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CORRELATION BETWEEN GENERAL AND SPECIAL SUBROGATION CLAUSES UNDER THE BULGARIAN OBLIGATIONS AND CONTRACTS ACT

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Abstract: *The general subrogation clause in Bulgarian civil law is presented in Article 74 of the Obligations and Contracts Act. Its text is laconic: "A person who has performed another's obligation, having a legal interest to do so, shall assume the rights of the creditor". The same act includes some special subrogation hypotheses. The paper examines and criticizes the existing opinion in the legal doctrine that the prerequisites under the general subrogation clause are also presented in the special ones. The practical conclusion inevitably following from this belief is that the collateral providers who are not principal debtors can employ both the special subrogation provisions and the general clause to step into the place of the satisfied creditor. The present article explores the thesis that the general subrogation clause is not applicable in hypotheses regulated by the special norms, which means that its scope of application is more limited than the common belief.*

Keywords: *subrogation, performance, guarantor, collateral, creditor, obligation, co-debtor*

INTRODUCTION

If someone performs an obligation although another person is ultimately liable to do so, and assuming that all other necessary conditions are met, the performer becomes entitled to stand in the place of the creditor. This legal technique is called subrogation. It is a restitution remedy purposing to eliminate the debtor's unjust enrichment by enabling the payer to employ on his own behalf the claim, its securities and priorities that previously belonged to the satisfied creditor.

In Bulgarian civil law, the general provision entitling subrogation is Art. 74 of the Obligations and Contracts Act [255]– henceforth only with the provision numbers of this statute for short. Its text is laconic:

> A person who has performed *another's* obligation, having a legal interest to do so, shall assume the rights of the creditor.

The law also regulates some special hypothesis of subrogation, specified in Art. 56, Art. 146, Art. 155, Art. 178, and before the amendment with SG No. 83/1996 – in Art. 344, too. Clarifying the correlation between the general clause and the specific regulations means clarifying their scope of application.This, of course, cannot happen in detail here, for the volume of the article does not allow it. Still, it is enough to offer a starting point for a discussion on the topic by introducing a new thesis and rejecting the existing one among scholars.

Legal doctrine seems to accept that the prerequisites of the general clause are also presented in the special subrogation clauses. Actually, this thesis is not explicitly stated, but it can be deduced from other common opinions. For instance, scholars believe that the third party referred to in Art. 74 should have an own right of recourse based on his relationship with the debtor. They see such a right in all special hypotheses of subrogation[256]. Thus, it turns out that the preconditions of the latter must be met in order to claim subrogation under the general clause. Indeed, Prof. Kalaydzhiev says that

[255] Unofficial translation of the current Obligations and Contracts Act (promulgated SG № 275 of November 22, 1950; come into force on 1 January 1951) can be found at URL: http://web.solicitorbulgaria.com/index.php/bulgarian-obligations-and-contracts-act (Accessed on 03.08.2022)

[256] Ruschev, Iv. in Gerdzhikov, O., and others. (2018). Collateral in substantive and procedural law. Sofia: „Trud i Pravo" Press, pp. 149-150; Goleva, P. (2015). Obligation Law. Sofia: "Nova Zvezda" Press, pp. 216-217; Kozhuharov, Al. (1954). Obligation Law. Sofia: "Nauka I izkustbo" Press, pp. 213-215; Kalaydzhiev, A. (1989). About the Subrogation. *State and Law magazine, vol. 5/1989, p. 35*

the preconditions of the subrogation of the guarantor do not reveal peculiarities in comparison with the general rules[257]; and a pledgor, who is not a debtor, but has performed the obligation, may refer to Art. 74[258].

As it seen, the practical upshot inevitably following from the above mentioned belief is that collateral providers who are not principal debtors can employ both the special subrogation provisions and the general one to replace the satisfied creditor. A set of arguments derived from the historical development of the researched legal institute, from comparative law, from other legal norms and from jurisprudence, call into question the veracity of this commonly accepted thesis. Instead, the one argued in the present article is that the general subrogation clause is not applicable in hypotheses governed by special rules, which means that its scope is more limited than the common belief.

EXPOSITION

All subrogation provisions require the performance of the obligation. The special clauses are such ones because the persons who may refer to them are explicitly specified in the relevant provisions or they must meet different conditions from the general clause, namely: the persons who have mistakenly fulfilled another's obligation (Art. 56); the guarantors (Art. 146); the transferees of pledged or mortgaged properties, or the owners of such properties (Art. 155); the purchasers of mortgaged properties who do not assume the obligations (Art. 178); or the insurers (Art. 334 – before the amendment of the Act with SG No. 83/1996[259]). In contrast, the persons under the general clause of Art. 74 are not specified. Of course, each subrogation provision indicates some other prerequisites as well, but not all of them are relevant to the topic of the article. In this regard, there are two important requirements of the general clause, which will be considered in a comparative context against the special hypotheses: one is that the obligation must be *another's*; and the other is that the person performing such an obligation should have *a legal interest* in doing so.

The latter condition is the main argument of the doctrine to claim that the prerequisites of Art. 74 are also presented in the special subrogation clauses, albeit the wording *legal interest* cannot be found in the texts of their provisions. Nevertheless, it is reasonably assumed that all collateral providers, as well as the transferees of mortgaged or pledged property, have an obvious legal interest in discharging the debtor's liability to the creditor[260]. One question, however, arises: if their legal interest is so obvious that is, indeed, tacitly presumed, why are the special subrogation provisions of Art. 146, Art. 155 and Art. 178 needed at all? Only the general clause is supposed to be sufficient in these cases. The explanation sounds quite reasonable: unlike the general clause, the entitled persons under the special ones do not have to prove their legal interest in the performance of the debt[261].

Actually, the legal interest is not just the main, but it is the only argument that substantiates the criticized thesis. On the other hand, a set of reasons against it can be found within and outside the Obligations and Contracts Act. For example, one of them is the subrogation under the Art. 56, which does not require the third party have *a legal interest* in performance[262]. Everything would be somehow in order, if Art. 56 were the only exception that proves the rule. However, another instance for weakness in the criticized thesis can be seen in Art. 146, which governs the subrogation of the guarantor. According to Art. 138, with the surety contract the guarantor undertakes an obligation towards another person's creditor to be liable for the performance of the other person's obligation.

[257] Kalaydzhiev, A. (2010). Obligation Law. Sofia: "Sibi" Press, p. 610
[258] Ibid., p. 635
[259] During the years the subrogation of the insurer was settled in several different acts; nowadays it is in Art. 410 of the Insurance Code (promulgated DV, issue 102 of December 29, 2015)
[260] Ruschev, Iv. (2019). Boundary cases in law: Relationship between subrogation and recourse. In Gramada URL: http://gramada.org/гранични-случаи-в-правото-съотношени/ (Accessed on 11.06.2021), (see the third parenthesis in point 3 of the exposition); Genchev, T. (2017). *About the Legal Interest in Respect to Subrogation*. Papers of National Conference of Doctoral Students in Law 1:211-217, p. 216; Kozhuharov, Al. Obligation…, pp. 214-215;
[261] In the same sense is Decision № 61/16.07.2012 г. on commercial case № 678/2011 held by the Supreme Court of Cassation, II c.d.
[262] Goleva, P. Obligation…, p. 217

Moreover, the guarantor is personally obliged, for he is jointly and severally liable with the principal debtor – Art. 141. It means that the guarantor performs not someone else's but his own obligation. The contradiction with Art. 74, which requires the third party perform *another's* obligation, is explained by Prof. Kalajdzhiev with "imprecision" of the text, some kind of lapse, as: "It is important not whether the obligation is one's own or someone else's, but as to whether the performance releases the debtor"[263]. It is also said that it is very important who is "ultimately responsible for the debt"[264]; the performer under the general subrogation clause is clearly not such a person.

The scholars who support the criticized thesis do not sound convincing at all in their explanations. The argumentative approach they use is well known among the academics whose research is on the theory of legal interpretation. According to one of them, Prof. Tashev[265], the interpreter relies on his professional legal awareness, experience and viewpoint, which have formed his pre-understanding of the law, to draw at first an interpretive conclusion *for himself*. This is the so-called "implicit interpretation", whose function is to convince the interpreter himself. He then proceeds to the "explicit interpretation" *for the others*. Prof. Tashev emphasizes that the functions of explicit interpretation – to explain and persuade – come on the scene after the interpreter has already decided on the meaning of the interpreted text. So, understandably, he is more willing to make every effort to convince others than to admit his conclusion does not conform to the letter and spirit of the law.

Following the above, some doubts arise as to whether the conclusion reached through the use of this interpretative approach is in line with the legislative will. First of all, it should be borne in mind that the former Bulgarian Obligations and Contracts Act, promulgated in 1882, was modeled on the French Civil Code (CC), in which the hypotheses of payment with subrogation were limitedly listed. Subsequently, both legislations came up with the idea of a general subrogation clause. The Bulgarian settled it in Art. 74 of the current Obligations and Contracts Act, which substituted the former statute on January 1, 1951. Then, almost seven decades later, as part of a major reform of the Civil Code in 2016, the French followed suit, settling their general subrogation clause in Art. 1346 CC:

> Subrogation takes place by the sole operation of law in favour of a person with a legitimate interest in it who satisfies a debt provided that his satisfaction discharges as against the creditor another person who is subject to the final burden in respect of all or part of a debt.[266]

The comparison between the two legislations is necessary, since the thesis criticized in the article fully corresponds in sense of the quoted French provision. The latter, however, lacks the word *another's* (obligation), unlike the Bulgarian counterpart. Due to this additional requirement, the scope of the Bulgarian general clause is more limited than its French analogue. The question now is whether it has been a desired effect or in fact imprecision of the text. A brief look at the background to the drafting of the bill is needed to answer.

Certainly, the radical change in the field of subrogation – from limitedly listed hypotheses to a general clause – has taken place due to the efforts of academic scholars. At that time, one of them was Prof. Petko Venedikov, although he was not officially a member of the committee that drafted the bill of the current Obligations and Contracts Act (promulgated in 1950)[267]. His study of subrogation "Assumption of the rights of the satisfied creditor in Roman and Bulgarian civil law"[268] was published in 1938 and it was one of the few at that time, if not the only one, so highly analytical and fundamental research on the topic. It is unlikely the committee drafting the bill was not aware of

[263] Kalaydzhiev, A. Obligation..., p. 296
[264] Genchev, T. (2019). About Entering into the Rights of the Creditor. *Legal thought magazine,* vol. 4/2019, pp. 32-33
[265] Tashev, R. (2007). Theory of interpretation. Sofia: "Sibi" Press, p. 95
[266] The reformed French Civil Code, URL: https://www.trans-lex.org/601101/_/french-civil-code-2016/ (Accessed on 11.06.2021)
[267] According to the information from the Bulgarian Central State Archive in "CSA-12, archival fund № 117, inventory № 9, archival unit № 52 – *A Bill on Obligations and Contracts*" the name of Prof. Venedikov is not mentioned among the members of the committee.
[268] Venedikov, P. (1938). Assumption of the rights of the satisfied creditor in Roman and Bulgarian civil law. – *Yearbook of Sofia University,* Vol 33

this great scholarly work. The opposite seems more likely, so one can reasonably assume that the study has been taken into consideration. In it, after a detailed, systematic and critical analysis of the relevant subrogation provisions and taking into account that the guarantor fulfills his own obligation, Prof. Venedikov concluded that the subrogation norm should not demand the third party pay another's debt, but the payment should discharge another's liability towards the creditor, instead[269]. The scholar had in mind the idea for a general clause, which was derived from "the general principle that any person who has an interest in paying the claim has a subrogation right"[270]. The wording *another's* in relation to the claim and the debt, respectively, was not presented in the cited statement of Prof. Venedikov. Apparently, the authors of the bill wanted to avoid such a broad general clause and therefore they deliberately added this extra requirement. Hence, the claim that the provision of Art. 74 is imprecise, due to the word *another's* in it, is not only wrong but is also unfair on the bill drafters and their work.

In addition, before Article 2 of the same Obligations and Contracts Act was repealed[271], it had delivered another argument against the statement of imprecision. The norm had insisted that the provisions of the act be applied according to their *exact meaning*. On the one hand, it is again difficult to believe that the bill authors would ignore this interpretive instruction, which they themselves had included in the act. On the other hand, even assuming such absurdity, the objective interpretation that Art. 2 had indicated should be preferred. The ground has always been that the law must be understandable to the common man, because not everyone is a lawyer who can interpret legal provisions beyond their exact meaning.

In fact, the exact meaning of Art. 74 was confirmed by the Supreme Court of Bulgaria in the interpretative Decree № 4, item 14, held by the Plenum of the court on October 30, 1975. It has concerned the restitution remedies available to the insurer in case it reimburses the damages to the insured person. One point is clear: since the liability of the insurer arises from the insurance contract, it always fulfills its own obligation, not someone else's. Therefore, the Supreme Court has held that the general subrogation clause of Art. 74 is not applicable to the insurer. The same reasoning, however, can be applied to the subrogation of the guarantor.

However, if Article 74 is not applicable to the guarantor and the insurer and these subjects can only refer to the special provisions, this means that the requirements of the general clause are not presented in the special ones. Accordingly, it turns out that the special subrogation under Art. 56 (regarding the payer in error) is not the only exception to the rule, as the doctrine insists, but such are also those under Art. 146 (regarding the guarantor) and when it existed – Art. 344 (regarding the insurer). Following the same line of thought, it can be concluded that all special hypotheses for subrogation are exceptions that do not duplicate the scope of the general clause.

The above conclusion also draws arguments from the theory that the law is a coherent system in which the individual norms are logically interconnected without overlapping in their scope of application. Article 26 of the Law on Normative Acts (LNA) applies this concept, specifying several principles that must be observed when writing bills. Three of them are necessity, justification and coherence and they will be explained now. First, the general clause has been introduced for the first time with the new Obligations and Contracts Act; alongside, some of the special hypotheses have been rewritten from the former act. Apparently, the legislator has deemed all of them *necessary* to regulate subrogation cases. Second, the existence of special provisions would not be justified, but would be useless if their scope of application were fully covered by that of the general clause; wherefore their existence is *justified*, meaning useful only if their scope differs. Third, the consistency between all subrogation provisions can be settled, unless their scope is duplicated; therefore, coherence exists when no such duplication is presented. In addition to these principles, "the theory of

[269] Ibid., p. 85

[270] Ibid., p. 67

[271] Article 2 of the Obligation and Contracts Act (OCA) is repealed with SG, no. 27 of 1973 when the new Law of Normative Acts (LNA) was enacted. The norm of Art. 2 OCA has been replaced by Art. 46 LNA, despite the slightly different wording of the two provisions.

the rational legislator"[272] excludes the implementing of unnecessary, lavish and useless provisions. However, the criticized thesis leads exactly to this result, as it maintains that the prerequisites of the general clause are also presented in the special provisions. Correctness requires attention to the fact that the Obligations and Contracts Act had already been enacted when the LNA entered into force; nevertheless, hardly anyone doubts that the legislator had been observing the up-mentioned principles even before their legal sanction.

CONCLUSION

Definitely, the institute of subrogation according to the current Obligations and Contracts Act has been evolved thanks to an in-depth doctrinal analysis and critique of the previous legislation. The provision of Article 74 cannot be considered inaccurate, imprecise, etc., as if negligently written in the law, which is claimed to be one of the most successful Bulgarian legislative acts. The small number of its amendments for more than 70 years is often cited as a proof of its perfection – a product of theory that every law is a coherent system developed by a rational legislator.

In conclusion, the thesis developed in this article that the general subrogation clause is not applicable in the hypotheses regulated by the special rules, and therefore its scope is more limited than the generally accepted belief, can be considered proven.

An essential practical result following the proved thesis is that co-debtors who have paid more than their shares of the debt cannot rely on subrogation against the other debtor(s); whereas an advantage of the rejected thesis was that co-debtors also fell within the scope of the general subrogation clause, since the performance of own debt was considered acceptable under Art. 74. Certain foreign legislations, such as the German one in § 426 II 1 of the BGB[273], explicitly serve the co-debtor with a subrogation right. Instead, the Bulgarian law grants him only with a right of recourse, according to Art. 127 of the Obligations and Contracts Act. Now this may be the question to the new thesis maintained in the paper. Namely, if the scope of Art. 74 does not cover the performance brought by a co-debtor, since he performs his own and not *another's* obligation, on what grounds can he subrogate against the other co-debtors for the part that exceeds his share of the debt? The short answer is: he does not need subrogation because he cannot use the accessories of the debt. The full answer is included in the exposition of the author's dissertation "Prerequisites and effect of subrogation under Article 74 of the Obligations and Contracts Act"[274], where the relationship between recourse rights and subrogation is discussed in details.

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[272] Tashev, R. Theory..., p. 120
[273] German Civil Code URL: https://www.gesetze-im-internet.de/englisch_bgb/ (Accessed on 03.08.2022)
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