

## NOTES ON THE ASSIGNMENT OF CONTRACT IN THE NEW ROMANIAN CIVIL CODE

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### ABSTRACT

*Reduced to its basic functioning, the legal operation of assignment of contract implies a global transfer of the contractual position of one party, assignor, from a contract concluded with the ceded contractor, to a third party, assignee. If the legal operation as such does not seem to raise complications, it was an object of dispute in Romanian civil law even before the New Romanian Civil Code in force since 2011, considering the personal nature of the obligation relationship, especially with regard to the passive element of the obligation. Considering the debates around this topic in the legal doctrine of the Romanian Civil Code of 1864 and following certain arguments advanced in French civil law, the New Romanian Civil Code explicitly recognizes the assignment of contract as a distinct legal figure with specific effects in Articles 1315-1320. This article intends to analyse the legal regime of the assignment of contract, from the debates in the legal doctrine around this topic in both Romanian and other legal systems to the specific legal provisions which address the assignment of contract, starting with the notion of assignment of contract, the form of the assignment, the moment in which the assignment occurs, the effects the transfer has on the assignor, the legal exceptions which can be formulated by the ceded contractor and the warranty obligations of the assignor.*

**KEYWORDS:** assignment of contract, cession of contract, transfer of contract, assignment of rights, obligation

### Introduction

As article 1315 of the New Romanian Civil Code states, assignment of contract is a legal operation in which one of the parties of a contract substitutes a third party in its position in the relationships generated by the contract. As such, the assignment of contract implies a global transfer of a third party in the contractual place of a party, distinct from the substitution of a third party in the obligation relationship which may be accomplished through means of transfer of obligations. During the previous Romanian Civil Code, considered independently, this operation was a matter of debate, in contrast to the case when it had a subsequent character when it was accepted, for example, when transferring a business fund (Vasilescu, 2017, p. 47).

Two opposing opinions structured the legal debate on the subject. One opinion considered that, on the basis of the personal character of the obligation relationship, the transfer of the passive implied by obligations is inadmissible (Dogaru, Drăghici, 2014, pp. 238-239). As such, the assignment of contract was not considered a means to transfer the contractual position of one of the parties to a third party, but a form of novation, generating a new obligation relationship. In addition to this, the entire assignment of contract, which was a matter of debates, could have been achieved by a number of undisputed operations such as the assignment of rights and personal subrogation for the transfer of the personal right and for the transfer of the obligation the personal subrogation, novation through the change of debtor, assignment of rights, or contract in favour of third parties, as means of transferring and transforming obligations (Ciochină-Barbu, Jora, 2020, pp. 358-359). Even if the assignment of contract was realized through these means, the substitution of the original debtor with a new one was to be conditioned by the acceptance of the creditor (Pop, Popa, Vidu, 2020, pp. 516-517).

The opposing opinion considered that the assignment of contract was entirely admissible and a distinct legal figure from the subsequent operations such as personal subrogation, assignment of rights, novation or contract in favour of third parties (Codrea, 2018, pp. 164-178), to which it could not have been properly reduced (Veress, 2019, pp. 233-235). In support of this last opinion there are legislative solutions from different European civil regulations, such as articles 1216-1216-3 from the French Civil Code, articles 1406-1410 from the Italian Civil Code or articles 424-427 from the Portuguese Civil Code and also the Draft Common Frame of Reference explicitly states in article III. 5:302 (1) that *A party to a contractual relationship may agree with a third person, with the consent of the other party to the contractual relationship, that that person is to be substituted as a party to the relationship* (Vasilescu, 2017, p. 47). The 8<sup>th</sup> Section of the Chapter I, Book V, Title II, articles 1315-1320 of the New Romanian Civil Code is inspired by such regulations which recognize the assignment of contract as a distinct legal figure, with particular effects when related to binding force of contracts and opposability of contracts to third parties (Pop, Popa, Vidu, 2020, pp. 518-520) .

### **The notion of assignment of contract**

The legal definition provided in article 1315 (1) of the New Romanian Civil Code states that the legal operation of assignment of contract implies a global transfer of the contractual position of one party, assignor, from a contract concluded with the ceded contractor, to a third party, assignee (Baias, Chelaru, Constantinovici, Macovei, 2021, pp. 1572-1573). Therefore, assignment of contract is a bilateral agreement between assignor and assignee, but since the approval of the ceded contractual party is also required, the contract can be concluded between the three parties. However, the assignment of contract is valid and binding even when concluded between assignor and assignee, while the approval of the third party is required only for the assignment of contract to produce its effects towards the ceded contractor (Oglindă, 2017, p. 386).

The legal doctrine has noted that the assignment of contract may occur in three different forms – as a main operation, as a subsequent operation, or as an effect of the exercise of a legal right (Pop, Popa, Vidu, 2020, p. 522).

Firstly, as a main operation, the assignment of contract can be concluded as a legal act between the three parties, assignor, assignee and ceded contractor, or as a contract between assignor and assignee which is later notified to the ceded contractor if the ceded contractor did not agree to the transfer of contract in advance. As a main operation, the assignment of contract can be seen as an autonomous operation, being related only to the original contract and formally independent of any other operations (Almășan, 2018, p. 231).

Secondly, as a subsequent operation, the assignment of contract is part of a main operation with the purpose of transferring property. For example, in the case of transfer of property of a real estate which was previously leased, the lease contract will be assigned to the new owner, as stated in article 1811 of the New Romanian Civil Code, or in the case of a business fund transfer, where the assignment of contract is related to the conditions of the main contract and not to the provisions 1315-1320 of the New Romanian Civil Code (Almășan, 2018, p. 232).

Thirdly, the legal doctrine pointed out that the assignment of contract can occur as a result of the exercise of a legal right, such as the legal or conventional pre-emption right.

### **Validity conditions**

Since assignment of contract is itself a contract, it has to respect all the validity conditions stated in article 1179 (1) of The New Romanian Civil Code required for any contract, such as the conditions required for the ability to conclude contracts, consent, a determined and licit object and cause. With regard to the form, there are no specific requirements, since the assignment of contract is a consensual contract. However, article 1316

of the New Romanian Civil Code states that both the assignment of contract and the acceptance from the ceded contractor must be concluded in the form required by law for the validity of the ceded contract, otherwise the operation would be completely void.

If the assignment of contract is binding from the moment of its conclusion for its parties, assignor and assignee, in order for the operation to have full effects and attain its purpose of substituting the assignee in the contractual position of the assignor, there has to be an approval of the ceded contractor. The approval of the ceded contractor cannot, however, affect the validity of the operation, but merely its effectiveness (Pop, Popa, Vidu, 2020, pp. 523), even if a distinct opinion was developed in the legal doctrine (Almășan, 2018, pp. 245-246). Even though without the approval of the ceded contractor the assignment of contract cannot produce its specific effects, it is still a valid legal operation, and was named in the legal doctrine an incomplete assignment of contract, in contrast to the complete one which produces full, specific effects. As such, the required approval of the ceded contractor is a condition of opposability, although there is an opposing opinion in the legal doctrine of Romanian, French and Italian legal systems, which consider the approval of the ceded contractor as a validity condition (Romoșan, 2018, pp. 355-356). However, whenever the ceded contract is *intuitu personae*, the approval of the ceded contractor is not required only for opposability but for the validity of the assignment of contract itself. Another condition required by article 1315 (1) of the New Romanian Civil Code is the one regarding the services of the ceded contract – they have to be not yet fully executed.

## Effects

When considering the effects of the assignment of contract the approval of the ceded contractor is essential.

Before the approval or in its absence, the assignment of contract is subjected to article 1270 of the New Romanian Civil Code which states the full binding effects between the parties of any concluded contract. In addition to *pacta sunt servanda*, article 1320 (1) of the New Romanian Civil Code demands from the assignor to ensure the assignee of the validity of the ceded contract, which implies legally formed contractual rights and obligations. The assignor may be considered a personal guarantor if he also ensures the assignee of the performance of the ceded contract, as stated in article 1320 (2) of the New Romanian Civil Code.

Towards the ceded contractor, in the absence or before his approval, the assignment of contract does not have any effect. Article 1318 (2) of the New Romanian Civil Code states that if the ceded contractor explicitly refuses to release the assignor of his contractual duties, the assignor is liable whenever the assignee does not perform the ceded contract. In this case, the assignment of contract, since it does not transfer the contractual obligations to the assignee but only the contractual right, has, between assignor and assignee, the effects of an assignment of rights.

After the approval of the ceded contractor, the assignment of contract has full effects. The approval must be given in the form required for the assignment of contract, according to article 1316 of the New Romanian Civil Code. The approval may be included in the assignment of contract, or it can be given separately, either before or after the assignment of contract, as stated in article 1317 of the New Romanian Civil Code. The moment in which the assignment of contract is considered concluded overlaps with the moment in which it is opposable to the ceded contractor – either in the moment of the approval, or in the moment of the notification of the ceded contractor.

After the approval of the ceded contractor, the assignment of contract has full effects between its parties, the assignor and assignee, since it is subjected to article 1270 of the New Romanian Civil Code. Also, as a general rule, the assignor, after the approval of the ceded contractor, is released of his obligations deriving from the original contract, as stated in article 1318 (1) of the New Romanian Civil Code. As an exception, however, if the ceded contractor

does not release the assignor, he will have two debtors, both the assignor and the assignee. Therefore, if the assignee does not perform the original contract, the ceded contractor can hold the assignor liable within 15 days from the moment of non-performance or from the moment in which he knew the non-performance, with the risk of losing his right of recourse against the assignor, as stated in article 1318 (2).

Between the assignee and the ceded contractor there will be the effects of the original contract, with several exceptions such as the inability of the ceded contractor to oppose to the assignee any vice of consent or any other defences or exceptions risen from the original contract, unless he reserved this right when he approved of the assignment of contract, as stated in article 1319 of the New Romanian Civil Code.

## **Conclusions**

Following the initiatives in other legal systems of introducing the assignment of contract in civil regulations such as the French, Italian, Portuguese or even considering the recognition of this legal figure in the Draft Common Frame of Reference, the New Romanian Civil Code addresses this legal operation in articles 1315-1320. Following the same sources and aligned to the dominant opinion in the legal doctrine of the previous Civil Code, in the new regulation the assignment of contract is recognized a specific status, distinct from several operations to which it cannot be properly reduced to, such as personal subrogation, assignment of rights, novation or contract in favour of third parties.

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