A THEORETICAL ANALYSIS OF THE SUBROGATION, AS PER THE AMENDMENTS BROUGHT BY THE CIVIL CODE OF 2009

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Abstract
Although extensively treated by the Romanian scholars in the past, the provisions of the Civil code of 2009 brought certain amendments with respect to the subrogation in creditor's rights by paying the debt.
Our main purpose is to outline the latest amendments brought to the institution under discussion by the Civil Code of 2009 and, in this respect, we will analyse the subrogation from a theoretical point of view, with some references to the existent Romanian jurisprudence.

Key words: *subrogation, obligation, Civil Code, transfer, creditor.*

I. Introduction

The actual Romanian Civil code[1] in force starting with 1 October 2011 regulates the ways of transferring and transforming the obligations in the same title, i.e. Title VI – *The transferring and transforming the obligations*, where the institution of subrogation is regulated among other important civil institutions, such as assignment of debt, assuming of a debt, novation.

The meaning of this institution arises mainly from its name and it means a replacement of one of the obligational relationship parties with another person.

It is our view that the subject proposed for this paper is important for the Romanian "civil life" due to the fact that, as stated in the doctrine, even if the operation of replacing a subject form an obligational relation can be performed by other civil proceedings (e.g. assignment of debts, assignment of contract), the institution under discussion is about that specific situation when a subject of the obligational relationship is replaced due to the performance of a payment (execution of the obligation)[2]. From the beginning we have to say that, under the Romanian civil legislation, the term "payment" is defined as being the operation of giving an amount of money or, as the case may be, performing a duty, object of the obligation[3]. Therefore, for the purpose of this paper, by using the term "payment" we will have in mind the definition offered by the legislation.

For the avoidance of any doubt, the problem of applicability of the new provisions regarding the subrogation was solved by Law No. 71/2011 for applying the Law No. 287/2009 regarding the Civil Code. Therefore, it was stated in the Article 117 paragraph 1 that the debt transmitted through subrogation after the Civil code entered into force is under the legal regime in force at the time the debt arisen.

In conclusion, by this paper, we will try to offer to the reader a concise and clear overview of the institution, by analysing the legal provisions of the Civil code with some references to the existent legal writings and jurisprudence.

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[1] The Law No. 287/2009 regarding the Civil Code, republished in the Official Gazette of Romania No. 505 of 15 July 2011.

[2] For further details, please refer to L. Pop, I. Popa, S. Vidu, *Elementary civil treaty. The obligations, according to the new Civil code*, Universul Juridic, 2012, page 651-652.

[3] Article 1469 of the Civil Code.

II. Notion. Legal regulation[4]

As previously mentioned, the Civil code regulates the subrogation in its Title VI (*The transfer and transform of the obligations*), Chapter II (*The subrogation*), between Articles 1593 – 1598.

A brief definition of the subrogation is offered by the paragraph 1 of Article 1593 which states that "anybody paying instead of the debtor can be subrogated in creditor's rights, without being able to achieve more rights than the later". Further, paragraph 2 of the same Article establishes that the subrogation can be either conventional (based on an agreement) or legal. Therefore, the subrogation has two forms: conventional subrogation and legal subrogation (both of them will be detailed above).

The legal scholars offered us a more accurate definition than the one provided by the Civil code. Thus, the *subrogation in creditor's rights by paying the debts (also known as personal subrogation) is that way of transferring, either conventional or legal, the outstanding debts, with all its securities and accessories, to a third person who paid the original creditor*[5].

By analysing the two definitions, the one offered by the Civil code and the one offered by the doctrine, we can say that mechanism of the subrogation consists in replacing the creditor from an obligational relation (the original creditor) with another person who, by paying the debt of the debtor, becomes the creditor of the last, acquiring all the rights of the original creditor (also known as *solvens* or *creditor by subrogation*).

From a practical point of view, the subrogation has an important role; thus, there are frequent situations when a third person pays the debt of the debtor without the intention to gratify the debtor, e.g. guarantor, jointly held liable co-debtor. By such payment, the debt towards the original creditor ceases to exist but the debtor will be further held liable towards the payer, who will become the new creditor[6].

As an exception of the above mentioned, Article 1474 paragraph 3 provides that "the payment performed by a third person ceases the obligation if it is performed on behalf of the debtor. In this case, the third person will replace the creditor only when expressly mentioned by the law". Therefore, not any payment performed by a third person made with the intention to cease the debt of the debtor will conduct to a subrogation, but just that payment performed under certain conditions, expressly established by the applicable legislation[7].

III. Conventional subrogation

The conventional subrogation has its bases on the agreement concluded between the third person who pays the debt (the new creditor), on the one hand, and the original creditor or the debtor, on the other hand. Taking into consideration the fact that the conventional subrogation is an agreement, the parties are under the obligation to observe the legal provisions established by the applicable legislation for its validly conclusion.

In order for the conventional subrogation to operate, the Civil code establishes the obligation for the subrogation to be expressly provided in the agreement to be concluded between the *solvens* and original creditor/ debtor. Also, in order for the subrogation to be opposable to third parties, must be done in writing. Even if not expressly provided by the law, it was considered that the deed attesting the performance of the payment needs to bear certain date (*data certa* in Romanian language); contrary the parties will not be able to prove the moment when their agreement was concluded[8].

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[4] The Civil code of 1864 regulated the subrogation between its articles 1106-1109.

[5] C. Statescu, C. Birsan, *Civil Law. The general theory of obligations. 9th Edition, revised and amended*. Hamangiu, 2008, page 368.

[6] L. Pop, I. Popa, S. Vidu, *cit. op.*, page 652.

[7] L. Pop, I. Popa, S. Vidu, *cit. op.*, page 653.

[8] Alexandru Beloanca in *The New civil code. Comments, doctrine and jurisprudence. Vol II. Articles 953-1649*, Hamangiu, 2012, page 966.

According to the provisions of paragraph 3 of Article 1593 of the Civil code, "the conventional subrogation can be agreed by the debtor or the creditor". Therefore, depending whether the agreement is concluded by the payer with the original creditor or the debtor, we can discuss about two types of conventional subrogation (i) subrogation agreed by the creditor or (ii) subrogation agreed by the debtor.

i. Subrogation agreed by the creditor

Pursuant to Article 1594 paragraph 1 of the Civil code, "the subrogation is agreed by the creditor when, by receiving the payment form a third person, assigns to the payer all the rights against the debtor". Further, paragraph 2 of the same Article provides that "the subrogation operates without the consent of the debtor. Any contrary provision is considered as not written".

By analysing the provisions of the aforementioned Article, it can be concluded that, apart the general condition, i.e. to be expressly provided, the subrogation agreed by the creditor must fulfil another condition: to operate simultaneous with the payment. This condition was consecrated in the past by a part the legal scholars; therefore, it was considered that if the replacement of the creditor is performed before the payment, we are not in the situation of a subrogation, but of an assignment of debt[9]. Moreover, it cannot be performed after the payment due to the fact that the debt ceased to exist[10].

This type of conventional subrogation operates exclusively based on the agreement between the *solvens* and the original creditor, the debtor not being involved in the operation. Moreover, any contrary contractual provision is considered not written and can be ignored by the parties.

ii. Subrogation agreed by the debtor

According to Article 1595 paragraph 1 of the Civil code, the subrogation agreed by the debtor represents that operation whereas the debtor borrows in order to pay the debt and, therefore, transmits to the lender the original creditor's rights.

Pursuant to the provisions of paragraph 3 of the same Article, the subrogation agreed by the debtor operates without the consent of the original creditor, if not contrary agreed. Therefore, the law allows to the original creditor to be part to the agreement between the debtor and the payer but only when this was expressly agreed by the original creditor and debtor.

The subrogation agreed by the debtor is valid only if the following conditions are observed:

a)the loan agreement and the acknowledgement of payment have certain date[11];

b) in the loan agreement is mentioned that the amount of money is borrowed for paying the debt; and

c)the acknowledgement of payment mentions that the payment was performed with the money borrowed from the new creditor.

IV. Legal subrogation

The subrogation operates *ex lege* (by law), without the consent of the original creditor or the consent of debtor to be required, in the following situations, expressly provided by Article 1596 of the Civil code:

a) *in the benefit of the creditor, even if it is an unsecured creditor, which pays to a preferential creditor, according to the law*. The doctrine and the jurisprudence stated that this is the case of an unsecured creditor who pays the debt to a secured creditor or the case of an inferior rank mortgagee who pays the debt to a superior rank mortgagee, the result consisting in the first replacing

[9] The assignment of debt is regulated by the Civil code between the Articles 1566-1592.

[10] C. Statescu, C. Birsan, *op. cit.*, page 370. There were also some legal scholars saying that there is no prohibition for the agreement between the payer and the original creditor to be concluded before the payment to be performed due to the fact that only when the payment effectively is performed, the subrogation operates.

[11] Until the Civil code of 2009 to be in force, it was requested for the loan agreement to be concluded in authenticated form.

the later. The first creditor has an interest to pay to the superior rank creditor due to the fact that, by selling the mortgaged asset, the amount obtained will cover only the debt of the superior rank creditor; therefore, by paying the debt, the inferior rank creditor subrogates in the rights of the superior rank creditor and can wait until the selling of the asset will cover both debts, the one paid to the superior rank creditor and its own debt[12].

b) *in the benefit of an acquirer of an asset who pays the creditor having a guarantee over the respective asset.* The interest of the acquirer is to avoid any fore-closure (enforcement) procedure to be commenced against the asset and to keep it in own patrimony.

c) *in the benefit of the person who, being jointly held liable together with or for other persons, has an interest to pay the debt*, such as the co-debtors jointly held liable, co-debtor in an indivisible obligation etc.

d) *in the benefit of the inheritor who pays the debts of the inheritance from his own assets.*

Besides the situations detailed above, there are some situations expressly established by the Civil Code when the subrogation operates by law, such as[13]:

a) Article 352 of the Civil Code states that if one of the husband or wife pays the common debts with his/ her own assets has the right to subrogate in the rights of the creditor for what it was paid from his/ her own assets;

b) Article 2210 of the Civil Code provides that "in the limit of the paid premium, the insurer is subrogated in all rights of the insurant or the beneficiary of the insurance against the person held liable for the damage, except for personal insurances"[14];

c) Article 1342 of the Civil Code provides that in case of a not owed payment when the repayment cannot be disposed, the payer has the right go against the real debtor based on the legal subrogation in the rights of the paid creditor;

d) Article 1813 of the Civil Code provides that "in the situations established by Article 1811[15], the acquirer is subrogated in the rights and obligations of the lessor from the lease agreement".

V. Effects of the subrogation

Due to the fact that the Civil Code does not distinguish between the two types of subrogation, it can be concluded that the effects of the subrogation are the same, irrespective of the type of subrogation (conventional or legal).

The main effect of the subrogation is that the new creditor acquires all the rights of the original creditor, i.e. the debt with all the rights and its accessories[16]. As a consequence, the new creditor will have the action the paid creditor would have had against the debtor in case of non-payment and also the guarantees of the debts, such as mortgage, lien etc[17]. This revealed form the interpretation paragraph 2 of Article 1597 of the Civil Code attesting the fact that "the subrogation produces its effects against the original debtor and those who guaranteed the obligation". Moreover,

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[12] C. Statescu, C. Birsan, *op. cit.*, page 368.

[13] Alexandru Bleoanca in *The New civil code. Comments, doctrine and jurisprudence. Vol II. Articles 953-1649*, Hamangiu, 2012, page 971.

[14] According to a decision of Bucharest Court of Appeal, decision No. 256/2003 (Source: *The New civil code. Comments, doctrine and jurisprudence. Vol II. Articles 953-1649*, Hamangiu, 2012, page 972), the insurer subrogated in the rights of the insurant starting with the moment when the premium was paid as a consequence of producing the insured event. From the date of indemnifying the beneficiary of the insurance, the insurer's debt towards the person guilt for the accident became due.

[15] Article 1811 of the Civil code expressly establishes the situations when the lease agreement is opposable also to the acquirer in case the immovable asset object of a lease agreement is object of a sale purchase agreement.

[16] C. Statescu, C. Birsan, *op. cit.*, page 371.

[17] Alexandru Bleoanca in *The New Civil Code. Comments, doctrine and jurisprudence. Vol II. Articles 953-1649*, Hamangiu, 2012, page 973.

according to the same paragraph, the original debtor and the guarantors are allowed to defence themselves by using the same proceedings as the ones they would have been entitled to use against the original creditor, e.g. causes for termination or nullity of the debts claimed by the new creditor[18].

Besides the actions of the original creditor, the new creditor has also the right to perform some specific actions against the debtor grounded on legal institutions such as mandate, business management (*gestiune de afaceri* in Romanian language) or causeless enrichment (*imbogatire fara justa cauza* in Romanian language)[19].

As regards the moment the subrogation produces its effects, the Civil Code provides in its Article 1597 paragraph 1 that "the subrogation produces its effects starting with the moment when the third person performs the payment in the benefit of the creditor".

In case of partial subrogation[20], respectively the situation when the new creditor pays only a part of the debt, the subrogation will operate also partially, in the limit of the payment. Thus, the debts and its accessories will be divided between the original creditor and the new creditor accordingly.

As a general rule, in case of partial subrogation, the original debtor and the new creditor are allowed to ask the payment from the debtor proportionally with their rights and no priority being applicable between them. Nevertheless, according to the provisions of Article 1598 of the Civil code ("in case of partial subrogation, the original creditor, beneficiary of a guarantee, […]"), if the original creditor benefits of a guarantee (security) in the moment of the partial payment, than it is preferred to the new creditor. After the unpaid debt is paid by the debtor to the original creditor, the next entitled to receive the payment is the new creditor[21].

Although, this exception is not applicable when the original creditor undertook the obligation to secure the amount for which the subrogation operates, the new creditor having priority in recovering the debt.

VI. Conclusions

By approaching this subject, we intended to offer the reader the possibility to make an opinion of the legal provisions applicable to the institution of the subrogation, as amended by the Civil code of 2009. In this respect, we focused mainly on identifying the legal provisions applicable to this institution and, after, we tried to offer concise explanations by using the different interpretations restrained by doctrine and jurisprudence.

Due to the fact that this institution continuously represents a subject of interest for the legal scholars and practitioners, new interpretations and opinions will be formulated in the future.

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[18] L. Pop, I. Popa, S. Vidu, *cit. op.*, page 657.
[19] For further details, please refer to L. Pop, I. Popa, S. Vidu, *cit. op.*, page 657.
[20] The partial subrogation is expressly provided by Article 1598 of the Civil Code.
[21] L. Pop, I. Popa, S. Vidu, *cit. op.*, page 658.