Contract of Assignment in the Current Regulation of Romanian Civil Code

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Abstract. The current Romanian Civil Code, inspired by the Italian Civil Code and the UNIDROIT Principles governing, the novelty in the national legislation, institution of the contract of assignment. The material is based on 1315-1320 in the Fifth Book, About the obligations "of title II, Sources of obligations" of chapter I, "The Contract", 8th Section, The assignment contract ".

This rule is general and applicable to the conventional assignment contracts only and not to the legal ones, being distinct and having special character to that of the constituent elements of the legal transfer of obligations, namely the assignment of debt which has its premises in (art.1566-1592) and the uptake of assignment of debt referred to in (art. 1599-1608), Chapter VI "the transmission and transformation of obligations", of title II of Book V of the civil code.

At the same time, the current Romanian civil Code governs the distinct and diverse legal contract transfers occur, for example, in terms of lease (1811-1813), pre-emptive (1733), insurance of goods (art.2220) etc.

Concluding, the assignment of the contract, as is regulated by the civil code, appears as a legal institution, sui generis, distinct both from its constituent operations (assignment of receivables and debt collection) and the so-called legal disposals and consists of full substitution of one of the original parties of a contract with the consent of the other party (from the initial Convention that retains its contractual position) in a situation in which up to that point the contract was not executed in its entirety.

As it is governed by the civil code, assignment of contract is a legal institution, sui generis, distinct from mentioned transactions (assignment of receivables and debt assumption) that compose it and the so-called legal disposals and consists of full substitution of one of the original parties of a contract with the consent of the other party.

Keywords: assignment of contract, transferor, transferee, assigned, the assignment of the debt-takeover (assignment of dating), download (transfer) of debt

1. Preliminaries
For the first time in our legislation, the current civil code, drawing inspiration from the Italian civil code (1406-1410) and the UNIDROIT Principles (art. 9.3.1-9.3.7) [1], deals with the institution of the contract of assignment, independently of the transmission ratio, just in terms of its active side (assignment of receivables-1566-1592 c. Civ.), and passive side (taking over the debt-1599-1608, c. Civ.). [2].

In Romanian scholars concept the rationale of such regulations is to consider those cases reported, the dynamics of economic relations in which a party wishes to convey to other people all its rights and

obligations arising from the contract "[3], and its finality is continued further to the contract being a native whose effects were not fully performed under the assumption of one of the Contracting Parties is withdrawn).

It considers that by this regulation occurs the objectification of the contract perception, a” materialization” in the sense that he is no longer viewed merely as an agreement of wills which arise as a subjective bond between two people, but also to a genuine legal entity, i.e. a set of rights and debt with patrimonial value, likely to come away from the person of originally contractors "[4].
2. The concept and features of assignment of contract

In the context of legislation prior to the adoption of the new civil code when the contract of assignment was not covered in the literature have faced two irreconcilable views about the validity and its effects.

In a first opinion, [5] was considered that the personal compulsory relation, is inadmissible to transfer its passive obligational side, by a conventional assignment path and that, in essence, the assignment of rights and obligations arising from a contract, does not represent anything other than creating a new compulsory report. Thus, through such an operation occurs on the birth of a new compulsory relation, not "a broadcasting contract positions consist of a sum of rights and obligations. In this opinion, the assignment of the contract shall be considered pointless because so called, "transmission of rights and obligations arising from the contract can be achieved on the path to other legal transactions expressly regulated by the civil code. For example, by the assignment of receivables and personal subrogation claim can achieve transmission and personal subrogation by novation by debtor change and even by stipulation for another, could carry out a passive side of the compulsory report transmission [6]. In all these operations replacing the original debtor by another, shall be subject to the consent of the creditor to whom it is not entitled to pretend acquiring a new debtor and release the other one without his consent.

The other opinion [7], is that the compulsory report should be considered inherited, therefore, could be transferable. Within this latter opinion some authors have argued that the transmission can be achieved on the path of transferring operations to separate assets and liabilities, while others, on the contrary, they supported the possibility of a full broadcast rights and contractual obligations through the assignment of contract. In this opinion, the consent of the contractor amenable is essential for the actual carrying out of the operation in question.

Arising from those specified above in both views is necessary taking into account the consent given by the contractor amenable as being indispensable for the realization of the legal operation.

In other words that consent plays an essential role in determining the legal nature of the assignment contract, namely whether it is bilateral or trilateral agreement with natural consequences resulting from that skill.

Thus, when the assigned contractor consent is considered a constituent for the validity of the transfer contract we shall be in the presence of a trilateral Convention, and when this consent is considered as a condition for triggering the effects of the assignment we shall be in the presence of bilateral conventions.

The Romanian legislature was stopped at an interim solution without admitting the idea of a total materialization of compulsory report and therefore neither the free submission. In the forms and within the 1315 paragraph 1 C. civ. It follows, in our view, that the legislature, believes the consent given by the contractor as an essential requirement, of background, of validity of the contract assignment and not as a condition for triggering the effects of assignment. At the same time we must emphasize that the wording of the text indicated that emerges and the Romanian legislator deals with the assignment of contract as a substitute as a subrogation of a party and not as a transfer of the contractual position, since it states that: "a party may replace a third party ..."

In this view it is considered that personal side that makes the obligations report non-transferable is considered by the creditor to the debtor's personal qualities at the moment of obligation report arising. In this theory personal character is given not by a specific ability of an obligor to perform a specific benefit, but the lender's perspective on its ability to execute a particular benefit [8].

As such, the assignment of the contract means that legal operation that consists in the substitution of a contract in course of execution, of one of its sides with a third party transferee having the effect a concomitant but not successive transfer of rights and contractual obligations that were not executed until that moment with the consent of the contractor amenable.

In the definition as well as the article 1315 (1) c. Civ., there is the following features of the contract of assignment:

a) It is a legal operation in which three people are involved: the transferor (that portion of the contract surrender the position), the transferee (a third party who shall take the place of the transferor in the contract) and the transferred (originating from the contract for the original contractor whose contractual position remains unchanged in the assignment
contract). As such, the consent of the contractor amenable is regarded as a constituent part of the validity of the assignment and not as a condition for triggering the effects of assignment.

b) the contract assignment is a unique transaction, which should be seen as a whole and not as a simultaneous and successive transmission of its active side, respectively, of the passive side of an obligation;

c) The object of the assignment Contract represents the entire contractual relationship [9], i.e. the unit of complex legal situations assets and liabilities that arise from the contract, along with the guarantees and the recognized potestative rights [10].

In another words, it represents "all rights and obligations of the withdrawing Party, taken as a whole along with the guarantees and the recognized potestative rights" [11];

d) The assignment contract involves a private transmission between the living beings of the compulsory report.

3. The conditions of validity and the effectiveness of the assignment of contract

3.1. The hypothesis
Assignment of contract being a Convention must bring together all the validity conditions required by the law regarding both the matter and the form of the contracts.

In addition, in order to achieve the assignment of the contract it needs to be disposed the transferred consent and the agreement was not fully implemented.

3.2. The substantive
The form conditions are provided under art. 1179 par (1) of the Civil Code, namely: capacity, consent, and a definite and lawful subject, a legal and moral cause. These conditions are developed in terms of their validity under art 1178-1245 Civil Code and in respect of invalidity under art 1246-1265 Civil Code.

3.3. The formal
In terms of form, the assignment of the contract is a consensual legal operation ends available by mere agreement of the parties, without any other formalities need to be carried.

However, being a legal operation intended to carry out the transmission of contractual report art.1316 C. civ., includes special provisions concerning its form stating that "the assignment of contract and its acceptance by the contractor assigned should take the form of legally required for the validity of the contract snapped." Thus the rule of the form is very special. As such, in the event that the validity of the contract succumbed is governed by authentic form assignment of such a contract must comply with the authentic forms.

Failure to comply with the formal requirements of the assignment leads to the absolute nullity of the whole agreement transactions under art 1242 par. (1) Civil Code which states, in turn, that "It is null and void unless the contract in lack of form that, doubtless, the law requires for valid conclusion."

3.4. The consent of the contractor failed.
As I stated after the transferred consent is central in the assignment of contract as well as in the collecting of debt. The Contractor consent gave at assignment moment may be previous simultaneously or posterior of achieving the will consent between the transferor and transferee.

For example, it can be expressed previously by an express clause of the contract that can be the subject of transfer. In such a situation, the assignment will be effective in relations with the contractor starting when he noted the implementation of the assignment. This can occur by notification or by acceptance, according to art 1317 par. (1) Civil Code.

As such, for the assignment of the contract to produce its effects it is sufficient that the transferor or transferee to notify the operation.

Notification is not required if the transferred behavior intimates that he found another way to achieve the transfer, the transaction for which he had previously agreed. Therefore, the "acceptance" mentioned in art 1317 par. (1) Civil Code should not take the form prescribed by the law for the validity of the contract failed and is governed by art 1316 of the Civil Code. [12]

If the consent is expressed simultaneously between all three parties to the legal operation of the assignment contract is not up no problem. Consent, however, may be subsequently disposed, i.e. after performing the will of the transferor and transferee.
In this situation the permission must be expressed in terms of form which the law requires the contract submitted. In this case it is considered that the will of the transferor and the transferee has the nature of an offer to contract. [13]

According to the article 1317 C. civ. expression of transferor consent can take place via the very assignment contract which is the subject of that or through a separate statement.

It is also possible, under art. 1317 (2) C. civ. as anticipated in the assignment agreement to produce in advance and be deducted from such standardized provisions clause "to order" or "equivalent" another mention, making it possible to assume that the contract coverage may occur by using the simple effect of endorsement. In this situation, the contract is, in principle, free transferable only when the assignment is different as it is about an assignment or one standard. This point coincides with that in which the effects of the assignment of the contract to snapped. In principle, the effects of a contract assignment succumb once voiced their agreement. Nonetheless, if the transferor consent is anticipated, the effects of the assignment of contract will occur only at the time of acceptance of the assignment. By exception, if we are dealing with a transfer agreement as part of standardized clauses "to order" or "other equivalent entries", the effects of assignment are producing when it is "endorsing".

3.5. The benefits of the original contract was not fully executed

In art 1315 par (1) The Civil Code is the attitude that the assignment of the contract can only occur if the benefits of the original contract were not fully executed. It is a logical requirement as contract whose benefits have already been executed could be no more a subject to assignment, whereas the effects of the transfer have been exhausted.

Law delimiting the scope of the assignment only in the perspective of the contracts, that may concern only acting conventions in which the benefits of the parties were not fully executed at the time of conclusion of the assignment.

Naturally, in case of a partial execution of the total substitution of the benefits may not cover all the active side of the passive obligation, since in such cases it may utilize specific legal means for the transmission of the claim or debt. [16].

4. The scope of the assignment of contract

The Romanian legislator does not specify the contracts category liable to assignment. In these circumstances we believe[17] that can be assigned both leases with successive execution and execution uno iuctu, whose main effects have not yet been exhausted.

Also, intuut personae contracts may be the object of someone's assignment as long as the transferor consent is indispensable for its issuance, it will be able to assess whether the qualifications are met counterparty originating in consideration which has concluded the contract and in the person of the substitute. In this context it should be noted that the rules contained in article 1315-1320 Civil Code are applied only in conventional assignment and not the legal ones. Disposals do not imply legal agreement between the transferor and transferee will and the transferred consent but operates under the conditions determined by the legal standard by which they are established. Also, in the absence of express provision of the transferred notification the contract assignment and the substitution of assignor arise ipso jure and will be relied on the transferred in the moment he knew or had to know about the assignment.

At the same time, the application of the provisions of article 1315-1320 C.civ.is limited when contracts are assigned as a result of a universal transfer times for universal. For example, in the case of transfer of the of legal persons asset through reorganization (merger, Division) every contracts can be transmitted automatically and without the consent of the other party, particularly when it comes to contracts, intuut personae. In such situations, the Contracting Parties may stipulate that the acquisition of the original contract by the legal successor person is subject to the agreement. The agreement must be given in accordance with art. 240 C. civ. within 10 days after the date on which it was communicated or notified by registered letter with acknowledgement of receipt.

5. Effects of assignment of contract

5.1. Listing relations involved in the assignment of the contract

Assignment of the contract being a complex legal transaction, naturally, is producing effect between the transferor and transferee as well as between the assignor and assignee.
5.2. The relationship between the contractor and the transferor

According to article 1318 par (1) Civil Code "the assignor is released of his obligations towards the contracting party assigned upon substitution shall take effect towards it".

As such, unless the parties have agreed otherwise, a transferor is released once the assignment shall take effect which could not coincide with the issuance of the contract. Thus, under the assumption of consent in advance, the assignment will take effect in relations with the transferred starting when it was notified or it has accepted it. In the literature [19] there is the opinion that if the transferred consented in advance to the assignment, he can reserve the opportunity not to free the transferor or even may specify in the contract that the assignor will not initially be convicted of his obligations in the event of an assignment.

The transferred can trace for the payment of the claim arising from the contract succumbed to both the transferee and the transferor. The transferred will be able to come back against the transferor by setting the payment express solidarity payment obligation of the transferor and the transferee.

The transferred is obliged, under penalty of loss of the right of recourse to the assignor in respect of the failure to perform the obligations of the transferee within 15 days of the failure or, where appropriate, from the date it is known this fact.

5.3. The relationship between the assignee and the transferred

Except the Contracting Parties, the contents of the contract transferred remains unchanged as a result of the assignment.

The assignment shall not affect the transferred contractual situation but you need to place the new Contracting Party (the assignee) in the same legal situation as the one that replaces it with regard to claim and debt.

As such, the transferred may oppose the transferee all means of Defense, as well as of extictive prescription plea of non-performance, annulment or termination that could preclude the assignor in respect of the debt.

The transferred cannot invoke the nullity of the contract succumbed to the vices of consent nor may oppose a claim for compensation to the assignee of his assignor. The transferred can use all the means they had available and against the assignor for performing his duties. Real or personal warranties which accompany the transferor's obligation to be maintained are required express agreement of guarantee and the credit account. For transferred to conserve the entire rights in the original contract deadline, actions that do not arise from the contractual relationship had "but other reports with the assignor included the possibility of subsequent assignment contract rescinded for vices of consent may be opposed to the assignee only if transferred expressly reserves this power when assignment consents.

In turn, the transferee shall likewise benefit from the same conditions as transferred for making a payment to the assignor, as well as by the same means of defense that can be invoked against the transferred of the original contract.

5.4. The relationship between the transferor and the transferee.

Assignor assignee towards a legal obligation of guarantee of the validity of the contract succumbed, similarly to the transferor of an assignment of receivables.

So he must ensure that until the assignment there was no question of invalidity apart from contract or which may be opposed to the transferee.

Whereas the provisions of art. 1323 paragraph 1 C. civ. do not make the distinction between the characters for consideration or free security due to the transferor, in specialized literature [20] shall consider that they apply only to transfers for valuable consideration, and in the case of free capacity to respond according to the General rules of liability in contracts to crowd out donation. The guarantee for the validity of the contract operates regardless if the assignor transferred knew or not cause invalidity of the contract and whether or not attributable to him. Instead, the transferor shall not be responsible if the transferee had knowledge of the cause of disability at the time of the assignment.

References

Moreover, the assignment of the contract shall be deemed admissible and regulated as such in the European countries as well as in the projects and proposals of the European and international uniform code. It is found mostly in more recent codes. Thus, for example, the Italian civil code, art. 1406-1410 and the Dutch civil code 6159 allowed assignment of the contract, and the Portuguese civil code. 424-427 admits assignment of contractual position. In turn, the German and Austrian law, although the rules do not include any positive law governing the assignment of a particular contract, assignment of contract is permissible in case the existence of consent of all three people involved in the operation.


[7] ibid.,


[14] Article 1317 par (1) The Civil Code states that: "If a party has consented in advance to the other to substitute a third party into the relationships arising from the contract, the assignment has effect starting when it is notified or where appropriate, from the moment is accepted."

[15] Article 1317 par (2) The Civil Code provides that: "If all the result of a written contract that contain the clause" to order "or other equivalent wording, unless the law provides otherwise, endorsement document the effect substitution endorsees in all rights and obligations guarantor".


[17] Ibidem

[18] Article 240 par (2) Civil Code says: "If retention or distribution of the contract is subject to the consent of the party concerned, it will be notified and, where appropriate, notified by registered letter with acknowledgment of receipt, to give or withhold consent within 10 days of the notification or notification. Failure to respond within this period amounts to refusal to maintain or return the contract by the legal successor ".


[20] Ibidem, p.1383