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PECULIUM PROCESS IN RECEIVABLES RIGHTS

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ABSTRACT

Peculium process is one of the most common types of legal transactions in daily life because it affects a right in the property. It is a legal transaction that directly affects a right in the assets of the person making the disposition, transferring, restricting, changing or terminating that right to another person. For this reason, it is important to evaluate the change made by the peculium process in the field of movable and immovable rights and relative rights. In this direction, the discussion of the intangibility of the receivables in the transfer of the receivable and the transfer of the receivables in the field of relative rights and the discussion of intangibility of the release and the intangibility of the reason in the release, which is a peculium process, were discussed and the results of the transaction were evaluated.

Keywords: Legal action, Peculium process, Relative right, Transfer of receivables

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1.1 Transfer of Receivable Rights

The process of transferring the right to receivable, which is made with a form-based contract between the right holder and the party who wants to take over the right without the consent of the debtor, and in which the right to receivable leaves the assets of the creditor and passes to the assets of the transferee party, is called the transfer of the right to receivable. The transfer of the right to receivable is in the nature of a peculium process. The transfer of the right to receivable results in a change of creditor. This transaction does not affect the amount of the receivable or the debt relationship. Two transactions are required for the right to receivable to pass from the assets of the creditor to the assets of the new creditor. The first transaction is the borrowing transaction or the transfer of the receivable, and the second is the peculium process.

1.2. Promise of Transfer of Receivables

In order for a receivable right to leave the creditor's assets and pass to the assets of the new creditor, the promise of transfer of the receivable, which is a borrowing transaction, and the transfer of the receivable, which is peculium process, must be made. The fact that the party who has made a borrowing transaction regarding the transfer of this receivable right can subject this receivable to another borrowing transaction or peculium process later is the result of the separation of both transactions. As a matter of fact, it is possible to carry out borrowing and peculium process at the same time. In such cases, the parties come together and both make a borrowing transaction for the transfer of the receivable and require the performance of the act arising from the borrowing transaction. A promise to transfer a receivable is a contract that imposes an obligation on a person to transfer the right of receivable to another person. The promise of transfer is different from the transfer of the receivable and is not in the nature of a peculium process. While there is not peculium process in the promise of transfer of the receivable, there is only a commitment to make a peculium process and this transaction does not depend on the form. If the party promising to transfer the receivable fulfills this commitment, the necessary results will arise for the transfer of the receivable. If the party who made the promise does not fulfill his promise, the party in whose favor he promised can apply to the court to return the claim to him. If this application is successful, the right to receivable passes to the new creditor with a court decision, without the need for a peculium process.

1.3. Peculium Process

We have already stated that the transfer of the receivable, which results in the transfer of the receivable right from the assets of the transferor to the assets of the transferee party, is in the nature of a peculium process. With the conclusion of the transfer agreement, the party who undertakes to transfer the right to receivable fulfills its debt. Accordingly, the transfer of the receivable as peculium process actually means the performance of the debt. When the receivable right in the assets of the old creditor passes to the assets of the new creditor, the transfer of the receivable takes place. Thus, since the transfer of the receivable results in the emergence of a right of receivable from the assets of the transferring party, a decrease in the assets of the transferring party occurs and an increase in the assets of the other party. Therefore, from the point of view of the transferee, this is a winning transaction. Since the subject of the transfer of receivables is a relative right, it is seen that it is separated from the contract regarding the transfer of real rights. The principle of public openness has been adopted in the disposition of real rights, and the principle of public openness has not been adopted in the transfer of receivables. However, it has been argued that the doctrine that the transfer is subject to the condition of written form, and that this situation serves the principle of public openness[1]. However, the purpose here is not to provide public openness, because good faith is not protected as a rule in the transfer of receivables[2]. It is possible to make the transfer of the receivable, which is in the nature of a peculium process, depending on the delaying or disruptive condition/period[3]. In the transfer of receivables due to the delaying condition/period, the right to receivable automatically

[1] Wolfgang Wiegand, "Kreditsicherung und Rechtsdogmatik", **Berner Festgabe zum Schweizerischen Juristentag 1979**, Bern und Stuttgart 1979, s. 292.

[2] Andreas Von Tuhr,Arnold Escher, **Allgemeiner Teil des Schweiserischen Obligationenrecht, Zweiter Band**, S 84, Zürich 1974, s. 261; Baki İlkay Engin, **Alacağı Temlik Edenin Garanti Sorumluluğu**, Ankara 2002, s. 20; Karl Larenz, **Lehrbuch des Schuldrechts**, Erster Band, Allgemeiner Teil, München 1987. s.576.

[3] Von Tuhr,Escher, **a.g.e.**, s. 331; Ingeborg Schwenzer, **Schweizerishes Obligationenrecht Allgemeiner Teil**, Bern 2006. N. 12; Hasan Pulaşlı, **Şarta Bağlı İşlemler ve Hukuki Sonuçları**, Ankara 1989, s. 166; Haluk Nami Nomer, **Beklenen Haklar Üzerindeki Tasarrufların Hukuki Sonuçları,** İstanbul 2002, s. 90.

passes to the assets of the transferee party upon the realization of the condition or the arrival of the period.

In the case of a transfer of receivables due to a disruptive condition or period, the right to receivable automatically reverts to the assets of the former creditor who transferred the right, without the need for a new transfer agreement or a declaration of will by the parties. Because the peculium process regarding the right to receivable is not completed with material facts such as delivery or registration, as in the field of real rights. In terms of a contingent peculium process, peculium process made before the realization of the condition and which undermine the provisions of the conditional transfer of receivables are invalid.

1.4. Dependence on the Cause in the Transfer of Receivables, Abstraction Discussions

It is clear that the transfer of the receivable is a gainful peculium process as it brings about an increase in the assets of the creditor. Undoubtedly, a winning process is carried out to achieve an underlying goal. In other words, this gain is made depending on a legal reason or reason. The promise of transfer of receivables is one of the most common reasons for the transfer of receivables. If this reason is not valid for any reason, it is a matter of debate whether it will also affect the transfer of the receivable. The question arises whether the transfer of the receivable depends on the cause or is abstract. According to those who advocate the view that the transfer of the receivable depends on the reason, the invalidity of the reason also invalidates the transfer of the receivable and the right to receivable does not pass to the other party[4].

Thus, the right to receivable remains on the transferor and there is no enrichment of the assets of the other party. In the event of the bankruptcy of the transferring party, since the legal reason will be invalid, the right to receivable continues to remain in the assets of the transferring party and the right to receivable is included in the bankruptcy estate. Proponents of the view of dependence on reason state that the purpose of the transfer of

[4] Sandt Vande, Carole, **L'acte de disposition**, Fribourg 2000, N. 745; Peter Jäggi, "Zur Rechtsnatur der Zession", **SJZ**, Heft 1, 67. Jahrgang, 1971, s. 6; Fikret Eren, **Borçlar Hukuku Genel Hükümler**, Ankara 2012, s.1231; Selahattin Sulhi Tekinay, Sermet Akman, Haluk Burcuoğlu, Atilla Altop, **Tekinay Borçlar Hukuku Genel Hükümler**, İstanbul 1993. s. 789.

receivables is not to ensure job security, and that the principle of protection of good faith is included in the system of dependence on cause.

Accordingly, if the debtor, who performs in good faith, has not been notified of the transfer of the receivable, he can deposit the receivable at the place indicated by the judge and get rid of his debt.

In the abstract view, even if the transfer of the receivable is not based on a valid legal reason, it is valid as long as there is no invalidity arising from its structure[5]. Even if the right to receivable is not based on a valid legal reason, it leaves the assets of the transferor party and passes to the assets of the transferee party. Thus, while the party who has gained the right to receivable is unjustifiably enriched, the party transferring the receivable can request the return of the right to receivable with an unjust enrichment lawsuit.

Since the right to claim despite the invalidity will belong to the transferee, the bankruptcy estate can only claim unjust enrichment in the bankruptcy of the transferor party. The authors who defend the abstraction view state that the provisions that protect good faith, as in the transfer of movable and immovable property, are not included in the transfer of the receivable, and this gap can only be filled by accepting the abstract view. Just as the disposition of movable property depends on the reason, the disposition of the right to receivable must also depend on the reason. When it is accepted that the transfer of receivables depends on the cause, any invalidity in the promise of transfer of the receivable, which is a legal reason, prevents the transfer of the right to receivable to the assets of the party opposing the transaction, and the right continues to remain in the assets of the original creditor.

There is no need for a claim for restitution for the return of the right, as there are no means of public access, such as possession or registration, in the disposition of the right to receivable. In the field of relative rights, the principle of causal dependence has a different meaning. Adherence to

[5] Herman Becker, Kommentar zum Schweizerischen Zivilgesetzbuch Obligationenrecht, I Abteilung, Allgemeine Bestimmungen, Art.1-183, Bern 1941. N. 1; Von Tuhr,Escher, a.g.e., s. 333; Max Rudolf Kummer, Beitrage zur Lehre vonder causa, insbesondere bei der Abtretung und beim Erlass von Forderungen, Bern 1942, s. 134; Ferit Hakkı Saymen/ Halit Kemal Elbir, **Türk Eşya Hukuku Dersleri**, İstanbul 1963, s. 330; Hıfzı Veldet Velidedeoğlu, **Medeni Hukuk**, İstanbul 1969, s. 308.

cause means that the right to receivable depends on the valid legal reason at the time of the disposition and its continuation. Otherwise, when the promise of transfer of receivables is reneged upon, there is no need for a repatriation between the parties in order for the receivable right to return to the assets of the former creditor, or for a refund request if this is avoided.

In the field of absolute rights, adherence to the cause is that the real right needs a valid borrowing transaction at the time it is the subject of the peculium process, and a valid borrowing transaction is not sought in the continuation of the real right. As a rule, the disposition of the right to receivable depends on the reason, and it is possible for the parties to make this transaction abstract among themselves. At this point, the rule that the peculium process of the right to receivable depends on the cause differs from the rule that absolute rights depend on the cause. Because the peculium process regarding the real right depends on the reason and cannot be abstracted by the parties.

2. Absolution

Absolution is the agreement of the creditor and the debtor to release the debtor from the debt without performing it. Absolution is when the creditor relinquishes his receivable with a contract with the debtor, relieving the debtor from the debtor. Absolution is a type of contract that only eliminates the right to receivable. The right to receivable and the rights attached to the right of receivable are terminated with effect upon the execution of the absolution process. In a broad sense, the elimination of the entire debt relationship is not by release, but by the conclusion of the rescission agreement, which is a peculium process.

2.1. Promise of absolution

The existence of the absolution promise, which is a debt transaction between the parties, should be accepted in accordance with the principle of separation. In the promise of absolution, the creditor is under the obligation to enter into a absolution agreement against the debtor regarding the right to receivable. Only the fact that the absolution promise has been made does not affect the right to receivable. In other words, the right to receivable will only end with the release of the receivable. The promise of absolution and the promise not to exercise the right to receivable are actually different concepts. Compared to the promise of discharge in the promise not to exercise the right of receivable, which is

in the nature of a borrowing transaction, the creditor is under the obligation not to demand performance while continuing to have the right to receivable.

2.2. Peculium Process

The absolution is realized by the mutual and mutually appropriate will of the creditor and the debtor to eliminate the right to receivable, in whole or in part. The release made by the mutual and appropriate declarations of will of the parties is a contract and is also a peculium process.

It was stated that it was not possible to unilaterally waive the right to receivable. A release that directly affects the right to receivable, eliminating or reducing it, is in the nature of a peculium process. At the same time, it is a gainful transaction as it causes an increase in the liabilities of the debtor's assets. Generally, the promise of absolution and the absolution, that is, the borrowing and peculium process, are located side by side. As a matter of fact, it is unlikely that there will be a promise of peculium made before and separately from the peculium process. Despite this situation, the principle of separation continues to exist in terms of release. As a rule, the absolution, which has the nature of a pulium process, is prospectively effective. It is possible for the release to be tied to the delaying condition or the disruptive condition or the period[6]. In the case of a delaying condition of absolution, the right to receivable and the rights attached to the right to receivable automatically terminate with the fulfillment of the condition. It is also possible for the release to be conditioned on the disruptor. With the realization of the disruptive condition, the release disappears and the right to receivable is almost reborn.

2.3. Commitment to Reason Abstraction Debates İn Absolution

According to one view, absolution is an abstract act of peculium process[7]. In line with this view, although the absolution word, which

[6] Von Tuhr,Escher, a.g.e., s. 176; Herman Becker, Kommentar zum Schweizerischen Zivilgesetzbuch Obligationenrecht, I Abteilung, Allgemeine Bestimmungen, Art.1-183, Bern 1941, N. 6; Nuri Turanboy, İbra Sözleşmesi, Ankara 1998, s. 9.

[7] Schwenzer, **a.g.e.**, N. 4; Viktor Aepli, **Kommentarzum Schweizerischen Zivilgesetzbuch Obligationenrecht**, Teilband, Das Erlöschen Obligationen, Erste Lieferung, Art. 114-126 OR, Zürich 1991, Art. 115, N. 44; Von Tuhr,Escher, S 75, s.

constitutes the legal reason for the absolution is invalid, the absolution agreement is valid. The creditor, who loses his right to receivable even though the release promise is invalid, has a claim for unjust enrichment in order to re-establish the right to receivable. Although the right to receivable is re-established at the end of the unjust enrichment lawsuit, it is not possible to accept this result in terms of the rights and guarantees attached to the right to receivable. It may not always be possible to establish the situation exactly as it was before the release. Another view argues that the absolution depends on the cause[8]. In this case, the invalidity of the cause causes the absolution to be invalid as well. In cases where the absolution is based on cause, the creditor does not need to assert the claim for unjust enrichment in order to re-establish the right to receivable. Because the right to receivable continues to exist, the rights related to the receivable continue in the same way. After the absolution is made, the movable pledge given for the receivable ends. Thus, the creditor can no longer claim that the right to receivable and the related pledge of movable property continues. The situation is different in the case of real estate pledges. If the creditor has abandoned after the request for abandonment, then the pledge must be re-registered. If the pledge of immovable property has not been abandoned, it will continue to exist as a right attached to the right of receivable.

CONCLUSION

The transfer of the right to receivable is in the nature of a peculium process. Two transactions are required for the right to receivable to pass from the assets of the creditor to the assets of the new creditor. The first transaction is the borrowing transaction or the transfer of the receivable, and the second is the peculium process. The transfer of the right of receivable to the assets of the transferee depends on the validity of the promise of transfer of the receivable, which is in the nature of a borrowing transaction. Otherwise, the right to receivable remains in the assets of the transferor and in this case, there is no need for a refund request. The

177; Kenan Tunçomağ, **Türk Borçlar Hukuku, Genel Hükümler**, I. Cilt, İstanbul 1976, s. 1178.

[8] Max Keller,Christian Schöbi, **Das Schweizerishe Schuldrecht, Band I, Allgemeine Lehrendes Vertragsrecht**, Basel und Frankfurt am Main 1988, s. 193.

principle of adherence to the cause must be accepted in the transfer of the receivable and the absolution of the receivable. The principle of adherence to reason is sought in the field of relative rights, at the time of the peculium process and its continuation. Thus, the renunciation of the borrowing transaction related to the relative right has the same effect and creates the result that the right to receivable automatically passes into the assets of the former creditor without the need for any action. As a result, the peculium process made in the field of both absolute rights and relative rights depend on the cause.

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