GROUND AND CONDITIONS OF PAYMENT WITHIN THE ROMANIAN NEW CIVIL CODE. GIVING IN PAYMENT[1]

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Résumé. *Le payement se définit comme l'exécution volontaire de la prestation, quel que soit son objet. Le payement est le moyen usuel d'extinction des dettes, qui donne satisfaction au créancier, en réalisant la finalité poursuivie par le rapport d'obligation.*

Le nouveau Code civil réglemente l'obligation d'exécuter les obligations avec la prudence et la diligence d'un bon père de famille. On trouve aussi une nouvelle codification, celle relative aux obligations de diligence et aux obligations de résultat. C'est une division récente des obligations, acceptée par la plupart de la doctrine et de la jurisprudence roumaines. Le payement s'analyse différemment selon l'obligation en discussion et la loi prévoit les critères qui font la délimitation entre ces catégories.

Le nouveau Code civil interdit le payement partiel, car le debiteur ne peut pas exécuter de façon incomplète son obligation. La loi consacre le principe d'indivisibilité du payement: le créancier n'est jamais tenu d'accepter un payement fractionné, qui ne présente pour lui un caractère satisfactoire.

La dation en payement, consacré dans le nouveau Code civil roumain, est une opération juridique qui n'a pas de réglementation dans le Code civil de 1864. La dation en payement nécessite la rémise d'une autre chose que celle initialement due; elle est soumise aux conditions ordinaires de validité des conventions. La dation éteint la créances et ses accesoires.

Mots clés: *payement, fondement, conditions, obligation de prudence, obligation de résultat, d'indivisibilité du payement, dation en payement*.

1. DEFINITION. GROUND OF PAYMENT

The definition of payment is found in Article 1469 of the Romanian new Civil code which also states in what the payment consists of. *Payment* means the voluntary execution of the service, no matter its object. It is an ordinary means of

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extinguishing obligations which gives satisfaction to the creditor, achieving the finality aimed by settling the obligations relationship[2]. “In the field of obligations, the notion of *payment* must be regarded *lato sensu.* To pay does not only mean to give the creditor the amount of money due; *by payment we must understand any discharging act,* no matter whether the obligation which is extinguished by payment, is an obligation to give or to do”[3]. Payment means the transfer of a sum of money or the execution of any other service that represents the actual object of the obligation.

The legislative intervention is useful and sets aside any equivoque: the object of payment is represented by the execution of any service due, not only the transfer of an amount of money. The text of Article 1469 of the new Civil code has no correspondent within the Romanian previous regulation; the second paragraph is inspired by Article 1553 of Quebec’s Civil code. Payment extinguishes perfect obligations as well as natural obligations; the reimbursement of payment is not admissible if the execution was voluntary.

Representing a bone of contention previous to the adoption of the new Civil code, the problem of the legal nature of payment is currently legislatively solved. Payment is conceived as a legal fact with significant consequences, including from the probation point of view. Within the majority opinion, payment was under the old regulation a legal act. However, there were a few authors that regarded payment differently, depending on whether it was seen as a means of performing an obligation or as a means of extinguishing an obligation relationship[4]. The new Civil code regards payment as a legal fact and sets forth that its proof is made with any means of evidence, in the absence of a contrary provision (Article 1499).

The ground of payment is represented by the debt: if any payment involves a debt, the performance of any debt represents a payment[5]. The core of payment is the act of execution. The relationship between payment and the act of execution is indissoluble; when the debt is extinguished in any way other than execution we are not in the presence of a payment. From this perspective compensation[6] and payment are not the same; the first does not represent a payment within the primary meaning of the notion (in fact, compensation is

[2] M. Mureşan, *Dicţionar de drept civil* [Dictionary of Civil Law], Cluj-Napoca, Edit. Cordial Lex, 2009, p. 500.

[3] I. Rosetti Bălănescu, Al. Băicoianu, *Drept civil român. Studiu de doctrină şi de jurisprudenţă* [Romanian Civil Law. Study of Doctrine and Jurisprudence], Bucharest, Edit. Socec & Co. SAR, 1943, p. 199.

[4] For a synthesis of these opinions, see L. Pop, *Tratat de drept civil. Obligaţiile* [Treatise of Civil Law. Obligations], vol. I (*Regimul juridic general sau Fiinţa obligaţiilor civile* [General Legal Regime or the Existence of Civil Obligations]), Bucharest, Edit. C. H. Beck, 2006, p. 447–448.

[5] J. Ghestin, M. Billiau, G. Loiseau, *Traité de droit civil. Le régime des créances et des dettes,* Paris, Librairie Générale de Droit et de Jurisprudence, 2005, p. 583.

[6] Compensation extinguishes debts only up to the smallest of them (Article 1616 of the New Civil Code).

mentioned, together with payment, among the means of extinguishing obligations in Article 1615 of the New Civil Code).

The regulation of the ground of payment is inspired from the 1864 Civil code (Article 1092 paragraph 1), the French Civil code (Article 1235 paragraph 1) and Article 1220 paragraph 1 of the Preliminary draft of the Code of obligations. Within the new Civil code, the necessity of return of the undue service is drawn from the *per a contrario* interpretation of Article 1470. Continuing the idea of returning undue services, the following article (1471) stipulates that the natural obligations that were voluntary fulfilled are not subject to return. Similarly, in the field of undue payment, Article 1341 paragraph 1 of the new Civil Code, states that the person who pays without owing is entitled to reimbursement. It is relatively presumed that the payment refers to a personal debt. If the payment is not due, the reimbursement follows the rules of Articles 1635–1649.

Payment – which involves a debt – represents the main modality of extinguishing obligations. The new Code stipulates that "obligations are extinguished by *payment,* compensation, confusion, debt remission, fortuitous impossibility of execution, as well as other means expressly regulated by law" (Article 1615).

The natural obligations[7] voluntary fulfilled are extinguished by payment. The text of Article 1471 continues Article 1469 which shows that obligations are extinguished by payment when the due services are voluntary fulfilled. The new Civil code rightly underlines the principle according to which reimbursement is not admitted in the case of natural obligations voluntary fulfilled. This rule is old, it was found in the 1864 Civil code (Article 1092), it is present in the French Civil code (Article 1235 paragraph 2) and in the Preliminary draft of the Code of obligations (Article 1220 paragraph 2). The text of Article 1471 of the new Civil code shapes the physiognomy of natural obligations: payment is not compulsory, but, once performed, it is considered made by the debtor in the hands of the creditor, with the condition to be voluntary[8].

Article 1471 refers to voluntary payment of a *natural obligation.* The meaning of the notion of "natural obligation" is not unitary regarded in the doctrine. The classifications of the civil obligations distinguish between perfect obligations and natural obligations, whose sanctions consist of defensive legal means[9]. Certain authors draw a line between natural obligations (of conscience)

[7] For the definition of the natural obligation, C. Hamangiu, N. Georgean, *Codul civil adnotat* [Annotated Civil Code], Alcalay, Edit. Librăriei „Universala", 1930, p. 226; G. Boroi, *Drept civil. Partea generală. Persoanele* [Civil Law. General Part. The Persons], 4th edition, revised and completed, Bucharest, Edit. Hamangiu, 2010, p. 77; C. Munteanu, O. Ungureanu, *Drept civil. Partea generală* [Civil Law. General Part], Sibiu, Edit. Universității „Lucian Blaga", 2011, p. 98.

[8] I. Rosetti Bălănescu, Al. Băicoianu, *Drept civil român. Studiu de doctrină şi de jurisprudență* [Romanian Civil Law. Study of Doctrine and Jurisprudence], ..., p. 166.

[9] The classification is analyzed in detail, having a consistent bibliography in L. Pop, *Tratat de drept civil. Obligațiile* [Treatise of Civil Law. Obligations], vol. I ..., p. 80–88.

and obligations that do not correspond to a legal action; others reunite these two under the same notion.

The effect of the payment made on the ground of a natural obligation is the impossibility of reimbursement[10]. The creditor that received the payment has at his disposal a defensive means – the exception deriving from Article 1471 of the new Civil Code[11]. The payment resulted from the voluntary fulfillment of a natural obligation (imperfect or of conscience) cannot be returned. Being a legal report that has in its construction also the sanction[12], the exception of making a due payment represents the defensive means that *accipiens* may use.

The particular application of the impossibility to return the payment within the natural obligations is regulated in the game contract. The payment of the debt deriving from the game or bet contract does not correspond to a legal action[13]. "That who loses cannot ask for the reimbursement of the payment made voluntary" (Article 2264 paragraph 2). The natural obligation is outlined, in this case, by the lack of legal action and the impossibility of returning the payment.

2. **CONDITIONS OF PAYMENT**

2.1. DILIGENCE ASKED IN PERFORMING PAYMENT

The participants to the legal relationships have to fulfill the obligations with the care and prudence of a good manager. The law imposes a normal, average diligence, the debtor being responsible only if he does not act with the care and prudence that an abstract, ideal, good manager would show in a similar situation[14].

The 1864 Civil code allowed exceptions to this rule only if they were stipulated by law, whereas the new Code admits derogations not only by law but also by mutual consent of the parties. By the act they conclude, the parties may agree that the fulfillment of the obligations they assume deflects from the general rule stated in Article 1480 paragraph 1.

The duty of care has an express regulation in certain special contracts. The borrower in a commodate is compelled to guard and preserve the loaned good with

[10] S. Guinchard (sous la dir. de), *Lexique des termes juridiques,* 16[e] édition, Dalloz, Paris, 2007, p. 451.

[11] This is not the place to analyze the legal nature of natural obligations. Still we outline the fact that this matter represented a bone of contention giving birth to three theories – the classical theory, the modern theory and the neoclassical theory. (For their presentation, see L. Pop, *Tratat de drept civil. Obligațiile* [Treatise of Civil Law. Obligations], vol. I ..., p. 85–87)

[12] The structure of the civil obligation determined the creation of two concepts: authors that claim the tripartite structure (subjects, object, content) and authors that argue four elements: the three already mentioned and in addition, the sanction of the civil obligation.

[13] Games and bets give birth to a legal action only if they are allowed by the competent authority.

[14] M. Mureșan, *Dicționar de drept civil* [Dictionary of Civil Law], ..., p. 244.

the prudence and care of a good owner; he cannot use the good for a different destination than that stipulated in the contract or deriving from the nature of the good (Article 2148 of the new Civil code); if the mandate is onerous the mandatory has to fulfill his obligations with the diligence of a good owner (Article 2018 paragraph 1, 1st thesis of the new Civil code); the consignee receives and preserves the goods as a good owner, being compelled to transfer them to the buyer or the consigner in the same condition received for sale (Article 2060 paragraph 1 of new Civil code); "in the absence of a contrary provision, when the depositary is paid, is a professional or is allowed to use the stored good, he is obliged to preserve the good with prudence and care" (Article 2107 paragraph 2 of the new Civil code); the administrator-seizure has to preserve the object of the sequester with the diligence of a depositary (Article 2140 of the new Civil code).

The new Civil code provides in paragraph 2 of Article 1480 a novel norm in respect to assessing the diligent behavior of a good owner. Such text did not exist in the previous regulation; it is reserved to the professional activities that have stipulated specific duties. Diligence will be assessed taking into account the nature of the work performed. The legislation in the medical field, for example, sets forth duties specific to the medical profession: obligation to provide medical care, obligation to inform the patient prior to carrying out certain therapeutic acts, obligation to maintain confidentiality of the patients' information. The obligation to inform has to be fulfilled by the medical personnel and is stipulated in Law No. 46/2003 on patients' rights[15] and Law No.95/2006 on healthcare reform[16], in the part referring to the civil responsibility of medical personnel. The requirement of the patient's informed consent to acts of potential risk is imperative. The content of the information refers to the diagnostic, nature and scope, alternatives to the treatment, disease prognostic, to a scientific level reasonable for the patient's power of understanding[17]. The assessing of the fulfillment of the obligation of information and medical advice relates to the scientific data known at the time of fulfillment.

2.2. OBLIGATIONS OF MEANS, OBLIGATIONS OF RESULT

The new Civil code regulates one of the classifications of civil obligations, recently introduced in the Romanian literature on the matter. Payment is regulated distinctly, depending on whether the obligations are of means or of result. As an

[15] Law on patients' rights was published in M. Of. no. 70/3 February 2003.

[16] M. Of. no. 372/28 April 2006.

[17] The content of the medical information is that stipulated by law and the form is oral. In concrete, the proof of the existence and content of the information allows any means of evidence admitted by law (I. Turcu, *Dreptul sănătății. Frontul comun al medicului și al juristului* [Health Law, Common Front of the Physician and Lawyer], Bucharest, Edit. Wolters Kluver, 2010, p. 190).

effect of payment, the obligation relationship is extinguished and the debtor is discharged. These effects are differently analyzed, according to Article 1481, depending on whether the legal relationship is composed of an obligation of care or an obligation of result. The two types of obligations are defined (paragraphs 1, 2) and moreover, the criteria that separates them are also mentioned (paragraph 3).

According to Article 1481, paragraphs 1 and 2, the obligations of result compel the debtor to reach a certain result for the creditor, whereas the obligations of means compel him to do everything necessary in order to reach the promised result. Therefore, the fulfillment or failure to fulfill the service depends on the category we are placed in – obligations of means or obligations of result[18]. In order to ascertain whether an obligation is of means or of result, it is proposed to take account especially of the criteria mentioned in Article 1481 letters a-d. The legal criteria in the delimitation of the two categories of obligations regard: the manner in which the obligation is stipulated in the contract; the existence and nature of the counterbenefit, as well as the other elements of the contract; the degree of risk presented by the result; the influence that the other part has on the execution of the obligation. These are the criteria considered significant by the redactors of the new Civil code, but they are not the sole elements of distinction that one can turn to. The legal text is not limitative, the wording used being "one will take *particular* account of the manner in which the obligation is stipulated in the contract […]".

Within the obligation relationships, *solvens* fulfills his obligation if he reaches for the creditor the promised result (in determined obligations), or if he uses his entire prudence and diligence in order to reach the result – in obligations of means. For example, *the obligations that have as object the payment of a sum of money or the delivery of a good of sort* are always obligations of result (furthermore, the creditor has the absolute guarantee that he will be satisfied because *genera non pereunt). The obligations that consist of the delivery of a certain good* are, in general, determined obligations, offering a relative guarantee for the creditor that he will be given what it belongs to him[19] ("the creditor is entitled to compensation for the prejudice the debtor caused and that is the direct and necessary consequence of the unjustified or, depending on the case, guilty non-fulfillment of the obligation" – Article 1530; "the creditor is entitled to full compensation for the damage he suffered from the fact that the obligation was not fulfilled" – Article 1531 paragraph 1). *The obligations that have as object the performance of services* are either obligations of means or of result; *the obligations not to do* are determined obligations. A welcome regulation is found in Article 2002 of the new Civil code in what concerns the main obligation of the carrier

[18] The two categories of civil obligations are analyzed in detail in a large monographic study-see J. Bellissent, *Contribution à l'analyse de la distinction des obligations de moyens et des obligations de résultat,* Paris, Librairie Générale de Droit et de Jurisprudence, 2001.

[19] L. Pop, *Tratat de drept civil. Obligațiile* [Treatise of Civil Law. Obligations], vol. I ..., p. 70.

(in the persons transportation), as obligation of result (the carrier is compelled to take on time the traveler at the destination place, safe and sound).

Some clarifications are necessary with regard to the legal stipulation of the classification obligations of means- obligations of result and to the criteria mentioned in paragraph 3 of Article 1481. Both the classification and the criteria are questionable in what stringency is concerned.

The classification, obligations of means - obligations of result, regards the object of the service[20] the debtor has to perform. Within the obligations of care, the debtor has the duty to give his best in order to reach a certain result, without assuming the obligation of reaching that result; within the obligations of result the debtor has to reach a determined result. The paternity of this classification is attributed to René Demogue[21] and is currently accepted by the majority of the French authors. It was taken in also Romanian doctrine, but its usefulness is questioned by some authors.

This division is relatively new in the Romanian doctrine and is not accepted with unanimity. Certain authors deny it[22], arguing that at a detailed analysis, between the two categories there aren't clear-cut differences (even if we would only take into consideration the probation aspect)[23]. Beyond a certain practical importance, this classification raises a number of difficulties. For certain obligations, the classification is not at all easy. For example, the obligations of security, arising from law or contract, are subject to doctrinal controversies, in terms of qualification and legal nature.

In what the criteria enunciated by Article 1481 are concerned, none of them can by itself draw a difference between the two types of obligation. Moreover, some of the elements are not capable of constituting real assessment criteria because they are not rigorous enough. They can be qualified, the most (eventually) as mere considerations that can be taken into account when placing the obligation in one category or another. For example, "the manner in which the obligation is stipulated in the contract" or "the influence that the other part has on the execution of the obligation", are vague, not clear formulations that don't determine the elements depending on which the obligation is seen as of result or of means. The

[20] For the classification of civil obligations in obligations of result and obligations of means, see L. Pop, *Tratat de drept civil. Obligațiile* [Treatise of Civil Law. Obligations], vol. I ..., p. 62–74; C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligațiilor* [Civil Law. General Theory of Obligations], Bucharest, Edit. Hamangiu, 2008, p. 5–7; I. Dogaru, P. Drăghici, *Bazele dreptului civil* [The basics of civil law], 3rd volume, *Teoria generală a obligațiilor* [General Theory of Obligations], Bucharest, Edit. C. H. Beck, 2009, p. 25–26; O. Ungureanu, *Drept civil. Introducere* [Civil Law. Introduction], 8th edition, Edit. Bucharest, C. H. Beck, 2007, p. 101–102.

[21] R. Demogue, *Traité des obligations, en général,* Tom V, Éditions Rousseau, Paris, 1925, p. 536–544 and tom VI, p. 644.

[22] See C. Stătescu, C. Bîrsan, *Drept civil. Teoria generală a obligațiilor* [Civil Law. General Theory of Obligations], ..., p. 5–7.

[23] For the detailed presentation of the arguments, see C. Stătescu, C. Bîrsan, *op. cit.,* p. 6.

existence and nature of the counterbenefit is an element that can be taken into consideration: the debtor that assumes the performance of a free service is held by an obligation of means (for example, free deposit), whereas if the service is remunerated the obligation is of result (onerous deposit). The *alea* element is especially mentioned in the French doctrine as a criterion of distinction: if the reaching of the result involves a great dose of risk, the debtor cannot promise or guarantee the creditor that result, the obligation being of prudence[24] (the frequently quoted case is that of the contract concluded between the physician and the patient[25]), whereas in the case when the reaching of the result involves no risk but it rests in the exclusive power of the debtor (for example the obligation to deliver a certain good), the obligation is of result. However, the application of the risk criterion is limited. It cannot be applied to the obligations born outside a contract and, furthermore, neither to all contractual obligations. It can be taken into account in the obligations whose execution requires the intervention of certain external factors, but even so, the will of the parties is the one that prevails, establishing the nature and object of the obligation[26]. Within the literature on the matter, the following criteria and considerations of delimitation between the obligations of means and those of result were formulated: the result aimed by the debtor is intrinsic or extrinsic to the obligation relationship; the nature of the interest[27]; the circumstance whether the execution of the obligation involves or not the creditor's activity; the circumstance whether the debtor contracted or not an insurance for the activity he carries[28].

The assessment of whether the obligation was fulfilled or not by means of this classification of the obligations needs further explanations. The rights and responsibilities of the debtor in relation to his creditor are more clearly defined by creating a real execution guarantee in favor of the creditor. In the case of determined obligations, the guarantee that he will receive what it belongs to him is great, whereas in the obligations of diligence, the guarantee is less or nonexistent[29].

At least for these reasons, it is not recommended to place civil obligations in a legal text of classification as categorical as the one present in Article 1481 of the new Civil Code. On the one hand, we can notice the desire to expressly state within

[24] The criterion is valid for the obligation relationships resulting from contracts.

[25] For a comment on the case *Mercier* (that brought about passionate discussions on the qualification of the physician's obligation to provide medical care to the patient – as obligation of prudence or obligation of result) see F. Buy, *L'essentiel de la jurisprudence civile. Obligations, 83 grands arrêts commentés,* Paris, Gualino, 2009, p. 98–99.

[26] For a detailed analysis see L. Pop, *Tratat de drept civil. Obligațiile* [Treatise of Civil Law. Obligations], vol. I ..., p. 67–68.

[27] I. Albu, *Drept civil. Introducere în studiul obligațiilor* [Civil Law. Introduction to the Study of Obligations], Cluj-Napoca, Edit. Dacia, 1984, p. 106.

[28] *Ibidem,* p. 67–69.

[29] See L. Pop, *Tratat de drept civil. Obligațiile* [Treatise of Civil Law. Obligations], vol. I ..., p. 62.

a law a recent, interesting and useful classification. On the other hand, what needs to prevail is the stringency in classifying civil obligations. Or, in this case, the interferences are multiple and do not allow a rigorous classification. Frequently, within the civil contracts, each obligation of result involves a certain diligence on behalf of the debtor and each obligation of diligence also involves activities of result of the same debtor. As it was outlined, "this interference is not capable of erasing the differences that, beyond any doubt, exist between the obligations of result and the obligations of means and do not diminish the practical importance and the usefulness of this modern, actual, subtle and necessary classification"[30].

2.3. OBLIGATION TO DELIVER THE GOOD

The obligation to deliver a determined individual good was regulated also in the 1864 Civil code: "The debtor of a certain and determined good is discharged when delivering the good in the condition in which he received it, if the further deteriorations are not caused by his wrong or mistake, or by that of the persons he is responsible of, or if previous to these deteriorations he wasn't formally noticed" (Article 1102)[31]. The element of difference consists of the fact that, according to the new Civil Code, the condition in which the good has to be delivered by the debtor is "that of the moment in which the obligation was born".

Article 1492 regulates the case in which the obligation to do (obligation to deliver the good) has as object a certain good[32]. The debtor is not discharged by executing an equivalent or higher service than the one owed[33]. He has to execute exactly what he owes. Therefore, he has to deliver the determined individual good in the condition in which it was at the moment in which the obligation was born. The delivery of the determined individual good includes also the obligation to preserve it, according to Article 1485.

It is worthy of mention the fact that within the field of obligation relationships, the duty to deliver the determined good represents the consequence of constituting a real right on a good or of transferring a real right. In the classical view, "to give" means to constitute or transfer a real right on a good. As it was established in the recent doctrine, within the property translative contracts having as object a determined individual good, the transfer of property takes place at the moment when the obligation relationship is born: the giver is compelled to deliver

[30] L. Pop, *op. cit.,* p. 71.

[31] In the same manner, Article 1562 of the Quebec's Civil code stipulates that, in general, the good has to be delivered in the condition and in the place where it was found in the moment of payment.

[32] The obligation to deliver goods of sort is regulated in Article 1486 of the new Civil Code.

[33] See, A. Bénabent, *Droit civil. Les obligations,* Paris, Montchrestien, 2001, p. 520. Giving in payment takes place only under the conditions of Article 1492 of the new Civil code, with the consent of the creditor.

the goods, which is an obligation to do. In what the goods of sort are concerned, the transfer of property takes place at the moment of the individualization of goods, which is usually concomitant to the delivery to the acquirer. In both cases, the debtor has the obligation to deliver the good, namely the obligation to do, to deliver a good (certain or of sort). Therefore, in relation to the traditional division of obligations from the point of view of their object, the classification of obligations is actually reduced to two categories: obligations to do (which include all obligations that have as object a positive conduct) and obligations not to do (what the debtor might have performed if it wasn't for the obligation). Having this premise as a starting point, within the obligations to give, the *solvens* is held only by an obligation to do, as a necessary consequence of the transfer of property or the creation or transfer of another real right.

If at the moment of fulfilling the obligation, the debtor is not the holder of the right on the good that has to be delivered, the obligation is not extinguished. The debtor will be compelled to purchase and deliver that good, according to Article 1230 of the new Civil code.

Article 1483 regulates the obligation to deliver the good, and thus, the obligation to preserve it until the delivery – obligations that result from the creation or transfer of real rights. The obligation of transferring the property involves two duties – of delivery and namely, of preserving the good until the moment of delivery. The formula "obligation of transferring the property" used in paragraph 1 of Article 1483 is susceptible of discussions. In fact, there is no contractual obligation to transfer the property. In the case of determined goods, the transfer of property takes place at the moment of the agreement, and in that of goods of sort, at the moment when the goods are individualized. The giver is obliged to hand over also the documents necessary for the registration in the land register, if the transfer of property involves an immovable. Thus, the transfer of the right to property is the *ope legis* effect of the contract, and it cannot represent the object of the obligation of one of the parties of the contract: "the debtor can never be directly compelled to give, that is to transfer the property; he can be obliged by the contract only to do certain material or legal acts that the law or contract links to the transfer of the right to property"[34].

The debtor of the obligation to deliver is also compelled to preserve the good until the delivery. The giver is obliged to hand over also the documents necessary for the registration in the land register, if the transfer of property involves an immovable. The obligation to preserve the determined individual good is regulated, separately, in another legal text – Article 1485 of the new Civil code.

The text of Article 1486 regulates the qualitative criterion used in the delivery of goods of sort. Two aspects are relevant in the selection of goods: the

[34] L. Pop, *Tabloul general al răspunderii civile în textele noului Cod civil* [General picture of civil responsibility in the new Civil code], in: *** *Contribuții la studiul obligațiilor civile,* Bucharest, Edit. Universul Juridic, 2010, p. 500.

liberty of selection belongs to the debtor, and the quality has to be at least medium. The debtor's right to choose the goods of sort in order to fulfill the obligation of delivery represents a novelty brought by the new Civil code. The 1864 Civil code mentioned that "if the debt is a good determined only by its species, the debtor, in order to be discharged, is not compelled to deliver neither one of the best species, nor of the worst" (Article 1103).

The idea that the payment has to be performed with goods of "at least medium" quality is kept from the old Civil code. The wording "goods of at least medium quality" is very close to the one used in the Swiss Civil code (Article 71). The provision of the new Civil code regarding the delivery of goods of at least medium quality is enforceable in the absence of a contrary provision. If the parties agreed on the quality of the goods of sort, the contract must be observed.

The regulation of the obligations to give goods of sort is inspired from Article 71 of the Swiss Code of obligations. Despite the fact that the article of the new Civil code is entitled "The obligation to give goods of sort", in fact, the obligation is to deliver goods of sort as a result of the transfer of property. The obligation to deliver a good of sort is the necessary condition of the transfer or creation of a real alienable right on a good determined by the characteristics of the species. The transfer of property takes place in the moment of the individualization of goods, moment which usually coincides with their delivery. The debtor's obligation is to do, that is to deliver the good of sort[35]. He has the right to choose the goods that will be delivered, and the quality of the goods has to be at least medium.

2.4. INDIVISIBILITY OF PAYMENT

The reason for a sole payment (as modality of executing the obligation) is obvious from the creditor's interest point of view: it is preferable to receive at once a benefit, than to receive at different intervals, reduced benefits that- especially in the case of money- are imperceptible consumed immediately as they are received[36].

Article 1490 of the new Civil code sets forth the principle of indivisibility of payment. Payment is made only one time for everything owed. The indivisibility operates no matter whether the duty can be fractioned. Similarly, the 1864 Civil code stipulated the rule of payment indivisibility, regulating that the debtor cannot force the creditor to receive part of the debt even if this can be divided (Article 1101 paragraph 1). Source of the first paragraph of Article 1490[37], the Swiss Civil

[35] With regard to the goods of sort see O. Ungureanu, *Drept civil. Introducere* [Civil Law. Introduction], ..., p. 119–120.

[36] The argumentation for the indivisibility of payment belongs to Pothier, in *Obligations* (quoted after J. Ghestin, M. Billiau, G. Loiseau, *op. cit.,* p. 609).

[37] The Civil code of Quebec stipulated that in general the creditor cannot be forced to receive a partial payment of the debt (Article 1561 paragraph 2).

code allows the creditor to refuse a partial payment when the entire debt is due; if he accepts the partial payment, the debtor is not entitled to refuse the recognized part of the debt.

Indivisibility is stipulated by flexible rules so that the parties may agree that the payment is divisible. The parts paid from the debt will have equal value, in the absence of a contrary provision. In the case of compensation, the creditor of the larger amount of money is partially paid only for the difference remained as a result of the compensation; the imputation of payment will bring about the division of the paid sums; in the event of plurality of fidejussors, the benefit of division invoked by one of the fidejussors will compel the creditor to receive a partial payment (for the recovery of the entire debt the creditor will have to go against every fidejussor); the debt will be transferred as fractionate to the heirs if indivisibility wasn't stipulated; allowing the debtor to pay in installments means the creditor's acceptance of divided payments. If the payment is divided the debtor has to cover the expenses caused to the creditor.

2.5. PLACE OF PAYMENT

The new Civil code regulates the place of payment given its practical interest, especially in what the currency of payment and the competent court are concerned. Payment can be made with any tool (scriptural or fiduciary currency) recognized at the place where the payment is made[38].

The practical interest of identifying the place of payment is noticeable also from the perspective of the international private legal relationships. The law of the state where the check can be paid determines the persons on which such title can be held, the deadline for the submission of the check, determines whether the title can be held immediately or after a certain time, the effect of postdating etc. (Articles 2657-2658 of the new Civil code); the law of the state where the bill of exchange and the promissory notes can be paid establishes the effects of the obligations of the acceptant of the bill of exchange and of the signer of the note (Articles 2651–2654 of the new Civil code).

The new regulation took the correspondent text from the 1864 Civil code and enriched it with other criteria of determining the place of payment. Article 1104 stipulated that payment is made at the place mentioned in the agreement. In the absence of this mention, for the determined goods, the place of payment is the place where the good was found in the moment when the contract was concluded or at the debtor's domicile. In general the payment is made at the debtor's domicile, it is not portable.

[38] Article 1489 of the new Civil code. If the payment is made through a check, transfer or other means, it is presumed that the creditor accepts these means of payment only if he uses them.

The assessment of the place of payment is governed by flexible rules that offer prevalence to the parties' will. Article 1494 proceeds to finding the payment location, enforcing mainly the criteria settled in paragraph 1, 1st thesis of Article 1494 and the legal location of payment which applies in subsidiary and in the absence of a contrary provision, according to the criteria established in the 2nd thesis, letters a-c, paragraph 1 of Article 1494. The rule is that *payment is localized mainly according to the criteria listed at Article 1494 paragraph 1, 1st thesis of the new Civil code.* The place of payment is established according to the nature of the service, on the ground of the contract or according to the practices between the parties or the customs. Explicitly or implicitly, the place of payment may result from circumstances such as: the execution of the debtor's works in the creditor's immovable; the payment of the goods at the place where they will be delivered, the presence of the parties before a public notary to draw up and authenticate the property translative contract etc. The parties can agree on the place of payment or, in the absence of such agreement, it can result from the performance of some previous contractual relationships between the same parties or from the customs specific to certain professional fields. For example, the carrier (in the goods transportation) will place the goods at the disposal of the entitled person, in the location showed in the contract, or in the absence of such indication, in the location established according to the practices set between the parties or the customs (Article 1976 paragraph 1).

Once ascertained the place of payment, on the ground of the autonomy of the parties' will, it will not be subject to modification by the unilateral expression of will. One of the parties cannot ask for the payment in a different place than the one shown in the convention[39], thus the payment made at a different location does not represent a valid payment[40]. However, the parties are entitled to conclude a further agreement, choosing another place of payment.

If none of the criteria provided by paragraph 1 is operational, the place of payment will be legally established according to the criteria set by letters a-c of Article 1494, 2nd thesis. In this situation we are in the presence of a subsidiary localization that applies in the absence of a contrary stipulation (as Article 1494 paragraph 1, 1st thesis mentions). It is worthy of notice that the legislator intervenes only as a last resort, if the place of payment cannot be established according to the first criteria.

According to letters a-c, the payment of money obligations is portable; it can be performed at the domicile or business center of the creditor (provision taken from Article 74 paragraph 2 point 1 of the Swiss Civil code). The new Civil code contains a special mention for bank deposits, namely that these are made at the location of the credit institution where the deposit was made, according to Article

[39] Cass. civ., decisions of 21 of April 1971 and of 17 June 1903, quoted after J. Ghestin, M. Billiau, G. Loiseau, *Traité de droit civil. Le régime des créances et des dettes*, ..., p. 612.

[40] Cass. com., decision of 18 of April 1989, apud J. Ghestin, M. Billiau, G. Loiseau, *op. cit.,* p. 612.

2191 paragraph 2. For the determined individual goods the payment is made at the place of their location at the moment when the contract was concluded (the place of delivery of the good sold is the place where it was located when the contract was concluded, if from the parties' agreement or in the absence of such, from the customs, does not result a different place – Article 1689 of the new Civil code, inspired from Article 1566 paragraph 2 of the Quebec's Civil code and from Article 74 paragraph 2 point 2 of the Swiss Civil code). The other obligations are fulfilled at the domicile or business center of the debtor, indicated at the date of contract (this provision of the new Civil code reproduces Article 74 paragraph 2 point 3 of the Swiss Civil code).

2.6. DATE OF PAYMENT

The date of payment did not have a regulation within the previous Civil code. Within the new Civil code, both the date and the place of payment are attentively stipulated. With the aim of establishing flexible provisions, what prevails is the will of the parties. The principle in the field is, according to Article 1495 paragraph 1, the conventional establishment of the date of payment. The term may be settled by the parties or may derive from the ground of the contract, the practices established between the parties or the customs. The debtor will prefer the payment in advance when he has an interest in doing so (for example, he wants to return a loan contracted with an interest with a significant amount in order to conclude another loan with a smaller interest[41]).

The term is settled by the parties or derives from the ground of the contract. The creditor cannot ask for the payment before the due date. Payment is made at the due date. The payment may be made in advance only under the conditions of Article 1496, if the parties agree or this fact is not contrary to the nature of the contract or to the circumstances of its conclusion. Thus, the payment may be asked only when the obligation is due. The new Civil code stipulates that, within the contract of commodate, the barrower has to return the good at the due date (Article 2155 of the new Civil code); the credit institution is compelled to return at the term stipulated in the contract, the same monetary quantity, of the same species deposited (Article 2191); annuity rates are paid quarterly in the absence of a contrary provision (Article 2248 paragraph 1 of the new Civil code).

By its nature, the consumption loan requires that the restitution of the amount of fungible and consumable goods will take place after a certain period of time (Article 2158 paragraph 1). The borrower in a commodate has to return the good after he used it.

The date of payment may derive from the practices established between the parties or from the customs. The customs are long practices, carried out usually in

[41] J. Ghestin, M. Billiau, G. Loiseau, *op. cit.,* p. 619.

professional environments. The bank deposit requires the restitution of the amount of currency at a date settled according to the customs, if the parties did not set a term (Article 2191 of the new Civil code).

The court of instance is entitled to establish a term for payment, when the nature of the obligation or the place in which the payment must be made requires this. The legal text protects the debtor that will be discharged when having the necessary means in order to pay. A particular application exists in the field of the consumption loan, being stipulated that the court will set forth a term for restitution (in the absence of a contractual term), taking into account the scope of the loan, the nature of the obligation and the goods loaned, the parties' situation and any other circumstance that has relevance. The term given cannot be longer than 3 months if in the contract was stipulated that the borrower will pay when he has the resources, and the court found that he has or can obtain these resources in the meantime[42] (Article 2162 paragraph 1 and 2 of the new Civil code). The court's possibility to set the term of payment[43] is operational only in the absence of a contractual term and of course, is adapted only to certain legal obligation relationships.

The obligation has to be immediately fulfilled only in the absence of a term settled by the parties or deriving from the contract, the practices or the customs. The good sold has to be delivered as soon as the price is paid, in the absence of a term (Article 1693). In general, payment is made at due date. Once the obligation reaches its term, the creditor may ask for its fulfillment and the debtor is compelled to do so. The antagonist character of the interests of the parties stops the payment in advance, with the exception of the situations provided in Article 1496 of the new Civil code. The debtor cannot force the creditor to receive a payment before the due date, this being the expression of the principle of the biding force, provided in Article 1270 of the new Civil code. However, sometimes the creditor is the one that asks for the payment in advance. This situation is expressly regulated in the case of the commodate when –according to Article 2156 of the new Civil code- the lender can ask the restitution of the good before the term established by the parties when there is an urgent and unforeseen need for the good for himself or when the borrower has died or breaches his obligations.

The contractual parties are allowed to stipulate payment in advance if they observe all conditions for contracts' validity. The obligation will be fulfilled in advance, and the creditor cannot oppose to this. However, the creditor cannot be forced to receive a partial payment in advance; in this case the provisions of Article 1490 of the new Civil code will be enforceable (even if the obligation can be divided). The advance payment is possible, without the creditor's consent, if the debtor gave up the term established in his benefit ("the one that has the benefit of the term may give it up at any time without the consent of the other party" – Article

[42] The request to establish the term for restitution shall be solved by presidential ordinance.

[43] J. Ghestin, M. Billiau, G. Loiseau, *Traité de droit civil. Le régime des créances et des dettes*, ..., p. 618.

1413 paragraph 2 of the new Civil code). If the debtor gives up the benefit of the term the obligation has to be immediately fulfilled, according to the provisions of Article 1418. The debtor can give up the benefit of the term if the contract stipulates that the benefit is in his favor. However, the creditor is entitled to refuse the payment in advance when he has a legitimate interest that the payment is made at due date. Paragraph 2 of Article 1496 allows the creditor to refuse the payment offered by the debtor before the due date.

The date of the payment made by bank transfer is the data when that sums enter into the creditor's account. The payment is made when the amount of money reaches the account. Article 1497 is correlated to Article 1504 which sets forth the presumptions of making the payment through bank transfer. The payment order signed by the debtor and the credit institution proves the fulfillment of the obligation. In addition to this, the proof of payment of debt can be made by means of the bank's written confirmation of the payment.

The regulation of the obligation to cover the expenses of payment is governed by the same autonomy offered to the parties in the field of the payment place and date. By mutual agreement, the parties will establish who will pay these expenses. Only in the absence of such agreement observing the conditions of validity for contracts, the legislator of the new Civil code compels the debtor to bear the costs of the operation. The provision with subsidiary character stipulating that the debtor will cover these expenses is totally justified. The expenses are occasioned by the payment the debtor has to make, so that it is only natural for him to bear them.

3. **GIVING IN PAYMENT**

The two limitations of the object of payment can be formulated as follows: on the one hand, the creditor has to receive exactly what is due, and on the other hand, the debtor has to pay everything he owes. Thus, we express the identity of the payment and its indivisibility[44]. Article 1492 of the new Civil code brings about the problem of the identity of the payment, stating that the debtor cannot be discharged by the execution of another obligation than that he owes. The norm is flexible so that the parties can mutually agree that the debtor will also be discharged when performing other service. The new Civil code stipulates that giving in payment is subject to the creditor's consent to accepting another payment.

Giving in payment, provided by Article 1492 of the new Civil code represents a legal operation that was not regulated in the 1864 Civil code. Its physiognomy was shaped mainly in the doctrine starting from the principle of the contractual freedom and from the provisions of Article 1100 (the old Civil code)

[44] A. Bénabent, *Droit civil. Les obligations*, ..., p. 520.

according to which "the creditor cannot be forced to receive another good than the one due even if it is equal or greater in value". The provision was not of public order, so that the parties could agree that the debtor could be discharged by the fulfillment of a different obligation. The new Civil code used as a source of inspiration for the institution of giving in payment, the Article 1561 paragraph 1 from the Quebec's Civil code: the creditor cannot be forced to receive a different good than the one owed, even if it has a greater value.

Giving in payment represents the parties agreement (a new agreement, different than that giving birth to the obligation relationship) according to which the debtor will be discharged if he performs another obligation than the one that was initially had in mind.

The extinctive effect of giving in payment is expressly regulated by Article 1492. By giving in payment the obligation relationship is extinguished: at the moment of performing the new obligation, the initial one is extinguished. Together with the main obligation, its guarantees or accessories are also extinguished. Giving in payment is one of the means of extinguishing obligations together with payment, compensation, confusion, debt remission and fortuitous impossibility of execution, expressly mentioned in the 7th Title regarding the means of extinguishing obligations.

The legal nature of giving in payment derives from the provisions of the new Code. The debates of the Romanian and foreign literature on the mater are abundant under the old regulation. The opinions are separated; giving in payment being qualifies either as a novel convention that extinguishes the original obligation, or as a particular form of payment, or as a sale followed by compensation[45]. Even if sometimes giving in payment borrows elements from the legal mechanism of sale, novation etc. they are not to be confused. For example, the rules of sale in what concerns the guarantee for hidden defects or eviction, will be enforceable when the new obligation consists of the transfer of property or another right, according to Article 1492 paragraph 2 of the new Civil code, with the exception of the case in which the creditor prefers to demand the performance of the initial obligation and the compensation for damages.

A relevant element that has to be taken into account in qualifying giving in payment is its regulation within the chapter dedicated to payment. The notion of giving in payment does not overlap the notion of payment, even if, naturally, the closeness between the two is important. Giving in payment requires a new agreement between the creditor and the debtor, the first accepting another payment than that initially agreed upon. Giving in payment "may be qualified as being a

[45] For the controversies regarding giving in payment, see, L. Pop, *Tratat de drept civil. Obligațiile* [Treatise of Civil Law. Obligations], vol. I ..., p. 547–549; I. Adam, *Drept civil. Teoria generală a obligațiilor* [Civil Law. General Theory of Obligations], Bucharest, Edit. All Beck, 2004, p. 656–657; J. Flour, J.-L. Aubert, E. Savaux, *Droit civil. Les obligations. 3. Le rapport d'obligation,* Paris, Dalloz, 2009, p. 386.

more special or particular payment, whose specificity, capable of differentiating it from the regular payment, consists of the performance by the debtor, with the creditor's consent, of another obligation than the one initially owed. Thus, in general the rules from the payment will be enforceable and, depending on the case, also certain rules that belong to the legal regime of sale or of novation by changing the object of the obligation. These are the premises that allow us to conclude that giving in payment has a mixed legal nature, resulting from the hybridization of two or more legal operations"[46].

If the new obligation consists of the transfer of the right to property or another real right, the debtor will offer the creditor guarantees for hidden defects or eviction. The rules specific for the sales contract are enforceable (Article 1672 of the new Civil code) with the exception of the case in which the creditor prefers to demand the performance of the initial obligation and the compensation for damages. If guarantees were offered by third parties, the performance of the initial obligation has a discharging effect also in what they are concerned.

Article 1493 regulates a special case of giving in payment. This text is enforceable also when the new obligation, agreed by the parties, is the assignment of a claim, the moment when the obligation is extinguished is the moment when the claim is satisfied. The assignment of claim is regulated in Articles 1566–1586 of the new Civil code, these provisions being enforceable in the situation mentioned in paragraph 1 of Article 1493. By derogation from the rule set forth by paragraph 1, the parties can agree that the obligation instead of which the debtor gives up his claim is extinguished from the date of the assignment. In this situation the provisions to be enforced are those regarding the responsibility of the assignor for eviction (Article 1586 of the new Civil code), with the exception of the case in which the creditor prefers to receive the initial service.

[46] L. Pop, *Tratat de drept civil. Obligațiile* [Treatise of Civil Law. Obligations], vol. I ..., p 549.