poca/files/8_Minuta_Întâlnire%208%20(litigation%20with%20professionals%20and%20insolvency)%20Constanta%2016-17.09.2021.pdf*.

[11] See HCCJ, 2nd civ. s., dec. no. 837/07.04.2022: *„To restrict the scope of application of the provisions of art. 1856 CC, as proposed by the courts, only in the case of natural persons in a legal employment relationship with an employer, to the exclusion of any form of*

the provision of services or the execution of the contracted work and who have a direct claim against the beneficiary, depending on whether they are natural or legal persons. As such, the exclusion of sub-contractor legal persons from the possibility of bringing a direct claim against the beneficiary, pursuant to the provisions of art. 1856 CC, is contrary to the principle ubi lex non distinguit, nec nos distinguere debemus."[12]

As far as we are concerned, we are of the opinion that direct claim undoubtedly also belongs to subcontractors, i.e., those companies which have been subcontracted by the main contractor to carry out the work. Sub-contracting is a situation frequently encountered in public works procurement practice. Being won by a particular company, it in turn subcontracts certain works to which it has committed itself under the main contract to other companies.

In disputes concerning public procurement contracts, the provisions of art. 218 et seq. of Law no. 98/2016 on public procurement expressly provide for the possibility for the subcontractor to express its opinion to be paid directly by the contracting authority.

We are of the opinion that even if the sub-contractor waives his right to be paid directly by the contracting authority (beneficiary) under the sub-contract, he can still avail himself of the provisions of Article 1856 of the Civil Code.

This conclusion is a natural consequence of the fact that the sub-contractor waives the right to be paid on performance of the contract in favor of the main contractor and not as a result of the contractor's non-performance of its obligation to the sub-contractor.

Waiver of the right to be paid directly by the beneficiary does not implicitly imply waiver of the right to direct claim conferred by law.

Therefore, even in such a situation, the subcontractor (legal person) is entitled to bring a direct claim against the contracting authority.

6. Conclusions

In view of all the considerations set out above, we consider that the concept of „persons" referred to in art. 1856 CC does not distinguish between natural and legal persons and, in accordance with the principle *ubi lex non distinguit, nec nos distinguere debemus*, the right of direct claim must also be granted to the legal sub-contractor. Moreover, the current social and economic reality illustrates that, unlike when the Civil Code of 1864 was adopted, the activities of providing services or executing works specific to the contract of entrepreneurship are mainly carried out in an organized manner, with the resources and workforce for those activities being concentrated in specifically regulated legal forms.

A restrictive interpretation of these provisions would not be in line with economic reality and would unduly and unjustifiably make it more difficult for commercial relations and for any disputes arising from such situations to be resolved within an optimal and predictable timeframe.

Finally, in the case of public procurement contracts, whether the contract between the contractor and the subcontractor recognizes the subcontractor's right to be paid directly by the beneficiary, the subcontractor has a direct claim against the contracting authority under the provisions analyzed above.

It remains to be seen whether the courts will fully embrace the new view established by the HCCJ case law.

References

- G. Boroi, C.A. Anghelescu, *Civil Law. General Part*, 2nd ed., revised and added, Hamangiu Publishing House, Bucharest, 2012;
- G. Boroi, C.A. Anghelescu, I. Nicolae, *Civil Law Fact Sheets. Obligations, Contracts, Inheritance*, 5th ed., revised and added, Hamangiu Publishing House, Bucharest, 2020;
- L. Pop, I.-F. Popa, S.I. Vidu, *Civil Law Course. Obligations*, Universul Juridic Publishing House, Bucharest, 2015;
- G. Tița Nicolescu, *The New Civil Code. Direct claims*, in Acta Universitatis George Bacovia, Juridica, vol. 5, issue 2/2016;

professional, natural or legal person, is tantamount to a major limitation of the category of persons who may act directly against the beneficiary under this text, although the content of this article does not even suggest such a distinction. The only way in which the legislature intended to delineate the scope of the holders of this direct claim was that the persons must have carried out an activity for the provision of services or the execution of the work contracted for (under the contract of contract, s.n.) on the basis of a contract concluded with the contractor, without any differentiation with regard to certain categories of persons."

[12] See HCCJ, 2nd civ. s., civ. dec. no. 607/15.03.2022.

- M. Bojincă, *Direct claim - a distinct legal mechanism for the enforcement of claims*, in Annals of „Constantin Brâncuși" University of Târgu Jiu, Legal Sciences Series no. 1/2016;
- V. Nemeș, G. Fierbințeanu, *Civil and Commercial Contract Law. Theory, jurisprudence, models*, 2nd ed., Hamangiu Publishing House, Bucharest, 2020;
- D.Al. Gidro, *Direct claims in civil contracts regulated by the new Civil Code. Elements of comparative law*, Universul Juridic Publishing House, Bucharest, 2018;
- Bucharest CA, 5th civ. s., dec. no. 326/24.02.2021;
- HCCJ, 2nd civ. s., dec. no. 837/07.04.2022;
- HCCJ, 2nd civ. s., civ. dec. no. 607/15.03.2022;
- HCCJ, 2nd civ. s., civ. dec. no. 1611/09.05.2018;
- HCCJ, 2nd civ. s., civ. dec. no. 1284/08.07.2020;
- HCCJ, 2nd civ. s., civ. dec. no. 2059/12.10.2021.