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Allocation of Payments under the Romanian Law



Mara Verenciuc
Lawyer

1. **Payment is the main way of discharging civil obligations.** Starting from this premise, one can observe that the Romanian Civil Code regulates all aspects related to “payment”, such as: notion of payment, subjects of the payment, terms and conditions of payment, proof of payment, formal notification to the creditor and the allocation of payment. In order to understand the way in which the allocation of payments operates, one's attention must be directed to the provisions of **Articles 1506 – 1509** of the New Romanian Civil Code (“**NCC**”), which entered into force on 1 October 2011. Before that time, allocation of payments was regulated by the Old Romanian Civil Code (“**Old Civil Code**”).

2. However, Law no. 71/2011 for the application of Law no. 287/2009 regarding the Civil Code stipulates at art. 113 that “*the allocation of payments shall be governed by*

the provisions of Articles 1506 – 1509 of the Civil Code if the payment is made after the entry into force of the said Code, regardless of the date of when the obligation arose”.

3. In any event, in regards to payments, the regulations of the NCC are similar to the ones of the Old Civil Code; thus payments should be deducted similarly regardless of whether made under the old or the new Civil Code.

4. In principal, under the Romanian law, the allocation of payments can occur in the following ways, as provided by Section 5 of the NCC:

- a) As the parties have accepted under mutual agreement (Article 1506 NCC);
- b) As per the debtor's demand, if point a) is inapplicable (Article 1507 NCC);
- c) As per the creditor's demand, if points a) and b) are inapplicable (Article 1508 NCC);
- d) Pursuant to the legal rules, if the above points are inapplicable (Article 1509 NCC).

5. Article 1506 of the NCC regulates the operation of payment allocation in the situation where a debtor owes several debts to the same creditor dealing with goods of the same kind and the payment is not sufficient to discharge all debts, it thus being necessary to establish the method of determining the order of payment of debts.





6. Article 1507 para. (1) of the NCC stipulates that a debtor is not allowed to pay off its principal debt in order to stop the interest/financing charges from running and to thus avoid payment of the interest/financing charges. The following rules laid down by art. 1507 of the NCC must be observed: a) the payment is first allocated with regard to expenses, then the interest/financing charges and, finally, the capital/principal amount; b) the debtor cannot allocate payment to a debt that is not yet due in preference to a debt that is due, unless the creditor consents to that effect and if it is provided for in the agreement that the debtor may prepay; c) the debtor has the duty to notify the creditor of the debts that he intends to discharge by the payment he makes, and when payment is made by bank transfer, the debtor indicates the debt that he is paying through the comments made on the payment order.

7. According to the above, as the debtor may choose which debt to pay out of two or more similar debts, the debtor may indicate to the creditor which debt he is going to pay, however, without having the possibility to pay the principal amount of a certain debt **prior to** paying the interest/financing charges that had/have accrued in respect of that debt,

at the date of payment.

8. If the debtor has not exercised his right to make the allocation of payment, it may be made by the creditor under art. 1508 of the NCC, i.e. if the creditor gives the debtor a receipt releasing him of all obligation, he has the duty to specify in that receipt which debt is extinguished by the payment to the debtor; if the creditor fails to send such a receipt to the debtor, the creditor may, within a reasonable time after receiving the payment, indicate the debt to which it will be allocated.

9. As explained above in the articles of the NCC, financing charges and the principal amount of a debt are not two (2) different debts of the same kind. They are one and the same debt bearing financing charges, as the debt [as a general term] is composed of expenses, financing charges and the principal amount.

10. Article 1509 of the NCC brings the following provisions: "(1) If none of the parties makes the allocation of payments, the following rules will be applied, in the following manner:

- a) the payment will firstly be applied on the debts which are due;
- b) the debts which are without securities or

for which the creditor has the least amount of securities will be considered extinguished;

- c) the allocation will firstly apply on the debts which are more onerous for the debtor;
- d) if all the debts are equally due, with securities and onerous, the oldest debts will be extinguished;
- e) if the absence of all the criteria listed under points a) – d), the allocation shall be made proportionally for each debt;

(2) In all cases, payment shall firstly be allocated to the judicial and forced execution expenses, then on the rates, interests and penalties, in the chronological order of their due dates and, finally, on the capital, if the parties do not agree to the contrary".

11. The above cited article referring to legal payment allocation brings further confirmation and support to the notion that the debtor cannot, unilaterally, apply the payments to the principal amount instead of the interest/financing charges.

12. In light of the above explanations, and as a **general rule governing payment allocation**, payment made in respect of a debt is drawn down first against the financing charges that have accrued on the respective debt by the date of payment and secondly against the principal amount of the debt as invoiced.





Allocating Risks and/or Disrupting Technical Solutions



Valentin Milkov
Contracts Manager

“Inaction breeds doubt and fear. Action breeds confidence and courage. If you want to conquer fear, do not sit home and think about it. Go out and get busy.” Dale Carnegie

The construction industry continues to be ready for disruption. According to McKensey & Company, large projects across the globe typically take 20 percent longer to complete and are up to 80 percent over budget. The inciters of those grim results could be found in the areas of productivity, quality and digitalization. These areas are discussed below, as well as some elaborations on fixing

the basics of the construction industry and an inquiry into who could disrupt the construction industry.

Productivity is the output the economy generates from each labour unit. It drives growth in the economy, and when it stops improving, companies must find ways to sustain their businesses by either employing immigrant workforces or exploring opportunities abroad. Unfortunately, in some developed countries there are skilled people, technologies and capital but at the end the construction companies within those countries are still not as productive as companies functioning in other sectors of the economy.

Thus, many argue that the productivity stagnation in the construction industry would disappear through the implementation of digital technologies (see Digitalization below). However, the norm is to hire only engineers when filling out the core capabilities of a construction company. Unfortunately, people with different skills, such as computer science skills, are not considered essential for the core capabilities of a construction company and this could

actually be the missing ingredient for disrupting the industry. Better illustrating the desire to digitalize without computer scientists is the example with the discovery of electricity in 1890s. In an attempt to catch the vibe, factory owners replaced their steam engines with large electric motors. However, it took 20 years for the proper electrification of the factories. Hence, the factories could not take full advantage of the electrical power, but when that happened, productivity doubled and new production methods were developed.

Quality as a priority discussion for the infrastructure projects among the leading G-7 and EU industrial nations (the US, the UK, Germany, Japan, Italy, France, Canada) has been replaced by discussions for weak trade, weak investments, declining commodity prices, low inflation and poor wage growth. Consequently, instead of investment-led spending, the developed nations continue to create conservative monetary policies. This trend must be stopped because further austerity would most certainly lead to times when paying for infrastructure would be much more expensive.





The construction industry is among the least digitized.

McKinsey Global Institute industry digitization index; 2015 or latest available data

Relatively low digitization Relatively high digitization
● Digital leaders within relatively undigitized sectors



¹Based on a set of metrics to assess digitization of assets (8 metrics), usage (11 metrics), and labor (8 metrics).

²Information and communications technology.

Source: AppBrain; Bluewolf; Computer Economics; eMarketer; Gartner; IDC Research; LiveChat; US Bureau of Economic Analysis; US Bureau of Labor Statistics; US Census Bureau; McKinsey Global Institute analysis

McKinsey&Company



Therefore, governments must focus on investing in quality infrastructure where the cheapest offer criteria must be disregarded. Only in this way would sustainable economic growth be established, and as a result, more resources would be raised for more quality infrastructure projects.

Digitalization, or technology innovation, has not been well adopted in the construction industry (See McKinsey Global Institute table). There are numerous discussions on how parties should change their core capabilities with the use of data and digital technologies but public or private entities continue to lack commitment. This stagnation is exacerbated by the fact that digitization is not a prerequisite to win large tenders. The competing Building information modelling (BIM) products are not fully accepted or are not flawlessly connecting decision-making in respect of a building or other built assets, especially in mega-projects where the decision makers are spread among different public and private institutions in one mega-institution.

According to BBG, a commercial real-estate valuation, advisory and assessment firm, in 2016, data centers proliferate in the US. Cloud service providers such as Facebook, Google, Apple and Microsoft have been actively working the data center space to meet the ever-increasing demand for cloud computing and data storage. However, these service providers have not received much input from their construction clients and the data centers have not been used as much as in other sectors of the economy. Therefore, the current digital platforms and/or data centers do not yet lead to better satisfaction, increased interaction or improved performance, nor do they inspire a culture of innovation and collaboration.

Fixing the basics

While it is clear that the construction industry is behind digitalization, a major challenge remaining in the construction industry is the *fixing of the basics*. For instance, project planning remains uncoordinated between the office and the field. Some Employers refuse to provide digital format drawings (AutoCAD). Such examples prove that innovation is just a discussion topic instead of persistent engagements for implementing new technological solutions. In this respect,

some Contractors' core capabilities are based on how to win tender bids with low offers and if possible later on recover the lost difference in cost and profit via variations. Such behaviour focuses on how to adapt to the public procurement system instead of disrupting the industry with innovations. That is why governments are suspicious, austerity measures grow and investments on quality infrastructure projects decrease.

In the Construction industry, the Contractors have to allocate risks because there are many uncertainties. That is a valid reason for delays and oversized budgets. However, in the manufacturing industries there are no such uncertainties and basically the client knows exactly what to expect from its particular investment.

Furthermore, the construction industry has not changed in terms of how it contracts as well. Contract management software is rarely used. Some contracts allocate risk just to one party. Other contracts do not deal with innovation (Value Engineering). On the other hand, the "proper" contracts are set up to transfer Risks, which by definition lead to a confrontational environment. Hence, some Contract Managers, Surveyors, Project Manager or Lawyers can solve some of the biggest and most complex engineering problems but the essential idea to transfer the risk to the lowest common denominator makes parties less productive and averse to innovation. In other words, in such a confrontational environment everybody has to protect a margin and self-interest rules. Therefore, the leading international contract institution, FIDIC, could work towards transforming its rainbow suite of contracts into a digital holistic product which both transfers risks and at the same time

disrupting the industry.

Notwithstanding the above, there is innovation progress in the development of new building materials, such as self-healing concrete, aerogels and nanomaterials, 3D printing and preassembled modules. However, despite the obvious benefits for lower cost, faster construction, improved quality and safety, those innovations are not yet fully developed and maybe that is why they are ignored by the decision makers. Therefore, the construction industry desperately needs disruptive organizational changes. Only in this way could the Contractors be doing a lot more, a lot quicker and with much more quality while satisfying the Employer and the general public.

It is yet unclear **who will set the tone for changing the construction industry**. It is very likely that the entity that disrupts the industry might be an outsider, a company that is not even in the construction industry. That is why the entrance of more computer scientists in the construction industry might be a feasible path toward the long sought change, because historically, through the use of computer scientists, if something has taken weeks and now takes man-days, through the use of algorithms, those days are now minutes.

Techno Engineering and Associates (TEA) is fully equipped to face the aforementioned challenges and stays very optimistic about its future, because it is pleased to have highly engaged, energetic, enthusiastic and diverse staff. It is a very fast growing company with long-term perspectives. Technical development will become a priority because TEA would not wait to be disrupted by its competitors and it would take the lead in developing more efficient technical solutions.





*Techno Engineering & Associates is wishing you
a blessed and wonderful Easter Season!*

*Techno Engineering & Associates vă urează
Sărbători Pascale cu liniște și armonie!*

