

The Real Payment Offer and the Consignation, in the Old and New Romanian Civil Code

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ABSTRACT: The real payment offer and the consignation are legal forms of voluntary payment, which can be defined as the manifestation of will of the payment obligation's debtor by means of which he executes, on his own initiative and in kind the pecuniary obligation undertaken, regardless of whether the obligational legal relation is national or has an extraneity element. In other words, the payment defines that operation by means of which an obligation to issue a certain amount of money to the creditor is voluntarily executed by the debtor, in view of terminating the obligational legal relation, with or without extraneity element. Still, the debtor must resort to the institution of the real payment offer and consignation only if he is faced with the creditor's reticence in receiving the payment or he is in a fortuitous impossibility to accept it. The reason why the lawmaker made such an institution available to the debtor is given by the fact that the creditor's refusal to accept payment may be due to his intention to charge penalties on the debtor for his late payment. Even in the situation when the creditor would be in a fortuitous impossibility to receive the payment, this

fact cannot create an advantageous situation for him, in relation to the debtor of the payment obligation, person from whom he can ask penalties for the delayed making of the payment.

KEY WORDS: payment, payment operations, payment offer, consignment, notice of default, creditor's, debtor

General aspects

From the legal perspective, the payment operation covers a much wider area of performance of the debtor, such as the transmission or establishment of a right, the execution of a work, the provision of a service, the turning over of a good, of documents, the assignment of a liability of a tangible asset etc. Therefore, it can be stated that the termination of an obligational legal relation can also be done through other manners than through pecuniary payment, on condition of accepting such a modality of achieving the liability by the creditor.

Given that payment represents the main means of termination of the obligational legal relation, through the expression *legal form of payment* are indicated all legal operations comprising a performance from the debtor of the payment and have as effect the termination of the obligational legal relations regarding which the payment has been made. Still, hereinafter, we shall restrict ourselves to the analysis of the legal operations having as object the making of a pecuniary payment, whose consequence is the termination of the original obligational legal relation. In this sense, we claim that the operations taking the legal form of payment, with the consequence of terminating the obligational legal relation, are *payment by subrogation, imputation of payment, the payment offer and consignment and the liability assignment*. (In what concerns the *assignment*, we mention that also under the old regulation, respectively, the Civil Code of 1865, even if the *debt assignment* was not expressly established, in practice, it was performed, reason for which the new Civil Code of 2011 distinctly regulated it.)

The real payment offer and consignation in the light of the Romanian Civil Code of 1865

We mention that at present the institution is no longer regulated in the new Civil Code with this name, but, by virtue of the Principles of European Contract Law, from where it was taken, it was called “*Creditor’s formal notice of default*”. In the daily activity, there is a possibility that a person entitled to receive a payment either refuses it, or is in impossibility to receive it, reason for which the lawmaker made available to the payment debtor a legal means by which he can be released from his debt without having to incur penalties as a consequence of the fact that he exceeded, without his fault, the date on which he should have made the payment afferent to an obligational legal relation, with or without extraneity element. Such means had in the previous regulation the name of *real payment offer followed by consignation* (Ciobanu 1996, 506-509; Terre and Lequette 1999, 1251-1253).

Hence, in the situation when the creditor would have refused the receipt of payment for different reasons, such as the fact that its value would not have been at the level actually owed, or would have invoked other more or less plausible reasons for preventing the debtor to make payment within the deadline, for the purpose of charging delay penalties or other advantages, as a consequence of the fact that the debtor did not perform the payment obligation on the deadline stipulated, the debtor could use the real payment offer followed by consignation.

In such situations, the debtor of the payment has the interest to clear the payment before the deadline stipulated, either in order to not have to incur penalties, or to not be obligated to make expenses with the preservation of the asset, or in order to not be placed in a position where he must incur all losses related to the depreciation of

the assets not delivered within the term stipulated in the contract, in the situation of an obligation to deliver goods.

In order to avoid such inconveniences, the payment debtor has and has the right to discharge himself through payment and on the deadline, by means of his real payment offer followed by consignment.

The conditions in which the debtor could make use of such a legal means were regulated in Title III called "On contracts and agreements", chapter VIII – "On the termination of obligations", section IV called "On payment offers and on consignations", art. 1114-1121 of the Civil Code (1865), and the procedure to follow was regulated in Book VI, called "Special procedures", Chapter III called "On payment offers and on consignations", art. 585-590 Civil Procedure Code (1865).

Thus, according to art. 1114 of the Civil Code (1865), "*when the creditor of an amount of money refuses to receive the payment, the debtor can make a real offer and, if the creditor refuses to receive it, he can consign the amount*". Article 586 of the Civil Procedure Code has a similar wording to that of art. 1114 of the Civil Code, and from the analysis of the text it is derived that the payment offer that the debtor made the creditor had to be real.

The term *real* used by the lawmaker considered the fact that the offer had to be made in writing and not verbally because this last variant did not fulfill the reality condition. At the same time, the amount offered as payment to the creditor had to be consigned at a bank, in his name.

Thus, in order for the real payment offer to have been valid, it had to fulfill the conditions established by law. Thus, art. 1115 of the Civil Code established that such an offer had to be made a) to the creditor or to the person entitled to receive the payment for the creditor, or b) by a person who had the capacity to make a payment, or c) for

the entire payable amount, for the interest owed, the liquid expenses, as well as for an amount afferent to the non-liquid expenses, which could be revisited after the liquidation of the respective expenses, or d) for a due liability, if it had a term stipulated in favor of the creditor, or e) for a liability whose condition was fulfilled, in the situation when the obligation undertaken would have been under suspensive condition, or f) in the place set for payment, and in the contrary case, at the creditor's domicile or at the domicile chosen for the contract execution or g) through a court officer.

Regarding the validity of consigning the amount to be deposited at the creditor's disposal, according to art. 1116 of the Civil Code (1865), it was not necessary to have been authorized by the court. However, for the validity of the operation, the debtor had to notify the creditor, and the notification had to contain the date, time and place where the amount was to be deposited, together with all the accessories until the day of consignment.

Thus, from those exposed above, it is derived that the procedure of the real payment offer followed by consignment comprised three stages, as follows:

a) A first step was represented by the *payment request* sent in written form to the creditor, at his place of establishment or at the one chosen for the performance of the contract, through a court officer, in which the amount offered or the asset owed was to be mentioned, together with the day, time and place when the creditor was summoned to appear for the remission of the amount or of the asset.

In the situation when the creditor appears in the day, place and at the time indicated and he either accepted the payment or refused it or did not want to sign, the court officer would draft a minute comprising the factual situation, which had to be signed also by the creditor or, in case of the creditor's refusal to sign, the court officer had to record this aspect in the minute.

In the first situation, respectively the one where the creditor accepted the payment, the minute drafted by the court officer proved the termination of the obligation through payment. In the other situations, the minute drafted by the court officer gave the debtor the right to proceed to the other stages of the real payment offer, in view of terminating the liability. Thus, in the case of express refusal to receive the payment by the creditor or in the event he did not appear on the day and in the place indicated in the request, the procedure established by law would be followed.

b) In such a situation, step two would be followed, which consisted of the actual fact of *consigning the amount or the asset to a bank unit*, on account and at the disposal of the creditor, and the consignment receipt was handed over to the court officer. Before consigning the amount, for the procedure validity, it was necessary to send a new notification/request to the creditor, mentioning the day, time and place where the amount was going to be consigned.

c) The thirist stage was represented by the *validation of the amount consignment by the court of law*, through final decision. Thus, after consigning the amount with the bank unit, the debtor could go to court in order to validate it. Regarding this aspect, it must be mentioned that until the validation of the amount the debtor could dispose of it as he pleased, being even able to withdraw it. After the court validated the consignment, the debtor, in principle, was no longer able to perform disposal acts regarding the consigned amount, even if it was not collected by the creditor and even if the creditor would have given his consent in this sense (Art. 1119 of the Civil Code 1865).

Still, if the creditor expressly accepted the amount withdrawal by the debtor, after the consignment validation by the court, the creditor would lose his right over the privileges or mortgages accompanying the liability (Art. 1120 of the Civil Code 1865). If the debtor's debt

was represented by a certain asset which had to be turned over in the place where it was and the creditor did not come to collect it after being notified, and the debtor needed the respective space, he could ask the court of law to allow that he moves the asset to a different location. In his turn, the creditor was entitled to ask the court to cancel the payment offer and the consignment, on condition that the conditions established by law had not been observed.

In conclusion, we mention that the real offer followed by consignment discharged the debtor and proved the payment, with the mention that all expenses incurred due to this procedure, validly performed, were on the creditor's account, as a consequence of the fact that he was the one who generated them by refusing to receive the payment from the debtor (Art. 1117 of the Civil Code 1865).

The creditor's formal notice of default in the regulation of the New Romanian Civil Code

As previously mentioned, the institution of the creditor's formal notice of default was not regulated, under this name, in the old Civil Code, the reason for which we can say it has a novelty character only in what concerns the name.

The institution of the *creditor's formal notice of default* is of European inspiration, being seen in the Project of the Principles of the European Contract Law of 1995, modified in 2003, and it establishes the debtor's possibility to notify the creditor to receive the execution of the obligation, as it is established in the obligational legal relation, if he refuses the receipt of the assets or of the amount with the title of payment. (The regulation comprised by the Project of the principles of European contract law was taken, with small changes, in the Draft Common Frame of Reference in the USA)

Thus, in the current meaning, the obligational legal relation is a complex legal mechanism and the payment, in order to lead to its termination, must be made strictly according to the contractual provisions, according to art. 1510 para. 1 and art. 1492 para. 1 of the New Civil Code. As a consequence, the acceptance of the execution of the payment obligation by the creditor is also necessary, followed by the take-over of the respective obligation.

In practice, there are situations when the payment execution by the debtor is conditioned by the creditor's involvement, who refuses to perform the preliminary acts of the execution, a case when the legal provisions regarding the creditor's formal notice of default come into play. In other words, when the debtor makes a payment execution offer according to the provisions of the obligational legal relation and the creditor refuses to accept and, implicitly refuses to take the payment from the debtor, the latter has the right to proceed to the formal notice of default of the creditor, requesting that he accepts payment and if the debtor's actions still remain without effect, he is entitled to proceed either to the consignment of the asset to the disposal of the creditor, or to the payment offer followed by consignment or to the public sale. Basically, by means of this procedure, the tendency is, mainly, to give efficiency to the termination effect of the payment and in a subsidiary, to prove the payment, as well. At the same time, the lawmaker also conferred upon this mechanism an additional effect afferent to transferring the non-execution risk to the creditor's patrimony, after the moment of formally notifying him of default. (Where we are concerned, we believe that the effects under the previous institution, called *real payment offer followed by consignment* were the same).

The procedure to follow in what concerns the creditor's notice of default, it is regulated in the New Civil Procedure Code, art. 1005-1012. Thus, similar to the previous regulations, the conditions for the creditor's formal notice of default are regulated by art. 1510-

1515 of the New Civil Procedure Code, and the procedure to follow, by art. 1005-1012 of the New Civil Procedure Code.

We mention that in the New Civil Procedure Code, the institution is regulated in Book VI, called "Special procedures", Title VIII under the name "*The procedure of the payment offer and of consignment*", art. 1005-1012. Thus, the editors of the New Civil Procedure Code were consistent and maintained the name of the institution from the previous civil procedure, in the conditions when there are no differences of legal effects between the previous and the current institutions. As an irony of fate, art. 1012 of the New Civil Procedure Code, whose marginal name is "*The incidence of the dispositions of the Civil Code*", stipulated that "*The dispositions of this title (VIII o.n.) are completed by the provisions of the Civil Code regarding the payment, as well as by those regarding the payment offers and consignments*", fact which proves the similarity of legal effects between the institution regulated by the Old Civil Code and that in the current Civil Code. The inconsistency of the editors of the New Civil Procedure Code does not stop at the name of the section reserved for this institution but continues with the mentions in the art. 1513 regarding the procedure, where they mentioned clearly and without equivoque that "*The procedure of the payment offer and consignment is established by the Procedure Civil Code*". Coming back to the analysis of the institution, we show that in what concerns the conditions imposed by art. 1510 of the New Civil Procedure Code, in order to be able to invoke the *creditor's notice of default*, two cumulative conditions must be fulfilled, respectively:

- a) there must be a payment offer from the debtor, according to the stipulation in the obligational legal relation;
- b) the creditor must refuse without justification to accept the payment offered by the debtor or he must refuse to make the preliminary acts without which the debtor cannot execute his obligation.

In what concerns the unjustified refusal of execution, from our point of view, we claim that it can be due, as in the previous regulation, either to a fortuitous execution impossibility, or to the situation when the non-compliance of the payment offer is claimed, invoking the exception of contract non-execution. Regarding the preliminary acts afferent to the payment execution, which the creditor must perform, in our opinion, they represent all those acts or facts which allow the take-over of the obligation execution by the creditor, such as making available to the debtor the means of transport for loading, when the creditor undertook he would do so; making available to the debtor of the warehouses or storage facilities for the unloading of the merchandise from the means of transport etc.

In what concerns the creditor's notice of default, it is performed according to the provisions of art. 1005 and 1006 of the New Civil Procedure Code. Considering that the procedure is similar to that regulated by the old Civil Procedure Code, which we referred to above, we no longer insist on it. It goes without saying that in the situation of accepting the payment offer, the procedure will follow according to art. 1007 of the New Civil Procedure Code, namely similar to the previous provision. If the notice of default remained without effect, the debtor is entitled to proceed according to the provisions of art. 1512-1514 of the New Civil Code and with the procedure established by art. 1008 of the New Civil Procedure Code, respectively *to consign the certain asset on account and at the disposal of the creditor* in a warehouse, thus performing the take-over of the execution offered by the debtor. With respect to the take-over of the execution offered by the debtor, in the specialty literature, it was stated that the storage of the goods in a place arranged for this purpose must have as effect an actual de-notification of the debtor with respect to that good (Pop and Vidu op. cit., 537). At the same time, when the creditor refuses payment or does not come in the day and at the time indicated in the notification, the debtor is entitled

to make a *real offer followed by consignment*, whenever the execution of the obligation consists of the payment of an amount of money or of the turnover of assets. The procedure of the real offer followed by consignment comprises, as in the previous regulation, also three stages, respectively a notification sent to the creditor, where the day, time and place where the amount will be consigned or the asset will be submitted will be mentioned, followed by the consignment of the amount to a bank unit, the receipt going to be sent to the court officer and, finally, the consignment validation through the closing drafted by the court officer, which has as effect the debtor's discharge as a consequence of establishing the payment as having been made.

The novelty character introduced by the of the New Civil Procedure Code consists in the fact that such a procedure of the real offer followed by assignment can also be performed before the court in an ongoing trial, situation when the court will validate the consignment by closing which can be challenged together with the base matter, according to the procedure established by art. 1010 of the New Civil Procedure Code. In the same order of ideas, we show that the closing of the court officer, which validates the consignment of the amount of money or of the asset on account and at the disposal of the creditor is communicated to him within five days from drafting and can be challenged before the court of law according to the provisions of art. 1009 of the New Civil Procedure Code.

Another possibility of capitalizing on the assets, established by the procedure of the creditor's formal notice of default, when he refuses payment without justification, refers to the *public sale*, according to art. 1514 of the New Civil Procedure Code, an operation which has a novelty character, is not regulated by the previous Civil Code. This gives the debtor to publicly sell the asset owed to the creditor and then to consign the price obtained on the account and at the disposal of the creditor. In order to the sale of the asset owed to the creditor to be allowed, it is necessary that the asset, through its nature, makes

consignment impossible, or it is perishable or the expenses with its storage of maintenance to be considerable in relation to its market value. In the situation when one of these conditions is fulfilled, the debtor is entitled to notify the creditor and to request the sale approval by the court of law. By exception, when the asset is listed on the stock exchange or on a regulated market or its price is too low for the expenses of a public sale, the court of law may approve the sale of the asset without the notification of the creditor (Art. 1514).

The effects of the creditor's formal notice of default

In what concerns the effects of the creditor's formal notice of default, they increase gradually, depending on the stage of the ongoing procedure. Thus, the first consequence of the creditor's notice of default with an execution offer is that the debtor is ready to precisely execute his undertaken obligation, at the same time showing the proof of his execution offer. Secondly, following the notice, the risk of fortuitous execution impossibility is transferred to the creditor, and the debtor has no obligation to return the fruit produced by the asset owed and collected after this date. Then, the creditor has the obligation to remedy the damage caused to the debtor as a consequence of the delay in the execution of his obligation to take over the execution and to incur the expenses with the preservation of the asset.

Finally, if the creditor appears on the date, at the time and in the place established in the notification and receives the payment of the amount or takes over the asset or assets owed by the debtor, the obligation is terminated, the procedure thus having an extinctive effect on the obligation executed. Also, an extinctive effect has the procedure of the real offer followed by consignment, if it was validated by the court or if the creditor failed from the challenged term. Until the moment when the court validates the consignment

or the acceptance of the asset by the creditor, the extinctive effect is temporary and the debtor can withdraw the asset, case in which the liability is re-established, with all guarantees and accessories, from the moment of withdrawing the asset (Art. 1515)

Conclusions

From those exposed above, it is derived that the lawmaker offered equality of legal treatment to the parties of the legal relation with or without extraneity element, making available to the debtor a procedure by means of which he can discharge himself on the deadline of the payment obligation undertaken through a civil or commercial contract, thus avoiding the payment of delay penalties in executing his obligation.

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