

THE EFFECTS OF THE CREDITOR-DEBTOR LEGAL RELATIONSHIP THROUGH THE OBLIGATION TO MAKE NON-EVALUABLE IN MONEY WITH A PROPERTY TRANSFER EFFECT WITHIN BANKING CONTRACTS

Ioana – Camelia BUCIU¹

Abstract: *The direct legal relationship between creditor and debtor has as its purpose, within the framework of civil action, the protection of patrimonial rights and legitimate interests arising from the contract concluded between the parties and which are obligations that can be valued in money. However, there are clauses through which obligations that cannot be valued in money at the time of the birth of the legal relationship are inserted and whose effect is property transfer.*

Keywords: *Obligations to do - not valuable in money - valuable in money - property transfer effects - patrimonial rights - expertise - quantification of obligations not valuable in money - civil action - banking contract - creditor – debtor.*

THE LEGAL ORDER OF PROTECTION

The legal doctrine² shows that the legal protection of rights and freedoms as a technique of the rule of law, involves the establishment of rights and freedoms with supra-legislative value, recognizing the right of individuals to refer to independent and impartial courts based on the principle of free access to justice as a guarantee in the matter of fundamental rights and freedoms. The independence of the courts being established by the Constitutional Court, in the decision no. 20/2000 published in the Official Gazette of Romania no. 72/18 February 2000, according to which: Parliament “*has the duty to legislate appropriate mechanisms for the real assurance of the independence of judges, without which the existence of the rule of*

¹ The author has been a lawyer at the Timiș Bar since 2009 and a university assistant at the Faculty of Law at Tibiscus University in Timișoara.

² D.C.Dănișor, *The Commented Constitution of Romania, Title I. General principles*, Universul Juridic publishing house, Bucharest, 2009, p.41.

law, provided for by art. 1 par. 3 of the Constitution³, cannot be conceived”. Appearing the connection or rupture between legitimacy⁴ and positive law or the distinct competences within the separation of powers in the state⁵ between the judicial, legislative or administrative power, established by the provisions of article 1 paragraph 4 of the Romanian Constitution⁶ and which may affect national sovereignty⁷. The competences of each power in the state exercising independently⁸ under the conditions of legitimacy

3 Article 1 paragraph 3 of the Romanian Constitution: 3. Romania is a state of law, democratic and social, in which human dignity, the rights and freedoms of citizens, the free development of the human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989 from December 1989, and are guaranteed.

4 F.B. Vasilescu, *The right to a fair trial*, published on the online platform <https://www.ccr.ro/wp-content/uploads/2020/10/vasilescu.pdf>, accessed on 10.12.2024, p.1.

„The notion of the rule of law constitutes one of the defining features of European constitutionalism, whose influence in today’s world is undeniable. By means of this concept, the state itself restricts the field of its action, in relation to its own value system. If he himself does not take into account positive law, which is his own creation, the very legitimacy of the exercise of power is called into question. „The public power that undermines the legal order that it itself has established pronounces its own decay”, mentioned Ihering at the beginning of this century”.

5 F.B. Vasilescu, *op.cit.*, p.5.

„But the independence of justice is also protected in another way, through one of the most important supra-constitutional principles, which is the separation of powers. As is known,²⁹ this principle is not enshrined as such in the Romanian Constitution, but the jurisprudence of the Constitutional Court has applied it in numerous cases³⁰, so that, rightly, it can be considered as „a structuring and functional principle in the Romanian constitutional order”. Moreover, the jurisdictional practice of the Constitutional Court which enshrines this principle only expresses the content of Article 2 paragraph 2 of Law no. 47/1992 on its organization and operation, which provides that the provisions of normative acts that violate the provisions and principles of the Constitution (underlining belongs to us) are unconstitutional”.

6 Article 1 paragraph 1 of the Romanian Constitution: 4. The state is organized according to the principle of separation and balance of powers - legislative, executive and judicial - within the framework of constitutional democracy.

7 Article 1 paragraph 1 of the Constitution of Romania: Romania is a national state, sovereign and independent, unitary and indivisible.

8 F.B. Vasilescu, *op.cit.*, p.6.

„In one of the first decisions given by the Court in this matter, namely Decision no. 6/1992 (32), a law was declared unconstitutional by which the Parliament suspended the course of the trial and the execution of final court decisions regarding certain determined causes, invoking in a categorical way the violation of the principle of separation of powers: „By virtue of this principle, the Parliament has no right to intervene in the process of achieving justice (...). An interference of the legislative power that would make the judicial authority unable to function (...) would have the consequence of creating a constitutional imbalance between these authorities”.

with the Romanian judicial system which ensures the implementation of the provisions of Article 6 of the European Court of Human Rights, which contains several steps⁹: constitutional, supra-constitutional and jurisprudence of both supranational courts, as well as the Constitutional Court according to the form of government¹⁰ of the Romanian state, from the beginning of its activity, respectively June 1992 – until now. Legal protection of fundamental human rights applying under the provisions of article 20 paragraph 1 and paragraph 2 of the Romanian Constitution¹¹ regarding the supremacy of international treaties regarding human rights.

In the analysis of the effects of positive law in the patrimony of the nationals of the member state, we must take into account the principle of the security of legal relations through the lens of the real and direct effects produced in the patrimony of the final recipients of the civil action through the effects of concluded legal acts and court decisions when we apply the fundamental principles, as legislated by the Romanian Constitution. In this sense, the legal doctrine¹² shows that the legislation that has the effect of restricting the exercise of civil rights that reflect fundamental rights is unconstitutional. And it has as a limit the violated fundamental right itself: *“the same happens with liberties not expressly constitutionalized. For example, contractual freedom is not expressly constitutionalized, thus appearing to be only a principle of law enforcement at the legislative level, resulting from the Civil Code. However, a law that would restrict the freedom of contract without respecting the conditions established by Article 53 of the Constitution, will be unconstitutional because it violates the supreme value of citizens’ freedoms”*.¹³

9 F.B. Vasilescu, *op.cit.*, p.3.

10 Article 1 paragraph 2 of the Romanian Constitution: The form of government of the Romanian state is the republic.

11 Article 20 of the Romanian Constitution: 1. The constitutional provisions regarding the rights and freedoms of citizens will be interpreted and applied in accordance with the Universal Declaration of Human Rights, with the pacts and treaties to which Romania is a party. 2. If there are inconsistencies between the pacts and treaties regarding fundamental human rights, to which Romania is a party, and domestic laws, international regulations take precedence, unless the Constitution or domestic laws contain more favorable provisions.

12 D.C.Dănișor, *op.cit.*, p.74 - 77.

13 D.C.Dănișor, *op.cit.*, p.76.

„Thus a special link is established between fundamental rights, subjective rights and supreme values. If normally the subjective rights are the reflection of the fundamental rights, the unconstitutionality of a legal norm being attracted by the violation of a fundamental right, the disregard of a subjective right being only a cause of questioning the fundamental right, the establishment of citizens’ rights as a supreme value tends to overturn the process, it being sufficient that a subjective right is disregarded by regulation, outside the

The civil action. The civil action is the set of procedural means, regulated by the provisions of Article 29 of the Civil Procedure Code by which the claimed rights, interests and legal situations are defended, in a real and effective way, in the sense of the practice of the European Court of Human Rights. And defenses¹⁴ are exercised in the process under Article 32 paragraph 2 of the Code of Civil Procedure. Ensuring the legal protection of legal situations, interests and patrimonial and non-patrimonial rights of legal subjects.

A civil action is the act of notification to the court and can be formulated by promoting a request¹⁵ for summons to court according to the provisions of Article 192 of the Code of Civil Procedure or by filing a request for forced execution¹⁶ according to the provisions of Article 622 of the Code of Civil Procedure.

The phrase provided by the text in attributing jurisdiction to the civil action to the court, provided by the provisions of Article 94, paragraph 1, point h, of the Code of Civil Procedure¹⁷ regarding the classification of obligations to do or not to do that cannot be valued in money, regardless of their contractual or extra-contractual source, it lacks predictability¹⁸ in terms of

framework imposed by art.53, for the norm to become unconstitutional because it violates the supreme value. This time, the subjective right itself becomes the limit of legislation, because it is directly attached to a supreme value without being directly attached to a fundamental right. The same happens with the expressly unconstitutionalized freedoms."

14 Article 32 Civil Procedure Code: 1) Any request can be formulated and supported only if its author: a. has procedural capacity under the law; b. has procedural quality; c. make a claim; d. justify an interest. 2) The provisions of paragraph 1 apply, accordingly, also in the case of defenses.

15 Article 192 Civil Procedure Code: (1) In order to protect his or her legitimate rights and interests, any person may address the courts by filing a lawsuit with the competent court. In specific cases provided for by law, the court may also be filed by other persons or bodies. (2) The process begins by registering the lawsuit with the court, under the terms of the law. (3) The person who files the lawsuit is called the plaintiff, and the person who is being sued is called the defendant.

16 Article 622 paragraph 2 of the Civil Procedure Code: (2) If the debtor does not voluntarily perform his obligation, it shall be carried out through forced execution, which shall begin upon notification to the enforcement body, according to the provisions of this book, unless otherwise provided by special law.

17 Article 94 Civil Procedure Code: Courts shall judge: 1. In first instance, the following claims whose subject matter is evaluable or, as the case may be, non-evaluable in money: h) claims regarding obligations to do or not to do that are non-evaluable in money, regardless of their contractual or extra-contractual source, except for those given by law to the jurisdiction of other courts.

18 V. Bărbulescu, On the fulfillment of the obligation to do, non-evaluable in money, subsequent to the enforcement of the enforceable title, article published on the online platform

the patrimonial effects of obligations that cannot be valued in money ab initio at the formulation of the civil action and the notification of the court through the petition for summons, appreciating the fact that an obligation concerns the merits of the case and the elements of the civil legal relationship, as opposed to form or legality.

Starting from the assertion that: *whenever a property right is sought to be protected through legal action, the evaluation of the object of the dispute is possible and necessary*¹⁹, in this article we wish to prove that there are legal situations in which the holder of the subjective civil right is objectively and factually unable to evaluate the object of the dispute. It remains up to the court to clarify the claims sought through the civil action and what constitutes a property action.

Motivated by the fact that it does not have real and effective possibilities to be able to calculate and indicate in concrete terms the extent of the material object of the obligation to do, regardless of whether it coincides²⁰ with or is distinct from the claimed right. Criterion for establishing the nature of obligations to do or not to do that are not valuable in money. and which concerns the susceptibility of the obligation to be valued in money by the final recipient in terms of the predictability of the economic value perceived in fact, respectively the transparency of the cost or the infringement of legitimate interests. In the sense of specifically indicating in the case of

Juridice, <https://www.juridice.ro/659020/despre-indeplinirea-obligatiei-de-a-face-reevaluabila-in-bani-ulterior-penurizi-in-executare-a-titlului-executoriu.html>, date of access 10.12.2024.

19 Based on the considerations of the High Court of Cassation and Justice, decision no. 32/2008 pronounced on appeal in the interest of the law.

20 High Court of Cassation and Justice, Panel for resolving legal issues, decision no. 8 of February 21, 2022, regarding the interpretation of art. 484 para. (1) of the Code of Civil Procedure, published in the OFFICIAL GAZETTE no. 331 of April 5, 2022, <https://legislatie.just.ro/Public/DetaliiDocument/253638>

Paragraph 27. In the court's assessment, the determination of the evaluable or non-evaluable nature of the dispute must be carried out not by reference to the purpose of the action promoted, (...). As such, the action will be qualified as evaluable in money, when a right with a patrimonial value is exploited, respectively non-evaluable in money, when the claimed right does not have such a value.

Paragraph 28. In this regard, it was shown that, from the perspective of art. 29, art. 30 and art. 194 letter c) of the Code of Civil Procedure, the object of the application brought to court, according to which the assessable or non-assessable nature of the dispute is established, is represented by the claimed right. However, this right may not coincide in certain situations with the material object of the obligation to do, the fulfillment of which is requested (the material object of the action for annulment). - to order the annulment of the works performed by the defendant in violation of the technical documentation (paragraph 10).

the request for a summons the extent of the subject matter of the dispute, i.e. the amount of money requested. Within the meaning of the provisions of Article 6 of the Code of Civil Procedure²¹, of the European Convention on Human Rights on the right to a fair trial as a guarantee of the right of defense; and of Article 47 of the Charter of Fundamental Rights of the European Union²².

In the sense in which we start from the legal situation in which the obligation to perform arising from a contract, through which a patrimonial right is protected, cannot be evaluated in money at the time of the notification to the court through the civil action petition. Analyzing the effects of an obligation that cannot be valued in money, I believe that the effects are assimilated to property transfer contracts by the interference with the security of legal relationships, the right to property and the right to private life and the family home, since under a contractual clause the disposition of real rights is in fact transmitted. Exceptions to the immediate translatable nature are not excluded in the case of cascade enforcement clauses in banking contracts in the event of an incident of early maturity of the contract between the parties or of a contract concluded with third parties.

An example of the claim²³ requested through the civil action petition of obligations to make non-evaluable in money is the legal situation regarding the monetary valuation of civil and commercial disputes having as their object the establishment of the existence or non-existence of a patrimonial right, the establishment of nullity, annulment, resolution, termination of legal acts regarding patrimonial rights, both in the situation in which the accessory claim regarding the restoration of the previous situation or the

21 Article 6 Civil Procedure Code: (1) Every person has the right to a fair trial, within an optimal and foreseeable time limit, by an independent, impartial court established by law. To this end, the court is obliged to order all measures permitted by law and to ensure the expeditious conduct of the trial. (2) The provisions of paragraph (1) shall apply accordingly also in the enforcement phase.

22 Article 47 of the Charter of Fundamental Rights of the European Union: Everyone whose rights and freedoms guaranteed by Union law are violated has the right to an effective remedy before a tribunal in accordance with the conditions laid down in this Article. Everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone has the opportunity to be advised, defended and represented. Free legal aid shall be granted to those who lack sufficient resources in so far as it is necessary to ensure effective access to justice.

23 Article 32 Civil Procedure Code: 1) Any claim may be formulated and supported only if its author: a. has the procedural capacity under the law; b. has procedural capacity; c. formulates a claim; d. justifies an interest. 2) The provisions of paragraph 1 shall apply, accordingly, to the case of defenses.

refund of the services provided is formulated, and in the situation in which this claim is not formulated, in order to determine the material jurisdiction to resolve these disputes in first instance and the appeals that can be exercised.²⁴

OBLIGATIONS NOT VALUABLE IN MONEY WITH PATRIMONIAL EFFECT

Civil obligations arising from the cascade clause regarding the debiting of subsequent accounts or contracts due in cascade:

1. Mentioning in the contract the account contamination clause prohibited by law which expressly prohibits the inclusion in mortgage credit contracts of a clause whereby “the creditor may declare the credit due in advance if the consumer has not fulfilled his obligations under other credit contracts concluded with other creditors”, (art.19 paragraph 3 letter c of Government emergency ordinance nr.52/2016);²⁵

2. Declaring the loan due in the event of forced execution initiated by third parties, (art.19 paragraph 3 letter c of Government emergency ordinance nr.52/2016);²⁶

3. The creditor has the right to declare the entire loan due if any creditor of the borrower initiates the procedure of forced execution or insolvency of the borrower. (art. 40 paragraph 4 letter c of Government emergency ordinance nr.52/2016);²⁷

4. *„The borrower/co-debtor authorizes the bank to take over from the available funds held by him in his accounts in lei/currency opened with the bank the amounts due under this contract as they become due, by automatically debiting the respective accounts. Within the limits of the amounts due, the borrower/co-debtor authorizes the bank to make in his name and on his account any currency exchange operation necessary to convert the*

²⁴ Based on the considerations of the High Court of Cassation and Justice, decision no. 32/2008 pronounced on appeal in the interest of the law

²⁵ Report National Authority for Consumer Protection, Synthesis of control actions, January 2016 – August 2017, financial services, National Authority for Consumer Protection, page 50; <http://storage1.dms.mpinteractiv.ro/media/1/186/3927/16712337/1/raport-sinteza.pdf>;

²⁶ Report National Authority for Consumer Protection, Synthesis of control actions, January 2016 – August 2017, financial services, National Authority for Consumer Protection, page 52;

<http://storage1.dms.mpinteractiv.ro/media/1/186/3927/16712337/1/raport-sinteza.pdf>

²⁷ Report National Authority for Consumer Protection, Synthesis of control actions, January 2016 – August 2017, financial services, National Authority for Consumer Protection, page 19; <http://storage1.dms.mpinteractiv.ro/media/1/186/3927/16712337/1/raport-sinteza.pdf>

amounts held by the borrower/co-debtor in his available funds accounts into the currency of this contract at the exchange rate applied by the bank on the day of the operation. Any currency exchange differences are the responsibility of the borrower. If there are several available funds accounts of the borrower/co-debtor with the bank, the order of the bank's satisfaction is first from the foreign currency account of this contract"²⁸

5. *"The credit, interest, and costs incurred directly or indirectly in granting the credit shall be repaid within the due dates provided for in this contract, and otherwise authorizes the creditor to take any income earned by him in any form, as well as all of his present and future assets."*²⁹

6. *"The change in the current interest rate shall be communicated to the mortgage borrower by written notification with acknowledgment of receipt or by posting at the bank's premises or by bank statement requested by the mortgage borrower. The mortgage borrower agrees to this method as sufficient and "waives any complaint, defense or claim that this method is inappropriate or inadequate"*"³⁰.

CONCLUSIONS REGARDING THE CONSTITUTIVE OR TRANSFERATIVE EFFECTS OF OWNERSHIP

The clause according to which the bank authorizes itself to dispose of all of the borrower's assets and wealth is an obligation of the borrower that cannot be valued in money at the time of signing the contract and whose effects extend to the entire assets, namely to all present and future assets. In this sense, the obligation that cannot be valued in money is corroborated by obligations that are apparently valuable in money regarding the repayment of the loan and are composed of the value of the loan, interest and costs

28 Report National Authority for Consumer Protection, Synthesis of control actions, January 2016 – August 2017, financial services, National Authority for Consumer Protection, page 19;

<http://storage1.dms.mpinteractiv.ro/media/1/186/3927/16712337/1/raport-sinteza.pdf>

See in this regard also I.C.Buciu, Application of the principle of contractual transparency to consumer consent, article presented at the National Conference of Master's and Doctoral Students in Law, "Law in Transformation. Theoretical and Practical Solutions for Contemporary Challenges", Sibiu, Faculty of Law, Lucian Blaga University, July 8, 2024

29 Report National Authority for Consumer Protection, Synthesis of control actions, January 2016 – August 2017, financial services, National Authority for Consumer Protection, page 38;

30 Report National Authority for Consumer Protection, Synthesis of control actions, January 2016 – August 2017, financial services, National Authority for Consumer Protection, page 80;

directly or indirectly incurred in granting the loan. The borrower's present and future assets, including the entire emolument of the patrimony consisting of movable and immovable property. Respectively, the obligation to make the goods susceptible to monetary valuation only at the time when they are present in the patrimony, becomes an indirect obligation to make them non-monetary at the time of insertion of the contractual clause and conclusion of the contract. It is the legal situation of the assets, movable and immovable, present and future, that make up the debtor's wealth and which, being uncertain, are not susceptible to monetary valuation. And which have the appearance of being valued in money, since the effective and real extent of these costs is effectively known by the bank at the time of collection, not even at the time of contracting. The legal situation of obligations not valuable in money becomes more damaging than the legal situation of obligations valuable in money because the creditworthiness procedure applied at the date of granting the loan is justified on the real possibilities of the borrowing power for granting the credit and which were taken into account when granting the credit or rejecting the granting of the credit. Patrimonial obligations, not valuable in money regarding future legal situations, are random obligations for the borrower and are not of the nature of a synallagmatic contract, on the one hand. And on the other hand, they have not been quantified through the banking creditworthiness procedure. But, in the event of a certain insolvency event or declaration of early maturity, these are likely to be valued in money. The cascading maturity regarding other credits concluded with third parties represents legal situations external to the contract between the parties. In conclusion, the future wealth of the debtor that was not subject to the creditworthiness procedure when granting the loan becomes an obligation that can be assessed in money for the creditor and which is an obligation that cannot be assessed in money for the debtor at the time of concluding the contract or even of filing a lawsuit in the case of a contract under execution that contains similar clauses. Just as the High Court of Cassation and Justice³¹ ruled that there is no random mixed

31 Decision No. 760 of 27 February 2014 pronounced on appeal by the Second Civil Section of the High Court of Cassation and Justice,

Quod nullum est nullum producit effectum - In this regard, the High Court specified that, since the loan agreement, as a variety of the credit agreement, is by its nature a contract with uno ictu execution, the fact that the bank assumes an obligation that is executed at once, and the other party assumes an obligation of successive repayment does not make its nature successive, knowing that it cannot have a dual nature, with execution at once for one party and with successive execution for the other party.

nature of the banking contract concluded between the parties, the debtor's future wealth represents the random element for the creditor. Respectively, the creditor's *uno actu* execution for unblocking a loan is an obligation assessable in money, while the debtor's successive execution for repaying the installments may be an obligation not assessable in money with a property transfer effect at the date of conclusion of the contract or during its execution. The creditworthiness procedure having the legal nature of a deceptive commercial practice.

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Notes on the author

Ioana – Camelia BUCIU – PhD student at University of Craiova, Romania, Faculty of Law. Coordinator Prof. Dr. Săuleanu Lucian Bernd. The author has been a lawyer at the Timiş Bar since 2009 and a university assistant at the Faculty of Law at Tibiscus University in Timişoara.