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PROTECTION OF THE DEBTOR IN THE POLISH CODE OF OBLIGATIONS – THE CASE OF THE ASSIGNMENT OF CLAIMS[*]

Abstract

In this article, the author discusses the sources of the protection of the debtor regarding the assignment of claims under the Polish Code of Obligations of 1933. In his study, he refers to Austrian, German, French, and Swiss law. The article considers also the regulation of the Franco-Italian Draft Code of Obligations of 1927. Subsequently, he presents the solution adopted in the Polish Code of Obligations in the context of the regulation of the aforementioned legal systems. For this purpose, the article is based on the legal state and the statements of the legal doctrine from the period before the entry into force of the Polish Code of Obligations.

KEYWORDS

favor debitoris, protection of the debtor, Code of Obligations, assignment of claims, obligation

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SŁOWA KLUCZOWE

favor debitoris, ochrona dłużnika, Kodeks zobowiązań, przelew wierzytelności, zobowiązanie

1. INTRODUCTION

The idea of the protection of the debtor has existed in private law for a long time. It is very often associated with the mythical *favor debitoris* - a principle having its origins in Roman law and demanding the adoption of solutions favorable to the debtor.[1] Although in Roman legal sources, which are available to us, this term does not appear,[2] there is no doubt that already in classical law there were legal institutions whose main goal was to protect the debtor. One of them refers to the possibility to discharge the obligation by performing to a person who was not the creditor and, moreover, was not authorized to receive it.[3] Among the Roman texts, we can point at a passage from the 30th book of Ulpian's Commentary *ad Sabinum*, in which the jurist discussed the effectiveness of performance towards a person who lost the mandate to receive the performance on behalf of the creditor. Although the debtor performed to the unauthorized person, he discharged his obligation vis-à-vis the creditor.[4] This solution was needed to protect the good faith of the debtor against the creditor.[5] The example is merely a hint, but it shows that the idea to protect the debtor, although he performed to an unauthorized third party, has its long roots in the European legal tradition.

In this article, the sources of the regulation of the Polish Code of Obligations of 1933[6] will be sought, especially Article 173, which allowed the debtor (*debitor cessus*) to perform to the assignor with the effect towards the current creditor – the assignee, despite the previous assignment of claim. Although the way of the protection of the debtor itself is truly Roman, the modern institution of assignment cannot be directly related to classical Roman law, which remained conservative in

[1] B. Biondi, *Il Diritto romano cristiano. Vol. III*, Milano 1954, pp. 217-260; M. Kaser, *Das römische Privatrecht. 2 Abschnitt. Die Nachklassischen Entwicklungen*, München 1975, pp. 327-328.

[2] W. Wołodkiewicz, *Il favor debitoris nel diritto e nella giurisprudenza della Polonia*, https://www.dirittoestoria.it/tradizione2/Wolodkievicz-Favor-debitoris-2002.htm (accessed 5 March 2023).

[3] See, among others: F. Haymann, *Schutz des guten Glaubens des leistenden Schuldners im Römischen Recht*, BIDR 1948, Vol. 51/52, pp. 393-426.

[4] D. 46, 3, 12, 2 Ulp. 30 ad Sab.; see also D. 46, 3, 18 Ulp. 41 ad Sab.

[5] Similarly D. 46, 3, 34, 3 Iul. 54 dig.

[6] Code of Obligations – *Kodeks zobowiązań,* hereinafter as *K.z.*; see Polish Journal of Laws, 1933, No. 82, 598.

its approach to the assignment of claims and applied a kind of half-measures, such as the institution of *procurator in rem suam* or *actio utilis*.[7] Some inspiration for protecting the debtor can be traced indirectly to the constitution of Emperor Gordian III of 239 AD, which confirmed that after the debtor had received a notice of assignment (*denuntiatio*), he could only perform to the assignee.[8]

The assignment of claims, in a form similar to the modern one, was known to Western vulgar Roman law. The assignment agreement not only obliged the assignor to transfer the claim to the assignee but itself caused this effect immediately. The assignment did not require any form. Whether the debtor was protected, if he performed to the assignor being unaware of the assignment, is not clear.[9]

The origins of the protection of the debtor may lay in *ius commune* and in the relation of *denuntiatio,* as well as effectiveness of the assignment. The foundations of *ius commune* was Roman law in the form transmitted in the Justinian's Corpus Iuris.[10] Below we will also take a look at German *ius commune* (*gemeines Recht*) at the end of the 19th century, which will represent the last phase of Roman law being directly in force.

After these brief general remarks, it is time to concentrate on Polish law. After Poland regained its independence in 1918, the country inherited four different – at the beginning even five – legal systems from the partition powers.[11] A pressing need of the young Polish state was to unify the law, including private law, which was dealt with by the Codification Commission, established as early as 1919.[12] Unfortunately, the period before World War II was too short to unify the whole legal system. Nevertheless, one of the achievements of the Polish Codification Commission was the already mentioned K.z. – a work that searched for inspiration in the most significant private law systems in interwar Europe, such as the Austrian, German, French and Swiss one. Also, the Franco-Italian Draft Code of Obligations of 1927 did not escape the attention of the authors of the Polish

[7] M. Kaser, *Das römische Privatrecht. 1 Abschnitt. Das altrömische, das vorklassische und klassische Recht, München 1971*, pp. 652-654.

[8] C. 8, 41, 3 pr.; see also W. Rozwadowski, *Studi sul trasferimento dei crediti in diritto Romano*, BIDR 76 (1973), pp. 90-95; P. Ściślicki, *Rzymska geneza instytucji zawiadomienia dłużnika o przelewie wierzytelności „denuntiatio" z C. 8,41,3 pr. a wybrane ustawodawstwa współczesne*, Zeszyty Prawnicze 2003, Vol. 3/1, pp. 106-107.

[9] E. Levy, *Weströmisches Vulgarrecht. Das Obligationenrecht*, Weimar 1956, pp. 150-151.

[10] T. Giaro (in:) W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego*, Warsaw 2018, p. 104.

[11] J. Bardach, B. Leśnodorski, M. Pietrzak, *Historia Ustroju i Prawa Polskiego,* Warszawa 2009, p. 581; C. Kraft, *Europa im Blick der polnischen Juristen: Rechtsordnung und juristische Profession im Spannungsfeld zwischen Nation und Europa 1918-1939*, Frankfurt am Main 2002, pp. 75-76.

[12] S. Grodziski, *Prace nad kodyfikacją i unifikacją polskiego prawa prywatnego (1919-1947)*, Kwartalnik Prawa Prywatnego 1992, Vol. 1.1-4, pp. 9-11; A. Moszyńska, *Organizacja i przebieg prac nad kodeksem cywilnym w latach 1919–1964*, Kwartalnik Prawa Prywatnego 2020, Vol. 29.3, pp. 446-453.

K.z. and was used by them in an auxiliary way.[13] The institutions of the Polish K.z., however, are not straightforward legal transplants such as the Swiss law in Turkey.[14] It was much more an amalgam of institutions, originating from the aforementioned legal systems, which often presented improved legal solutions. It was possible thanks to the knowledge and experience of the authors of the Code who were trained in different legal systems.[15]

In this article, the author compares the regulations that allow the debtor, despite the assignment of a claim, to perform to the assignor with effect against the assignee in Austrian, German, Swiss, French law and the Franco-Italian Draft Code of Obligations, as well as the final regulation of the K.z. The Roman law in the form adapted in *ius commune* in the late nineteenth century will be presented first followed by the codification of the Germanic tradition, i.e., the Austrian ABGB and the German BGB, then the French Code civil, the Swiss Code of Obligations (OR), and the Franco-Italian Draft Code of Obligations.

Since the goal is to put across the sources of the K.z., legal doctrine and case law are mainly presented from the period before the K.z. came into force. An important source, particularly with regard to the foreign literature used by the Codification Commission, is here, albeit unofficial, the Explanatory memorandum to the K.z. prepared by the main drafter Roman Longchamps de Bérier[16] and the handbook "Instytucje Kodeksu Zobowiązań" written by a co-author of the K.z. Ludwik Domański.[17]

2. *IUS COMMUNE* (ROMAN LAW) AT THE END OF THE NINETEENTH CENTURY

As mentioned above, Classical Roman law did not permit the assignment of claims in the modern sense. It was believed that an obligation was strictly tied to the parties. This concept, according to which the assignee merely asserts anoth-

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[13] A. Moszyńska, *The Franco-Italian Draft Code of Obligations - The Polish Perspective* (in:) D. Deroussin, F. Mazzarella, S. Wagner (eds.), *Bürgerliches Recht im nachbürgerlichen Zeitalter - 100 Jahre Soziales Privatrecht in Deutschland, Frankreich und Italien. Bd. 1. Vom Liberalen zum Sozialem Privatrecht? Der französisch-italienische Obligationenrecht-Entwurf von 1927*, Frankfurt am Main 2022, pp. 135-136.

[14] A. Watson, *Legal transplants and European private law*, Maastricht 2000, pp. 8-9.

[15] See I. Adamczyk, J. F. Stagl, *Der Eigentumserwerb an Fahrnis im polnischen Recht*, Rabels Zeitschrift für ausländisches und internationales Privatrecht 2022, Vol. 86, Heft 2, pp. 484-487; 501.

[16] R. Longchamps de Bérier, *Uzasadnienie Projektu Kodeksu Zobowiązań z uwzględnieniem ostatecznego tekstu kodeksu. Art. 168-238*, Warszawa 1935.

[17] L. Domański, *Instytucje Kodeksu Zobowiązań. Część Ogólna*, Warszawa 1936.

er's right (*excercitium actionis*), was clearly evident as late as the second half of the nineteenth century through the point of view promoted by Christian Friedrich Mühlenbruch, who assumed precisely that the assignee is pursuing someone else's claim, i.e. the assignor's.[18] Indeed, the assignment was not to transfer the claim itself, but to authorize only the assertion of it.[19] The assignment of a claim in its modern form, that is, by virtue of which there is a transfer of the claim directly to the purchaser, who becomes a new creditor, was present in *ius commune* of the late nineteenth century.[20] As Bernhard Windscheid pointed out, Roman law distinguished between *obligatio* and *actio* and allowed only *actio* to pass to the purchaser, leaving the *obligatio* itself with the assignor, which, at the same time, had no substantive meaning, since this could only be effected with an *actio*. This division has become blurred in modern law. Consequently, it was possible to break the Roman model and assume that the assignment transferred the entire claim to the purchaser, and not just the possibility of asserting it.[21]

The assignment of claims itself came about between the assignor and the assignee without involving the debtor. According to Windscheid, the assignment resulted in the assignor being entitled to assert the claim, as well as to undertake other legal transactions modifying the obligation. The assignee thus became a full-fledged creditor. At the same time, the assignment did not automatically cause the assignor to lose the ability to accept performance from the debtor, as well as to undertake other transactions with him, such as debt release. The debtor would not even have the right to rely on the assignment against the assignor in order to avoid performance to him. To put an end to this situation, the debtor had to be notified of the assignment of the claim (*denuntiatio*). Until then, there would exist a solidarity of creditors between the assignor and the assignee.[22]

Windscheid described the situation from the point of view of the creditor, but it is precisely the debtor's position that cannot be overlooked here in the first place. After all, this person, who is not a party to the assignment, could continue to regard the assignor as his creditor. According to Otto Bähr, the notice was

[18] Mühlenbruch, however, by no means invoked arguments from Roman law in his work, so R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Cape Town-Johannesburg-Wetton 1992, p. 64.

[19] C. F. Mühlenbruch, *Die Lehre von der Cession der Forderungsrechte*, Greifswald 1836; so also K. A. v. Vangerow, *Lehrbuch der Pandekten. Bd. 3*, Marburg-Leipzig 1869, pp. 100-106.

[20] H. Dernnburg, *Pandekten. Bd. 2. Obligationenrecht*, Berlin 1904, p. 134; R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Cape Town-Johannesburg-Wetton 1992, pp. 62-66.

[21] B. Windscheid, *Lehrbuch des Pandektenrechts. Bd. 2*, Frankfurt am Main 1891, pp. 229-230; *ibid.* p. 230, note 9; see also B. Windscheid, *Die Actio des römischen Civilrechts vom Standpunkte des heutigen Rechts*, Düsseldorf 1856, pp. 170-171.

[22] B. Windscheid, *Lehrbuch des Pandektenrechts. Bd. 2*, Frankfurt am Main 1891, pp. 234-237; *ibid*. pp. 236-237, note 8.

intended to exclude the perception of the assignor as the creditor, who, after all, lost this position as soon as the assignment took place.[23]

The notice should be given to the debtor by the assignee himself. The debtor's acquisition of knowledge from other sources, even from the assignor, did not forbid him to perform to the latest. According to Windscheid, the Roman sources (e.g., the Constitution of Emperor Gordian III, C. 8, 41, 3) made the effectiveness of the assignment against the debtor dependent upon the notice given by the assignee.[24] A different opinion was presented by Heinrich Dernburg, who pointed out that it was essential that the debtor had certain knowledge of the assignment (German: *sichere Kenntnis*). Thus, he regarded as a valid *denuntiatio* a notice given by any party of the assignment.[25]

Thus, as long as none of the above-mentioned events occurred, which would give grounds to consider the debtor's knowledge of the assignment as certain, he could perform to the assignor. This possibility also existed if the debtor knew about the assignment from sources other than the parties to that transaction. Such a construction was advantageous for the debtor, since he first had to obtain certain information regarding the new creditor from one of the parties to the assignment (or, following Windscheid, only from the assignee). On the other hand, it is difficult to speak here only of protection of the debtor's *bona fides* if the debtor was able to perform to the assignor, despite his knowledge from sources other than the parties of the assignment, that the assignor was no longer his creditor.[26]

[23] O. Bähr, *Zur Cessionslehre*, Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts (Jhering's Jahrbücher) 1857, Vol. 1, pp. 414-420; see also H. Dernburg, *Pandekten. Bd. 2. Obligationenrecht*, Berlin 1904, p. 135.

[24] B. Windscheid, *Lehrbuch des Pandektenrechts. Bd. 2*, Frankfurt am Main 1891, pp. 235-238; see also literature cited *ibid.* pp. 237-238, note 9.

[25] H. Dernnburg, *Pandekten. Bd. 2. Obligationenrecht*, Berlin 1904, pp. 135-136.

[26] The protection of good faith by this construction was advocated by Otto Bähr. However, this was due, among other things, to his assumption that the assignment has effect with respect to the debtor as a result of the debtor's acquisition of information from any source, not only from the parties of the assignment, which would cause the assignor, in the further understanding of the assignor as a creditor, to give rise to the assumption of deceit (*dolus*) on the part of the debtor. Nevertheless, also in this author's opinion, the reliable information here was the notice of the assignee, so that the debtor could see reasonableness in resisting demands of the assignor. By the same token, the debtor could not be required, relying solely on 'heard' (*hörensagen*) information, to take the risk of protecting the interests of the assignee and resisting the demands of the assignor; see in detail O. Bähr, *Zur Cessionslehre*, Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts, Jhering's Jahrbücher 1857, Vol. 1 pp. 416-417.

3. AUSTRIAN LAW

The assignment of claims in the Austrian ABGB is regulated in §§ 1392-1399. The assignment agreement and the assignment itself take place exclusively between the assignor and the assignee, without the participation of the debtor. The effectiveness of the assignment in regard to third parties is independent of the debtor being notified of the assignment. The assignee can already enforce the claim against the debtor from the moment it is acquired, provided, of course, that he can prove his right.[27] This does not mean, however, that the ABGB does not take the debtor's situation into consideration, particularly with regard to the knowledge of the assignment agreement. The provisions of the Code come to the debtor's rescue, enabling him to perform to the former creditor. This construction is regulated in §§ 1395-1396 ABGB,[28] the text of which has not changed to this day since the Code came into force on 1 January 1812.[29]

> § 1395[30] *Durch den Abtretungsvertrag entsteht nur zwischen dem Ueberträger (Cedent) und dem Uebernehmer der Forderung (Cessionar); nicht aber zwischen dem Letzten und dem übernommenen Schuldner (Cessus) eine neue Verbindlichkeit. Daher ist der Schuldner, so lange ihm der Uebernehmer nicht bekannt wird, berechtiget, den ersten Gläubiger zu bezahlen, oder sich sonst mit ihm abzufinden.*

> § 1396[31] *Dieses kann der Schuldner nicht mehr, so bald ihm der Uebernehmer bekannt gemacht worden ist; allein es bleibt ihm das Recht, seine Einwendungen gegen die Forderung anzubringen. Hat er die Forderung gegen den redlichen Uebernehmer für richtig erkannt; so ist er verbunden, denselben als seinen Gläubiger zu befriedigen.*

ABGB already emphasizes in the first sentence of § 1395 that the assignment of a claim constitutes a transaction between the assignor and the assignee, and

[27] A. Ehrenzweig, *System des österreichischen allgemeinen Privatrechts. 2 Bd. 1 H. Das Recht der Schuldverhältnisse,* Wien 1920, pp. 241-243; K. Wolff, *Commentary on § 1392* (in:) H. Klang (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch. 4 Bd. §§ 1293 bis 1502*, Wien 1935, pp. 291-292.

[28] A. Ehrenzweig, *System des österreichischen allgemeinen Privatrechts. 2 Bd. 1 H. Das Recht der Schuldverhältnisse*, Wien 1920, pp. 243-244.

[29] https://www.ris.bka.gv.at/NormDokument.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001622&FassungVom=2007-02-22&Artikel=&Paragraf=1395&Anlage=&Uebergangsrecht= (accessed 5 March 2023).

[30] § 1395. *The contract of assignment creates a new obligation only between the assignor (cedent) and the assignee of the claim (cessionar), but not between the latter and the transferred debtor (cessus). Therefore, as long as the assignee is not known to him, the debtor is entitled to pay to the first creditor or otherwise settle with him.*

[31] § 1396. *The debtor can no longer do this as soon as the assignee has been made known to him; however, he retains the right to raise his defenses to the claim. If he has acknowledged the claim brought by the bona fide assignee to be correct, he shall be obliged to satisfy the latter as his creditor.*

only between them exists a new obligation to transfer the claim. On the contrary, no new obligation is established between the assignee and the debtor. This sentence illustrates that the debtor is not involved in the assignment, and his obligation, except for the person of the creditor, remains unchanged.[32]

In connection with the debtor's exclusion from participation in the assignment, the Code stipulates in § 1395 sentence 2 ABGB that as long as the debtor has no knowledge of the transfer, he may discharge the obligation by performing to the former creditor (German: *Den ersten Gläubiger zu bezahlen*). At the same time, the Code does not only limit the debtor's authority to the performance but also makes it possible to settle with him in another way (German: *sich sonst mit ihm abzufinden*), which should be understood as the possibility of undertaking other legal transactions with regard to the debt. We should mention here, e.g. novation or debt release. Performance of the contract then, as well as other legal transactions concerning the debt, also remains effective vis-à-vis the assignee, despite the fact that he did not participate in them and did not even need to know about them.[33]

In turn, § 1396 sentence 1 ABGB supplements the norm of § 1395 sentence 2 ABGB indicating that the debtor may undertake those transactions with the former creditor as long as the assignee has not become known to the debtor. The next part of §1396 ABGB refers to two other legal institutions. The first one is the debtor's entitlement to set up against the assignee all defenses that he had against the assignor. The second one considers the interests of the assignee. Even if the assignment agreement turned out to be ineffective for some reason, but the debtor nevertheless acknowledged his debt to the assignee, who was at the same time in good faith regarding the effectiveness of the assignment, an obligation was established between the debtor and the assignee which became analogous to the former one between the assignor and the debtor.[34]

The performance rendered to the assignor depends on the debtor's knowledge of the assignment. Thus, from the debtor's point of view, the moment at which he became aware of the assignment is decisive. Co-author of the first edition of Heinrich Klang's Commentary on the Austrian ABGB Karl Wolff emphasized that the Code deliberately uses the terms *Uebernehmer nicht bekannt wird*[35] and *Uebernehmer bekannt gemacht worden ist*[36]. These are intended to show that the

[32] K. Wolff, *Commentary on § 1395* (in:) H. Klang (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch. 4 Bd. §§ 1293 bis 1502*, Wien 1935, p. 317.

[33] A. Ehrenzweig, *System des österreichischen allgemeinen Privatrechts. 2 Bd. 1 H. Das Recht der Schuldverhältnisse*, Wien 1920, p. 244; K. Wolff, *Commentary on § 1395* (in:) H. Klang (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch. 4 Bd. §§ 1293 bis 1502*, Wien 1935, p. 317.

[34] K. Wolff, *Commentary on § 1395* (in:) H. Klang (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch. 4 Bd. §§ 1293 bis 1502*, Wien 1935, p. 317.

[35] *The assignee is unknown.*

[36] *The assignee became known.*

ability to invoke the protection under § 1395 ABGB depends solely on the debtor's positive knowledge of the assignment. In contrast, the ABGB does not make this entitlement dependent on the mere possibility of having such knowledge. The Austrian doctrine of the 1930s thus did not expect the debtor to inquire whether the assignor was still entitled to receive the performance.[37]

According to Wolff, the regulation of § 1395 ABGB referred to anyone who did not have knowledge of the assignment, even if gross negligence could be charged against him for failing to know of this fact. Since Austrian law classifies as a person in good faith only this one, who cannot be accused of negligence (e.g., § 326 ABGB),[38] Wolff assumed that the provision in question was not limited in its scope to protecting the debtor in good faith but had a wider application. It referred also to the debtors who did not know of the assignment due to their own fault.[39] A different point of view was presented by Horaz Krasnopolski, who argued that only the debtor in good faith should be protected.[40]

The debtor can get the information about the assignment by any means and in any form. It does not matter whether the information was provided by the assignor or the assignee. What is important, is that it must be unambiguous and reliable.[41] This was clearly stressed by Armin Ehrenzweig who emphasized that the debtor may believe, despite having been notified, that he was not aware of the assignee if the notice was unclear or ambiguous, e.g., the debtor overlooked a reference to the assignment on an invoice, which was objectively easy to miss, or the notice did not make it possible to clearly determine whether there was an assignment or another legal transactions.[42]

In conclusion, it should be said that the protection of the debtor because of the performance rendered to the assignor was understood quite broadly under Austrian law at the beginning of the twentieth century, especially, when it comes

[37] K. Wolff, *Commentary on § 1395* (in:) H. Klang (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch. 4 Bd. §§ 1293 bis 1502*, Wien 1935, p. 317.

[38] § 326 ABGB concerns the distinction between the legal situation of a holder in good and bad faith (German: *redlicher* and *unredlicher Besitzer*); see in detail J. Schey, *Commentary on § 326*, (in:) H. Klang (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch. 1 Bd. 1 Halbbd. §§ 1 bis 352*, Wien 1933, pp. 1234-1237.

[39] K. Wolff, *Commentary on § 1395* (in:) H. Klang (ed.), *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch. 4 Bd. §§ 1293 bis 1502*, Wien 1935, p. 317.

[40] H. Kransopolski, *Österreichisches Obligationenrecht*, Leipzig-Wien 1910, p. 269; so also V. Hasenöhrl, *Das oesterreichische Obligationenrecht in systematischer Darstellung mit Einschluss der handels- und wechselrechtlichen Lehren. Bd. 2*, Wien 1899, p. 197.

[41] J. Krainz, A. Ehrenzweig, *System des österreichischen allgemeinen Privatrechts. 2 Bd. Das Obligationen-, Familien- und Erbrecht*, Wien 1907, p. 112; A. Ehrenzweig, *System des österreichischen allgemeinen Privatrechts. 2 Bd. 1 H. Das Recht der Schuldverhältnisse*, Wien 1920, p. 244; K. Wolff, *Commentary on § 1396* (in:) H. Klang (ed.) *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch. 4 Bd. §§ 1293 bis 1502*, Wien 1935, p. 318.

[42] A. Ehrenzweig, *System des österreichischen allgemeinen Privatrechts. 2 Bd. 1 H. Das Recht der Schuldverhältnisse*, Wien 1920, p. 244

to the premise of the debtor's knowledge of the assignment. It should be put to the fact that it was not enough for the debtor merely to have knowledge of the assignment. It had to be reliable.

4. GERMAN LAW

In the German BGB the assignment of claims is regulated in the §§ 398-413. The possibility to perform to the assignor despite the effective assignment of the claim is provided for in § 407 para. 1 BGB.[43] Also, this provision has not changed since the Code came into force on 1 January 1900.[44]

> § 407[45](1) *Der neue Gläubiger muss eine Leistung, die der Schuldner nach der Abtretung an den bisherigen Gläubiger bewirkt, sowie jedes Rechtsgeschäft, das nach der Abtretung zwischen dem Schuldner und dem bisherigen Gläubiger in Ansehung der Forderung vorgenommen wird, gegen sich gelten lassen, es sei denn, dass der Schuldner die Abtretung bei der Leistung oder der Vornahme des Rechtsgeschäfts kennt.*

The provision above, as well as § 1395 ABGB, does not apply only to the situation of performance to the previous creditor, but also to all undertaken legal transactions (German: *jedes Rechtsgeschäft*), the object of which is the assigned claim. Under this provision, the assignee must accept their effectiveness against himself, unless the debtor knew of the assignment at the time of the performance. As pointed out by Heinrich Siber, the regulation of § 407 BGB, adopted in favor of the debtor, exceptionally overcomes the application of § 398 BGB,[46] according to which, at the time of the conclusion of the contract of assignment, the assignor loses the right to dispose of the claim in favor of the new creditor – the assignee.

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[43] § 407 (2) concerns the effectiveness of a judgment between the debtor and the assignor against the assignee. If the transfer of the claim occurred after the time of the lis pendens of the dispute, the subject of which was the transferred claim, the judgment rendered in this case also has effect against the assignee. The exception is if the debtor had knowledge of the transfer at the time of the lis pendens of the dispute.

[44] https://www.gesetze-im-internet.de/bgb/__407.html (accessed 5 March 2023).

[45] § 407 (1): T*he new creditor must allow performance that the debtor renders to the previous creditor after the assignment, as well as any legal transaction undertaken after assignment between the debtor and the previous creditor in respect of the claim, to be asserted against him, unless the debtor is aware of the assignment upon performance or upon undertaking the legal transaction.*

[46] § 398 *Eine Forderung kann von dem Gläubiger durch Vertrag mit einem anderen auf diesen übertragen werden (Abtretung). Mit dem Abschluss des Vertrags tritt der neue Gläubiger an die Stelle des bisherigen Gläubigers. [*§ 398 *A claim may be transferred by the creditor to another person by contract with that person (assignment). When the contract is concluded, the new creditor takes the place of the previous creditor.]*

The transactions undertaken by the assignor become exceptionally valid, despite the already effective assignment.[47]

Since the German BGB came into force, the doctrine argued that § 407 is aimed at protecting the good faith of the debtor and is a solution that can be traced back to *ius commune* (German: *gemeines Recht*), in which the performance to the previous creditor was effective until the debtor received the notice of assignment. The German BGB, on the other hand, adopted a premise less stringent than the late *ius commune*. It is sufficient for the debtor to acquire knowledge of the assignment by any means, i.e., not only by notice given by the assignor or assignee to the debtor.[48] However, the authors of the BGB already during the works of the first Codification Commission, rejected the proposal that the mere possibility of acquiring knowledge, rather than real knowledge, should exclude the good faith of the debtor. As justification for this, they pointed out that by adopting such a solution, the debtor's legal situation would become more difficult than could be reconciled with the nature of the contract.[49] In the German doctrine, it was additionally pointed out that a mere 'hearsay' – a rumor – is not enough; the information about the assignment must be reliable.[50] Nor could the mere possibility of acquiring the knowledge be equated with the real knowledge of the debtor.[51]

Thus, if the debtor, not knowing of the assignment, performs to the assignor, he becomes discharged. The performance, as well as other legal transactions undertaken with the assignor, become fully effective against the assignee. As Ludwig Kuhlenbeck pointed out, in such a situation the assignor appears to the debtor still as a creditor.[52] However, as Siber emphasized, the term of any legal transaction, as used in § 407 BGB, should not be understood as legal transactions that benefit only to the creditor such as, for example, the establishment of securities or the interruption of the statute of limitations, as well as acts that create new obligations for the creditor. In contrast, this provision would have to be applied to

[47] H. Siber, *Commentary on § 407* (in:) E. Strohal (ed.), *Planck's Kommentar zum bürgerlichen Gesetzbuch nebst Einführungsgesetz. II. Bd. 1 Hälfte. Recht der Schuldverhältnisse*, Berlin 1914, p. 577.

[48] L. Kuhlenbeck, *Commentary on § 407* (in:) L. Kuhlenbeck, *J. v. Staudingers Kommentar zum BGB. II. Band. Recht der Schuldverhältnisse. I Teil*. München-Berlin 1912, p. 469.

[49] Protkolle der Erstenkommision p. 1304, H. H. Jakobs, W. Schubert (eds.), *Die Beratung des Bürgerlichen Gesetzbuchs in systematischer Zusammenstellung der unveröffentlichten Quellen. Recht der Schuldverhältnisse §§ 241 bis 431*, Berlin-New York 1978, p. 804.

[50] L. Enneccerus, *Lehrbuch des bürgerlichen Rechts. Zweiter Band. Recht der Schuldverhältnisse*, Marburg 1927, p. 252.

[51] L. Kuhlenbeck, *Commentary on § 407* (in:) L. Kuhlenbeck, *J. v. Staudingers Kommentar zum BGB. II. Band. Recht der Schuldverhältnisse. I Teil*. München-Berlin 1912, p. 469.

[52] *Ibid.* p. 470.

dispositive transactions that lead directly to a modification of the obligations or even to its extinguishment.[53]

Thus, as can be seen above, German law also decides that the debtor deserves protection, so that he can discharge himself by performing to the already untitled assignor unless he did not know about the assignment. The continuation of the thought aimed at protecting the debtor can be seen in the following §§ 408, 409, 410 of the BGB. In particular, these last two provisions should be brought closer.[54]

In § 409, the Code refers to performance rendered to the assignor when the assignment itself has been ineffective.[55] According to this provision, if the assignor has notified the debtor that he had transferred the claim, the assignor must accept all legal transactions, i.e., including the performance which took place between the debtor and the assignee.[56] The BGB in § 409, unlike in § 407, does not make the performance to an unauthorized party dependent upon the debtor's knowledge, in this case, of the ineffectiveness of the assignment. Thus, the debtor may know of the ineffectiveness of the assignment and nevertheless effectively discharge himself by performing to the assignee. However, the debtor is not protected in every case, e.g., in a situation where he has performed to the assignee in order to cause damage to the assignor.[57]

A certain continuation of § 409 is § 410 BGB.[58] It regulates the situation in which the debtor has not been informed in writing by the assignor about the assignment. In that case, the debtor is not obliged to perform to the assignee

[53] H. Siber, *Commentary on § 407* (in:) E. Strohal (ed.), *Planck's Kommentar zum Bürgerlichen Gesetzbuch nebst Einführungsgesetz. II. Bd. 1 Hälfte. Recht der Schuldverhältnisse*, Berlin 1914, p. 578.

[54] § 408 BGB refers to situations where multiple assignments of claims occur. The provision itself demands the application of § 407 BGB, so that the good faith of the debtor must also be protected in multiple transfers of the same claim; see C. Crome, *System des Deutschen Bürgerlichen Rechts. Zweiter Band. Rechts der Schuldverhältnisse*, Tübingen-Leipzig 1902, p. 330; L. Kuhlenbeck, *Commentary on § 408* (in:) L. Kuhlenbeck, *J. v. Staudingers Kommentar zum BGB. II. Band. Recht der Schuldverhältnisse. I Teil*. München-Berlin 1912, pp. 472-473.

[55] § 409 (1) *If the assignor notifies the debtor that he has assigned the claim, he must allow the notified assignment to be asserted against him in relation to the debtor, even if it does not occur or is not effective. It is equivalent to notice if the creditor has issued a document relating to the assignment to the new creditor named in the document and the latter presents it to the debtor.* (2) *The notice may only be revoked with the approval of the person who has been named as the new creditor.*

[56] L. Enneccerus, *Lehrbuch des bürgerlichen Rechts. Zweiter Band. Recht der Schuldverhältnisse*, Marburg 1927, pp. 254-255.

[57] L. Kuhlenbeck, *Commentary on § 409* (in:) L. Kuhlenbeck, *J. v. Staudingers Kommentar zum BGB. II. Band. Recht der Schuldverhältnisse. I Teil*. München-Berlin 1912, p. 474.

[58] § 410 (1) *The debtor is only obliged to the new creditor to perform in return for the delivery of the document relating to the assignment issued by the previous creditor. Notice of termination or a warning by the new creditor is only ineffective if it occurs without presentation of such a document and if the debtor rejects it without undue delay for that reason.* (2) *These provisions are not applicable if the previous creditor notified the debtor of the assignment in writing.*

until the confirmation issued by the assignor is handed over to him. It is not enough only to present the confirmation to the debtor. It should be issued to him in exchange for the promised performance.[59]

5. FRENCH LAW

In the French Code civil assignment of claims is regulated in the provisions on sale as a subtype of it (Article 1689-1701).[60] The immediate inspiration for the regulation was adopted by the Code civil from the Coutume de Paris, especially regarding the form and the effectiveness of the assignment.[61]

The assignment is carried out in the same way as the transfer of property which means that the claim is transferred immediately (Article 1689).[62] In place of the physical delivery of the sold item, which in the case of a claim cannot be done, is the delivery of a title – a document confirming the existence of the claim. However, this is not a prerequisite for the transfer of the claim itself, since this, as indicated above, already occurs at the time of the conclusion of the contract. Nonetheless, the assignment becomes effective only between the assignor and the assignee. For third parties, including the debtor, the assignor remains still perceived as the creditor.[63] This situation persists according to Article 1690 Code civil[64] until the debtor is notified about the assignment, or he accepts the assignment in a prescribed form.[65]

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[59] L. Kuhlenbeck, *Commentary on § 410* (in:) L. Kuhlenbeck, *J. v. Staudingers Kommentar zum BGB. II. Band. Recht der Schuldverhältnisse. I Teil*. München-Berlin 1912, pp. 476-477.

[60] G. Baudry-Lacantinerie, L. Saignat, *Traité théorique et pratique de droit civil. Vol XIX. De la'vente et de l'échange*, Paris 1908, p. 795, No. 749.

[61] M. Planiol, G. Ripert, *Traité élémentaire de droit civil conforme au programme official des facultés de droit. Vol. 2*, Paris 1926, pp. 561-562, No. 1614.

[62] A. Colin, H. Capitant, *Cours elementaire de droit civil français. Vol. 2,* Paris 1924, p. 147.

[63] M. Planiol, G. Ripert, *Traité élémentaire de droit civil conforme au programme official des facultés de droit. Vol. 2,* Paris 1926, pp. 561-562, No. 1623-1624; N. Jansen, *Commentary on Art. 11:303* (in:) N. Jansen, R. Zimmermann (eds.), *Commentaries on European Contract Laws*, Oxford 2018, pp. 1695-1696.

[64] Art. 1690 *Le cessionnaire n'est saisi à l'égard des tiers que par la signification du transport faite au débiteur. Néanmoins, le cessionnaire peut être également saisi par l'acceptation du transport faite par le débiteur dans un acte authentique. [An assignee is vested with regard to third parties only by notice of the assignment served upon the debtor. Nevertheless, the assignee may likewise be vested by acceptance of the assignment given by the debtor in a public instrument.]*

[65] M. Planiol, G. Ripert, *Traité pratique de droit civil français. Vol. VII. Obligations. Deuxième partie*, Paris 1931, p. 449, No. 1128; A. Colin, H. *Capitant, Cours elementaire de droit civil français. Vol. 2*, Paris 1924, pp. 146-147.

The debtor's position related to the assignment before he received the notice is governed by Article 1691 Code civil, which has not been changed since the Code came into force on 21 March 1804.[66]

> Article 1691[67] *Si, avant que le cédant ou le cessionnaire eût signifié le transport au débiteur, celui-ci avait payé le cédant, il sera valablement libéré.*

The provision above regulates that until the debtor receives a notice of assignment (*signification*) from either the assignor or the assignee, he can discharge his obligation by performing to the assignor. The provision does not make it dependent on any other condition, such as knowledge of the assignment or the good faith of the debtor.

Article 1691 Code civil regulates explicitly only the effectiveness of performance (literally payment – French: *paiement*)[68] but in the early French doctrine and case law was a point of view presented that the debtor, until he does not receive the notice, can undertake with the assignor also any other legal transactions, including the debt release.[69]

As was mentioned before, an equivalent way to make the assignment effective is not only the notice given by the assignor or assignee to the debtor but also his acceptance of the assignment (French: *l'acceptation*).[70] The acceptance of the assignment, to be effective, required according to Article 1690 Code civil an authentic instrument (French: *acte authentique*). It could be fulfilled by confirming the acceptance by a *huissier de justice* – judicial officer responsible for the service and execution of court decisions and enforceable instruments. As a matter of practice, it has also become adopted that the notice should be delivered via a *huissier de justice*.[71]

This formalism arising from the provisions of the French Code civil, requiring notice or acceptance, was subsequently loosened in case law. It was assumed that

[66] https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006442488?init=true&page=1&query=1691&searchField=ALL&tab_selection=all (accessed 5 March 2023).

[67] Art. 1691 *If, before the assignor or assignee had given notice of the assignment to the debtor, the debtor had paid the assignor, he shall be validly released.*

[68] The Code uses the term *paiement*, which literally should be understood as payment, that is, the performance of a monetary obligation. However, in the French doctrine, there was a common opinion that this term should generally be understood as the performance, regardless the type of it, cf. C. Aubry, F. Rau, *Cours de droit civil français d'aprè la méthode de Zachariae. Vol. IV*, Paris 1902, p. 244.

[69] M. Planiol, G. Ripert, *Traité pratique de droit civil français. Vol. VII. Obligations. Deuxième partie*, Paris 1931, p. 450, No. 1128; Judgment of the Cour de Cassation of 29 June 1881, Recueil périodique de jurisprudence de Dalloz, D: 82. 1. 33.

[70] C. Aubry, F. Rau, *Cours de droit civil français d'aprè la méthode de Zachariae, Vol. V*, Paris 1905, pp. 200-202; A. Colin, H. Capitant, *Cours elementaire de droit civil français. Vol. 2*, Paris 1924, p. 147.

[71] G. Baudry-Lacantinerie, L. Saignat, *Traité théorique et pratique de droit civil. Vol XIX. De la vente et de l'échange*, Paris 1908, p. 813, No. 768; M. Planiol, G. Ripert, *Traité élémentaire de droit civil conforme au programme official des facultés de droit. Vol. 2*, Paris 1926, pp. 560-561, No. 1612-1613.

the debtor, by declaring in an informal document that he accepted the assignment, caused the assignment to take effect with respect to him. The assignment still did not become effective vis-à-vis third parties. Such a solution was a kind of intermediate stage between the full effectiveness of the assignment towards everyone and a situation where it was binding only between the assignor and the assignee.[72] Case law adopted also a solution that the debtor could effectively discharge his obligation by performing to the assignee, even before the notice or acceptance took place.[73] According to Marcel Planiol and Georges Ripert, it would be irreconcilable with Article 1691 Code civil, which clearly indicates that the assignment does not take effect vis-à-vis the debtor until the notice is delivered or the acceptance is issued. This would lead to a dangerous situation, in which the assignor and assignee would have essentially the same rights against the debtor.[74]

Under French law, it is difficult to determine whether the idea of the protection of the debtor was the aim of Article 1691 Code civil itself. However, the regulation is congruent with the adopted model of the assignment.[75] The debtor, even if he knows about the assignment, could effectively perform to the assignor. His good faith or knowledge of the assignment is irrelevant. The assignment of a claim does not have any effect against third parties, including the debtor unless the debtor has been notified of it or has accepted it.

6. SWISS LAW

The assignment of claims is regulated in Article 164-174 OR. In this legal system, the debtor can also discharge his obligation by performing to the assignor despite the assignment that has already taken place (Article 167 OR). The norm, which made it possible for the debtor was originally regulated in Article 187 of the First Code of Obligation of 1881. Article 167 OR which is still in force,[76] does not differ in wording from it as it is visible below.[77]

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[72] Judgment of the Cour de Cassation of 26 July, 1880, Recueil périodique de jurisprudence de Dalloz, D. 80. 1. 36; Judgment of the Cour d'Appel de Paris of 18 December 1884, Recueil périodique de jurisprudence de Dalloz. D. 86, 2, 15.

[73] Judgment of the Cour de Cassation of 9 March 1864, Recueil de jurisprudence de Sirey, S. 64, 1, 185; C. Aubry, F. Rau, *Cours de droit civil français d'aprè la méthode de Zachariae. Vol. V,* Paris 1905, pp. 216-217.

[74] M. Planiol, G. Ripert, *Traité pratique de droit civil français. Vol. VII. Obligations. Deuxième partie*, Paris 1931, pp. 453-454, No. 1129.

[75] N. Jansen, *Commentary on Art. 11:303* (in:) N. Jansen, R. Zimmermann (eds.), *Commentaries on European Contract Laws,* Oxford 2018, pp. 1695-1696.

[76] https://www.fedlex.admin.ch/eli/cc/27/317_321_377/de (accessed 5 March 2023).

[77] Art. 187. *Wenn der Schuldner, bevor ihm der Abtretende oder der Erwerber die Abtretung angezeigt hat, in gutem Glauben an den früheren Gläubiger oder, im Falle mehrfacher Abtretung, an einen im Rechte nachgehenden Erwerber Zahlung leistet, so ist er gültig befreit.*

Article 167.[78] *Wenn der Schuldner, bevor ihm der Abtretende oder der Erwerber die Abtretung angezeigt hat, in gutem Glauben an den früheren Gläubiger oder, im Falle mehrfacher Abtretung, an einen im Rechte nachgehenden Erwerber Zahlung leistet, so ist er gültig befreit.*[79]

This provision regulates not only the performance of the assignor in the case of a single assignment but also when the assignment took place several times.[80] Of course, in both cases, at the time of performance, the assignor is no longer a legitimate creditor. Nevertheless, the debtor discharges his obligation by performing in good faith before being notified of the assignment.[81]

Under Swiss law, the good faith of the debtor is considered to exist until he came to know of the assignment. Most often, bad faith is established by means of a notice given by one of the parties of the assignment. Nevertheless, this is not the exclusive way to lose good faith. It is sufficient for him to acquire knowledge by any means from any reliable source.[82]

Already during the works on the first Code of Obligations of 1881, it was accepted that notice given to the debtor is not the only way for him to acquire knowledge of the assignment. According to the Swiss Federal Council's Message (German: *Botschaft des Bundesrates*), a kind of Explanatory Memorandum to the draft of the first Code of Obligations, every message providing the debtor with knowledge of the assignment was considered sufficient. It would distinguish the draft from Article 1691 Code civil or *gemeines Recht* presented by Windscheid in his handbook which requested that the notice should be given by the parties of assignment.[83] According to Hugo Oser, the opinion presented in the Message of the Federal Council was not justified on the grounds of Article 167 OR. This author claimed that from the point of view of the existence of the debtor's good faith, the notice was of primary importance, which can be clearly seen in Article 167 OR. Nevertheless, he did not exclude the significance of information about the assignment coming from sources other than just the assignor and the assignee.

[78] Art. 167. *Where, before the assignment has been brought to his attention by the assignor or the assignee, the debtor makes payment in good faith to his former creditor or, in the case of multiple assignments, to a subsequent assignee who acquired the claim, he is validly released from his obligation.*

[79] French version: *Art. 167. Le débiteur est valablement libéré si, avant que la cession ait été portée à sa connaissance par le cédant ou le cessionnaire, il paie de bonne foi entre les mains du précédent créancier ou, dans le cas de cessions multiples, entre les mains d'un cessionnaire auquel un autre a le droit d'être préféré.*

[80] An analogous provision is found in Section 408 of the BGB, see footnote 54 above.

[81] H. Becker, *Commentary on Art. 167* (in:) M. Gmür (ed.), *Kommentar zum Schweizerischen Zivilgesetzbuch. Obligationenrecht. I Abt. Allgemeine Bestimmungen. Art. 1-183*, Bern 1917, p. 631.

[82] H. Oser, *Commentary on Art. 167* (in:) H. Oser, *Das Obligationenrecht. Erster Halbband: Art. 1-183*, Zürich 1929, p. 729.

[83] Botschaft des Bundesrates an die hohe Bundesversammlung zu einem Gesetzentwurfe, enthaltend Schweizerisches Obligationen- und Handelsrecht. (vom 27. November 1879), BBl of 1880 No. I 149, p. 182.

However, such information must be reliable.[84] This was vividly described by Hermann Becker: *After all, the debtor does not have to take seriously every conversation in the tavern, and if he should have any doubts, he can demand the delivery of a document confirming the assignment. Good faith is presumed.*[85] The last conclusion is obvious in connection with Article 3 Swiss ZGB which contains a general presumption of good faith.[86]

The law itself does not explicitly specify which party and in which manner should inform the debtor of the assignment. This could be done in any way. In Oser's opinion, the debtor could have contented himself with the oral assurance given by the assignor. With regard to the assignee, a mere assertion that the claim was acquired may not have been sufficient to protect the debtor. This is because the debtor is not sure whether the assignee, so far, a third party to him, has really acquired the claim. It was pointed out that in such a situation, the debtor, in order to dispel any doubts, should demand from the assignee a written confirmation of the assignment, for example, issued by the assignor. By limiting itself to the assignee's mere assurance, it was considered that the debtor performed at his own risk.[87]

It has been assumed, although Article 167 OR does not express this explicitly, as § 1395 ABGB or § 307 para. 1 BGB does, that this provision should also be applied to other legal transactions with regard to the claim. Accordingly, if the prerequisites provided for in Article 167 OR are met, legal transactions such as, for example, debt release should be considered effective against the assignee.[88]

As Virgile Rossel pointed out, Article 167 OR should be applied only to an assignment which was concluded in a written form.[89] An oral assignment would have no effect against the debtor, even if he knew of it. This conclusion has its

[84] H. Oser, *Commentary on Art. 167* (in:) H. Oser, *Das Obligationenrecht. Erster Halbband: Art. 1-183*, Zürich 1929, p. 729; cf. A. v. Thur, *Allgemeiner Teil des Schweizerischen Obligationenrechts. Zweiter Halbband*, Zürich 1925, p. 742.

[85] H. Becker, *Commentary on Art. 167* (in:) M. Gmür (ed.), *Kommentar zum Schweizerischen Zivilgesetzbuch. Obligationenrecht. I Abt. Allgemeine Bestimmungen. Art. 1-183*, Bern 1917, p. 631; similar V. Rossel, *Manuel du droit fédéral des obligations. Tome premier*, Lausanne-Genève 1920, p. 231.

[86] A. v. Thur, *Allgemeiner Teil des Schweizerischen Obligationenrechts. Zweiter Halbband*, Zürich 1925, p. 742.

[87] H. Oser, *Commentary on Art. 167* (in:) H. Oser, *Das Obligationenrecht. Erster Halbband: Art. 1-183*, Zürich 1929, p. 729.

[88] H. Becker, *Commentary on Art. 167* (in:) M. Gmür (ed.), *Kommentar zum Schweizerischen Zivilgesetzbuch. Obligationenrecht. I Abt. Allgemeine Bestimmungen. Art. 1-183*, Bern 1917, p. 631, H. Oser, *Commentary on Art. 167*, *Das Obligationenrecht. Erster Halbband: Art. 1-183*, Zürich 1929, p. 729.

[89] V. Rossel, *Manuel du droit fédéral des obligations. Tome premier*, Lausanne-Genève 1920, p. 231.

grounds in Article 165 OR which requires that the assignment should be provided in writing.[90]

There is no doubt that the regulation of Article 167 OR was seen as a way to protect the debtor who does not have knowledge of the assignment. Similarly, as in the legal systems described before, the performance to the assignor discharges the debtor's obligation with effect against the current creditor – the assignee. According to the point of view presented by Oser, the regulation of Article 167 OR was intended to support the debtor's situation only.[91]

7. THE FRANCO-ITALIAN DRAFT CODE OF OBLIGATIONS

It is worth exploring in greater detail the regulation contained in the Franco-Italian Draft Code of Obligations which was intended to become a common Code of Obligations for France and Italy. As in the French Code or in the Italian Codice civile of 1865, which was influenced by French law,[92] the provisions on the assignment of claims were located in the title regulating contract of sale, specifically in Articles 260-270. The draft followed the French model also with regard to the nature of the assignment. Therefore, the effectiveness of the assignment depended upon the notice given to the debtor or acceptance issued by him (Article 263). As in the Code civile the debtor could discharge his obligation by performing to the assignor before he received a notice (Article 264).

> Article 264[93] *Le débiteur qui n'a pas accepté la cession est valablement libéré s'il a payé le cédant avant la signification.*
> *Toutefois la liberation ne se produit pas, si le cessionnnaire peut établir que le paiement a été fait de mauvaise foi par un débiteur qui avait connaissance de la cession.*

The provision above was not a complete carbon copy of Article 1691 Code civil or Article 1540 Codice civile of 1865.[94] The first paragraph, which states that the debtor could discharge his obligation by performing towards the assignor until he was notified of the assignment, is concurrent with the regulations of both model

[90] Art. 165 (1) OR: *Die Abtretung bedarf zu ihrer Gültigkeit der schriftlichen Form.* Art. 165 para. 1 OR: *An assignment is valid only if done in writing.*

[91] H. Oser, *Commentary on Art. 167* (in:) H. Oser, *Das Obligationenrecht. Erster Halbband: Art. 1-183*, Zürich 1929, p. 730, 8.

[92] G. Alpa, *Dal Code Civil al Codice Civile del 1942* (in:) G. Alpa, G. Chiodi (eds.), *Il Progetto Italo Francese delle obbligazioni (1927). Un modello di armonizzazione nell'epocca della ricodificazione*, Milano 2007, pp. 28-29; *ibid.* pp. 4-5.

[93] Art. 264. *A debtor who has not accepted the assignment is validly discharged if he has paid the assignor before notice. However, discharge does not occur if the assignee can establish that the payment was made in bad faith by a debtor who was aware of the assignment.*

[94] N. Stolfi, *Diritto Civile. Vol. Terzo. Le Obbligazioni in Generale*, Torino 1932, pp. 376-377.

codifications. However, the second paragraph made the effectiveness of the debtor's performance dependent upon his good faith at the time of performance. This provision was a significant change in comparison to Article 1691 Code civil. The debtor would have to reckon with the fact that, knowing about the assignment, he might not be released from his obligation. Thus, in Article 264 above, we could also look for some similarities to Article 167 OR, which on the one hand requires a notice given to the debtor but on the other hand, makes it impossible for him to discharge his obligation if he is not in good faith at the time of performance. The draft thus combined the previous regulations of the Code civil and Codice civile with the tendencies current at the beginning of the twentieth century. This way of creating legal norms corresponds to an appeal of Vittorio Polacco presented in 1908, how to conduct the codification works so that the new law does not fully destroy the old one: *certo che innovare senza distruggere, saper scernere codesti rami da rinverdire con felici innesti e uno dei compiti più difficili della difficilissima arte del legiferare*.[95]

8. THE POLISH CODE OF OBLIGATIONS

Let us now turn directly to the regulation of the Polish K.z., in which the assignment of claims was regulated in Article 168-176. The assignee became a full-fledged creditor from the moment the claim was acquired (Article 170 § 1 K.z.), which corresponds to the Austrian, German and Swiss Codes, but differs from the solution adopted by the French Code civil and the Franco-Italian Draft Code of Obligations.[96] The effects of the performance rendered to the assignor, as already mentioned before, were regulated by Article 173 K.z. According to the authors of the Code, this regulation was intended to protect the debtor who did not participate in the assignment.[97]

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[95] V. Polacco, *La cabale del mondo legale* (in:) *Vittorio Polacco. Opere Minori. Parte I. Problemi di legislazione*, Modena 1928, p. 48.

[96] R. Longchamps de Bérier, *Explanatory memorandum on Art. 173* (in:) *Uzasadnienie Projektu Kodeksu Zobowiązań z uwzględnieniem ostatecznego tekstu kodeksu. Art. 168-238*, Warszawa 1935, pp. 253-255; L. Domański, Instytucje Kodeksu Zobowiązań. Część Ogólna, Warszawa 1936, p. 701.

[97] R. Longchamps de Bérier, *Explanatory memorandum on Art. 173* (in:) *Uzasadnienie Projektu Kodeksu Zobowiązań z uwzględnieniem ostatecznego tekstu kodeksu. Art. 168-238*, Warszawa 1935, p. 259; L. Domański, *Instytucje Kodeksu Zobowiązań. Część Ogólna, Warszawa 1936*, p. 701; cf. J. Korzonek, *Commentary on Art. 173* (in:) J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz. T.1*, Kraków 1934, p. 382.

Article 173[98] *Dopóki dłużnik nie otrzymał zawiadomienia na piśmie o przelewie wierzytelności od zbywcy albo od nabywcy, zapłata, dokonana poprzedniemu wierzycielowi, oraz czynności prawne, z nim zdziałane, mają skutek przeciwko nabywcy, chyba że dłużnik wiedział o dokonanym przelewie w chwili zapłaty długu lub w chwili zawarcia czynności z poprzednim wierzycielem.*

Analogous regulations contained already the so-called Lwów draft of the Code of Obligations, edited by Ernest Till in 1923 (Article 115)[99] and the counter-draft edited by Ludwik Domański (Article 191)[100]. The Lwów draft, unlike the final wording of Article 173 K.z., did not require the notice to be in writing, while clearly stating that it was to be given by the assignor or assignee. Instead of the debtor's knowledge of the assignment, it requested his good faith. The text of the provision from the Lwów draft was, with a few modifications – primarily the replacement of good faith with debtor's knowledge, adjusted into the counter-draft of Ludwik Domański which became the direct source for Article 173 K.z.[101]

According to the main drafter of the K.z. Roman Longchamps de Bérier, Article 173 was based on the models of the Austrian, German and Swiss systems.[102] The solution adopted by K.z. combined regulations from the legal systems discussed above but it was by no means a simple carbon copy. On the one hand, there was a prerequisite of the written notice to the debtor – which occurs in Article 1691 CC (written) and in Article 167 OR (any form) – on the other hand, we can find there the premise of the debtor's knowledge can be found there, which in turn is also included in §§ 1395-1396 ABGB and § 407 BGB.

As it results from Article 173 K.z. the debtor could discharge the obligation by performing to the assignor until he received a notice of assignment. It means also that the mere possibility of getting the information from other sources was insufficient.[103] This could suggest that K.z. adopted the Austrian or German regulations which require the debtor's knowledge of the assignment. However, in this legal system, it is not substantial that notice is given by the parties of the assign-

[98] Art. 173. *As long as the debtor has not received notice in writing of the assignment of the debt from the assignor or the assignee, the payment, made to the previous creditor, and the legal transactions, made with him, have effect against the assignee, unless the debtor knew of the assignment at the time of payment or at the time a transaction was undertaken with the previous creditor.*

[99] E. Till (ed.), *Polskie Prawo zobowiązań (część ogólna). Projekt wstępny z motywami*, Lwów 1923.

[100] L. Domański, *Projekt Prawa o zobowiązaniach w opracowaniu koreferenta projektu adwokata Ludwika Domańskiego*, Warszawa 1927.

[101] L. Domański, *Instytucje Kodeksu Zobowiązań. Część Ogólna,* Warszawa 1936, p. 701.

[102] Cf. R. Longchamps de Bérier, *Explanatory memorandum on Art. 173* (in:) *Uzasadnienie Projektu Kodeksu Zobowiązań z uwzględnieniem ostatecznego tekstu kodeksu. Art. 168-238*, Warszawa 1935, pp. 260-261.

[103] R. Longchamps de Bérier, *Zobowiązania*, Lwów 1938, p. 300; so also J. Korzonek, *Commentary on Art. 173* (in:) J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz. T.1*, Kraków 1934, p. 383.

ment. The debtor can come to know of it in every manner. It is only crucial that the received information is reliable. The burden of proving the debtor's knowledge of the assignment lies with the assignee.[104] According to the main drafter of the K.z. Roman Longchamps de Bérier, such protection of the debtor would go too far. To avoid it, K.z. adopted the Swiss regulation based on the prerequisite of notice. However, unlike Swiss law, which does not require any form of notice, the authors of the Code opted for a written form. Longchamps de Bérier explained, that the purpose of the written form was not evidentiary, but the substantial one. The debtor's protection ended at the time, when the written notice itself reached him, regardless of his actual knowledge of its contents. Thus, even if the debtor did not know about the assignment, he was not protected.[105] As Domański accurately pointed out, the notice, in order to have such an effect, had to reach the debtor in a way that he could have become familiar with its content (Article 30 K.z.).[106]

The Polish K.z. also did not specify who should give notice to the debtor. If it was sent by the assignor, it had to be assumed that the debtor would effectively perform to the assignee even if the assignment was ineffective (like § 309 BGB). He could then defend himself with *exceptio doli* against the assignor. If, on the other hand, the notice was sent by the assignee, the debtor could perform only at his own risk.[107]

It would then arise from the nature of Article 173 K.z. that the latest moment at which the debtor could perform to the assignor was the delivery of a written notice. At that time he had the opportunity to get the information about the assignment. Of course, the protection of the debtor could cease to exist earlier as soon as he became aware of the assignment from any other reliable source.[108]

The regulation of the K.z. primarily took inspiration from the Swiss OR and to some extent from the German BGB and the Austrian ABGB. In K.z., the debtor's knowledge was significant, regardless of the source. It could exclude the effective performance rendered to the assignor even before the written notice was given to the debtor. Furthermore, the notice was not a prerequisite for the effectiveness of the assignment itself. Therefore, it differed from the regulation of Articles 1690-

[104] A. Ehrenzweig, *System des österreichischen allgemeinen Privatrechts. 2 Bd. 1 H. Das Recht der Schuldverhältnisse*, Wien 1920, p. 244; L. Enneccerus, *Lehrbuch des bürgerlichen Rechts. Zweiter Band. Recht der Schuldverhältnisse*, Marburg 1927, p. 252.

[105] R. Longchamps de Bérier, *Explanatory memorandum on Art. 173* (in:) *Uzasadnienie Projektu Kodeksu Zobowiązań z uwzględnieniem ostatecznego tekstu kodeksu. Art. 168-238*, Warszawa 1935, p. 260.

[106] L. Domański, *Instytucje Kodeksu Zobowiązań. Część Ogólna*, Warszawa 1936, p. 702.

[107] R. Longchamps de Bérier, *Explanatory memorandum on Art. 173* (in:) *Uzasadnienie Projektu Kodeksu Zobowiązań z uwzględnieniem ostatecznego tekstu kodeksu. Art. 168-238*, Warszawa 1935, pp. 260-261.

[108] J. Korzonek, *Commentary on Art. 173* (in:) J. Korzonek, I. Rosenblüth, *Kodeks zobowiązań. Komentarz. T.1*, Kraków 1934, pp. 383-384.

1691 Code civil. First of all, the function of notice and the importance of the debtor's knowledge of the assignment are of other significance. In French law, until the debtor is notified, he can perform to the assignor, even though he knew of the assignment. In addition, the notice or acceptance is necessary for the assignment to have an effect upon third parties which is not required in the other described here legal systems.[109]

9. THE REGULATION OF THE K.Z. AS A SOURCE OF ARTICLE 512 K.C.

The regulation of Article 173 K.z.[110] was slightly changed in 1950[111]. K.z. in its new wording regulated that the assignor or assignee shall notify the debtor in writing of the assignment. As mentioned above, under Article 173 K.z. before 1950, the prerequisite of the written form of notice did not have a purely evidentiary value and was needed to end the protection of the debtor.[112] This change may suggest that since 1950 the written notice was intended for evidentiary purposes only, while any notice, regardless of form, had immediate effect against the debtor.[113]

The provision, in its 1950 form, was then adopted into Article 512 of the Polish Civil Code of 1964,[114] which is still in force:

> Article 512[115] *Dopóki zbywca nie zawiadomił dłużnika o przelewie, spełnienie świadczenia do rąk poprzedniego wierzyciela ma skutek względem nabywcy, chyba*

[109] L. Domański, *Instytucje Kodeksu Zobowiązań. Część Ogólna*, Warszawa 1936, pp. 701-702.

[110] Art. 173 (from 1950). *O dokonanym przelewie zbywca lub nabywca wierzytelności powinien zawiadomić dłużnika na piśmie. Dopóki dłużnik nie został zawiadomiony o przelewie, zapłata, dokonana poprzedniemu wierzycielowi, ma skutek względem nabywcy, chyba że w chwili zapłaty dłużnik wiedział o przelewie. Przepis ten stosuje się także do innych czynności prawnych, dokonanych między dłużnikiem a poprzednim wierzycielem.* [Art. 173 (from 1950). *The assignor or assignee of a claim shall notify the debtor in writing of the assignment. As long as the debtor has not been notified of the assignment, the payment, made to the previous creditor, shall have effect against the assignee, unless at the time of payment the debtor knew of the assignment. This provision also applies to other legal transactions undertaken between the debtor and the previous creditor.*]

[111] The Act of 18 July 1950 Introductory Provisions of the General Provisions of the Civil Law (Polish Journal of Laws 1950 No. 34 item 312).

[112] See above p. 339.

[113] Cf. Minutes of the K.c. Codification Commission meeting of 24 October 1957, p. 2 (unpublished).

[114] Polish Journal of Laws 1964 No. 16 item. 93; hereinafter K.c.

[115] Art. 512. *As long as the assignor has not notified the debtor of the assignment, performing to the previous creditor shall have effect against the assignee, unless at the time of performance*

że w chwili spełnienia świadczenia dłużnik wiedział o przelewie. Przepis ten stosuje się odpowiednio do innych czynności prawnych dokonanych między dłużnikiem a poprzednim wierzycielem.

The Codification Commission of the K.c. did not include in the provision the requirement that the notice should be given in writing, which made it more similar to Article 167 OR. The provision also modified the indication of the party which should give the notice to the debtor. Under Article 512 K.c., it should be the assignor. Of course, the debtor can have the knowledge of the assignment acquired from other sources. In addition, Article 512 K.c. contains changes of a rather editorial nature compared to Article 173 K.z. However, the principle remains the same. The debtor can discharge the obligation by performing to the assignor until he is notified or acquires prior knowledge of the assignment from other sources. The doctrine also pointed out that the purpose of this provision invariably remained the protection of the debtor.[116]

10. CONCLUSIONS

The analysis above confirms that the regulation of Article 173 K.z. is a part of the common European legal tradition, in which it is widely accepted that the debtor deserves protection in regard to the assignment of claims in which he does not participate. Of course, such protection is limited due to certain circumstances. One of these circumstances is the debtor's knowledge of the assignment and, consequently, of his current creditor. The example of Article 173 K.z. shows that this Code followed, obviously, the regulations of other European systems, but did not do that blindly. It presented its own original solutions, which were based on the experience of other legal systems. This perspective helps to understand better the statement made about the Polish K.z. by Filippo Ranieri: *so dass die damalige erste polnische Kodifikation des Obligationenrechts sich auch als erste echte 'europäische' Zivilrechtskodifikation verstand*.[117]

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the debtor knew of the assignment. This provision shall apply accordingly to other legal transactions undertaken between the debtor and the previous creditor.

[116] W. Czachórski, *Prawo zobowiązań w zarysie*, Warszawa 1968, pp. 392-393; E. Łętowska (in:) Z. Radwański (ed.), *System Prawa Cywilnego. Prawo zobowiązań – część ogólna*, Wrocław-Warszawa-Kraków-Gdańsk-Łódź 1981, pp. 392-393.

[117] *so that the first Polish codification of the Code of Obligations at that time also should be understood as the first true 'European' codification of civil law*; F. Ranieri, *Europäisches Obligationenrecht. Ein Handbuch mit Texten und Materialien, Wien-New York 2009*, p. 106

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