

## REFERENCES AND DILEMMAS OF THE LEGAL NATURE OF THE OBLIQUE PROCEEDINGS IN ACCORDANCE WITH THE LAW OF THE REPUBLIC OF MOLDOVA

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### **Abstract**

*This study represents a relatively complex treatment of indirect claim in its procedural sense and seeks to highlight those concerns that may waken the formulation of such actions in court.*

*For an introductory approach we propose one of the definitions of civil action in general, as a genre concept in which is framed the oblique action.*

*The civil action represents that legal way of protection by judicial restraint of civil rights violated or interests protected by law by which a legal entity, person or entity, require to the competent judicial authority to recognize a pre-existing subjective right or provision of new legal cases or termination of the obstacles puted in the exercise of his right by another person, or payment of compensation when the establishment and enforcement of such obligations is necessary in order to achieve that right. Starting from these conceptual premises is follow to be treated oblique action, since it can not be conceived outside the genre and is not to be an exception from what is the legislation of the Republic of Moldova provides.*

*Being a relatively novation for the legislation of the Republic of Moldova, the oblique action knows at the moment a superficial and insufficient approach both in the Civil Code and in the literature. Even if the action is, clearly, a range of civil action and this institution is assigned to the civil procedural law, its regulation was exclusively done in material legislation, which generates a series of misunderstandings about the legal nature of this civil action and its essence is within the parameters of a typical civil action.*

*At the same time, we will try to explain civil law regulating of such actions in civil legislation in terms of two aspects of the civil action: material and procedural. Material sense of the civil action consists of those claims based on the legal relationship which has developed the conflict situation that the defendant formulates against the complainant or against him, while the procedural sense directs the requirements by the court, and without doubt it is nased on the material side, but it is clear from. The civil provisions related to oblique action have the goal to create favorable conditions for the defense of creditor about the possibility of his debtor who risk the insolvency may not be able to honor its obligations towards oneself and slash action that constitutes a legal basis for appeals to the courts for indirect satisfaction of the material interest of the creditor who can be right.*

*This study predend to be an investigation of the procedural meaning of the oblique action , proceeding from the material particularities covered by the civil law and benchmarks provided in this sense of literature through deductive and analytical methods.*

*It should be noted that the definition of a civil action is not based on a specific rule of civil procedure, but its features can be learned from those legal provisions governing the formulation and application of the call request in the court, exercise the procedural*

*documents by the parties in the process during the examination and how can they have a such civil action.*

*The first we should mention the litigious nature of the civil action, or it is not possible except by the claims made in court by a person who is standing by the complainant against another person determined defendant. Here it is the case to invoke the view that, if oblique action will be conceived as a category of civil action, it will comply with the conditions of contentious, ie an oblique action is possible only in cases when the third party debtor may be identified that is obliged to the principal debtor and not any kind of action that will be done by the creditor substituting the debtor will comply with oblique action rules.*

*The study also refers to the legal material relation that binds the creditor to the debtor, and the latter by the debtor or his debtors, and opportunities, especially in the applicant's procedural risks of the plaintiff, effects and manner of execution of court decision favorable to plaintiff, the costs of proceedings supported by the creditor in a lawsuit, etc.. It examined the possibility of meeting the legitimate claims of creditors through a simplified procedure, in parallel with the oblique action, as well as other adjacent issues which arise from this type of procedure.*

*This is an opened study for new visions and approaches to oblique action and leaves space for views and discussions, trying the funding of concepts which to generate proposals and interpretations of legal regulations dedicated to indirect claim, in particular, but also civil action in general.*

**Keywords:** *civil action, oblique action, indirect claim, creditor, debtor.*

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For an introductory approach we propose one of the definitions of civil action in general, as a genre concept in which is framed the oblique action.

The civil action represents that legal way of protection by judicial restraint of civil rights violated or interests protected by law by which a legal entity, person or entity, require to the competent judicial authority to recognize a pre-existing subjective right or provision of new legal cases or termination of the obstacles puted in the exercise of his right by another person, or payment of compensation when the establishment and enforcement of such obligations is necessary in order to achieve that right. Starting from these conceptual premises is follow to be treated oblique action, since it can not be conceived outside the genre and is not to be an exception from what is the legislation of the Republic of Moldova provides.

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complainant or against him, while the procedural sense directs the requirements by the court, and without doubt it is based on the material side, but it is clear from. The civil provisions related to oblique action have the goal to create favorable conditions for the defense of creditor about the possibility of his debtor who risk the insolvency may not be able to honor its obligations towards oneself and slash action that constitutes a legal basis for appeals to the courts for indirect satisfaction of the material interest of the creditor who can be right.

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It should be noted that the definition of a civil action is not based on a specific rule of civil procedure, but its features can be learned from those legal provisions governing the formulation and application of the call request in the court, exercise the procedural documents by the parties in the process during the examination and how can they have a such civil action.

Do not overlook the legal provision under which the creditor whose claim is certain, liquid and due, perhaps on behalf of his debtor, exercises its rights and his actions in the case when the debtor at the expense of the creditor refuses or fails to perform (paragraph. 1, Art. 599) showing that the creditor, in addition to the claims of the debtor may assert its rights. That provision will be interpreted in the meaning that fits into the concept as such civil action, ie the extent to which subjective rights of the debtor will assert in relation with third parties (debtors) and not declarative or unilaterally.

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Some authors believe that if the heir, at the expense of the creditor, refuses or fails to accept the succession, it can be accepted by the creditor's successor via an indirect claim. This way is excluded invoking as an argument the nature of the act of acceptance of the succession which is a succession option, a volitional act that belongs exclusively heir and can not be passed to third part such as no one can subrogate the heir, except the provided law. On the other hand, is omitted and the litigious nature of the oblique action, so it is unclear against whom is this supposed to make civil action, who will be the defendant? As much as we try to assume and create versions in this sense, is clearly that the action can not be directed against the other heirs who have accepted the inheritance and the more will not make such a requirement against state which come into possession of the vacant inheritance. In these cases is missing the litigious element in itself and the oblique

action becomes meaningless, as long as no one can determine the person against whom a civil action be formulated.

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Another aspect of the dilemma on the issue oblique action is related to civil procedure since, in essence, an oblique action meets the general conditions for a civil action brought, affecting in particular the criterion of existence and justification of a legal interest, legitimated, born and current personally and directly - they represent some rules aimed at making the material interests of that who formulate the civil action. An applicant who has made an oblique action undeniably has a material interest which meets, in general, the mentioned conditions, besides the directness of interest, taking into account the specificity of subrogatorial action. It seems that it does not affect the essential object of civil action, so the plaintiff anyway is asking for another event, but in terms of the basis for action, the problem is different because the creditor will not rely on the legal proceedings to which the disputed material was a part, but a foreign legal relationship to itself, mediated by the debtor. This will affect primarily the evidential side of the procedure as the applicant is putted in difficulty both in the foundation of the civil action, but, above all, to present evidence in trial, especially since this type of action is the premise and the debtor's bad faith, who if is not necessarily attracted to the process, could create serious problems of proof of the applicant (creditor). This bad faith is deducted from the content of the law, or if the debtor only has the protection and preservation of its heritage, will not involve the creditor in question to act in his interest in justice.

From the content of the law is not results the obligatorily of attraction in the process of the debtor, so we believe that this is an option of the creditor, although we do not see how it would be possible without the involvement and support of the debtor - a part to the legal material litigious rapport.

On the other hand, if the debtor will have attracted as co-applicant in the process, the creditor is no longer any point in this process and this can happen only in cases where the debtor will agree to endorse the action brought by the applicant. His involvement as an accessory intervener would be unnatural, because it implies an indirect interest, but that his interest is directly and then should change the role as the defendant, but it will not be an oblique action anymore.

We have to mention about the procedural risk which is supported by the applicant who requires for his debtor, being obliged, under the general rules, to pay fees and other expenses incurred in case of procedure. This risk is consumed in a negative sense and absolute for the debtor in the case when it is lost the civil cause. It is possible that this effect is predictable for the debtor and he passes over in silence this circumstance that is sure that his own debtor is entitled to oppose. This does not mean necessarily in bad faith by the debtor as the creditor may bring action and without sufficient documentation or prior without discussing the circumstances of the obligation relation between the debtor and third party indebted to him. Applicant's risk may be based both on the right of that against who was intended the oblique action to oppose all exception to the creditor binding to the creditor, and the lack of evidence of the claimant, the result is the same: pay all

expenses related to examine the case in court. If will proven that the debtor dishonest intent and has exposed the creditor a certain risk, the latter shall be entitled to claim compensation for the resources used, time and effort wasted.

In this context we specify that the state tax paid by the applicant is a risk in any case because enforcement of the obligation to its debtor by the creditor, the defendant does not ensure the recovery of its claim, he just having a potency relative safety of the debtor within the meaning of the whole heritage, as unsecured creditors, thus benefiting from universal guarantee along with all other unsecured creditors of his debtor.

Exemption from payment of the applicant will work for all situations in which the exemption is material that is derived from the essence and legal nature of the dispute based on the relationship between the debtor and his debtor, but could raise questions if that the applicant will rely on personal exemption, which is not the holder of the right material, but the person who replaces him. In principle, the quality of the applicant should make application of general rules, without taking into account the rights and material interests, but it could be a dangerous way to defraud the justice if the debtor does not meet the requirement of state tax exemption, it will use the creditor that can benefit from credit facility intentionally, consciously and deliberately to satisfy their legal interests, including the creditor's consent. Even if there will happen this, the court is not entitled to dismiss the civil action without legal basis and understanding this way, and this is one more reason to specify the procedural rules governing indirect claim, if not in a distinct way, then in an isolated and fragmented way where is not the case.

These aspects arguments the skeptical and vicious nature of the oblique action and explains the very small frequency or almost non-existent, of address in court by oblique action.

Hypothetically, the requirement of the creditor to his own debtor could be made in the simplified procedure (in order), but this is excluded, taking into account the nature of the litigious issue of the civil action as an exclusive form of litigation procedure.

I think it would be reasonable opportunity of examination in the simplified procedure of indirect claims, since it requires speed and efficiency and allows place for the examination of complex litigation procedure. If this method of examination of claims guardianship would be allowed, would disappear the formality and adversarial element, which is welcome in certain claims. The possibility of not accepting the order of the debtor against whom were filed in court requirements and, accordingly, set aside the debtor is an implicit guarantee against a possible third baffle of the creditor and debtor, but in the sense that it self could be affected by a certain excess in achieving its rights through the creditor.

In the context of the above, we propose to specify the possibility of creditor to preserve the claims including trough simplified procedure, in parallel with the oblique action and leaving place for it in case when the court will not issue an order of execution of the obligation by the debtor of the debtor or for cases when he will oppose judicial ordinance.

It is interesting in a special sense and the effect of the oblique action that deprives the applicant of a material interest even if it possible and a win, because he has not enforceable, but will only create the premises for recovery of the claim in competition with other creditors (unsecured) of the debtor who benefits of execution. It is a unique legal situation in which the plaintiff asked for another risking to lose and if they use all legal ways and win a civil lawsuit. Although it has its own interest, it is not directly defended in court, which bedevil the classic duel between the parties related by the legal document in which each promotes and protects its own interest.

Counter-action is formulated by the part with a defensive position against the offensive party and is inevitable to wonder to what extent a counter-action may take the form of oblique action or the chance that defendant to be creditor of the applicant creditor is not impossible and then to judicial efficiency, would be permissible, in absurd and hypothetical, this request from the defendant. In an attempt to answer this question we must take into account firstly the material nature of indirect claim, quoting Matthew Cantacusino, we argue that "the exercise of this action by creditors is more than an act of conservation and also more less than a prosecution", thus we consider the lack of an enforcement action that finality for oblique action what the reason straightening against him, ostensibly as a counter-action defense not the fulfillment of a direct and material interest collectable from the defendant, and the requirements specified in Art. 173 of the Civil Procedure Code (CPC) of the Republic of Moldova, this action should follow the original claim compensation. The legislature is more rigorous with the respondent within the meaning of his chances of making an oblique action against the applicant, and the requirement of connection with the counter claims of action and to give them the same basic issue, which is not feasible under any circumstances in case of an oblique action, which is subrogatory and indirect. That said, we conclude the impossibility implied forward oblique action of the defendant in a lawsuit filed by the applicant's request.

It is questionable whether the outstanding debt that belongs to him who has the right to submit an oblique action with a relative specific which can be deduced from the legislation contained in par. 3, art. 599 CC, which states that the claim must be liquid and due no later than the time of examination. The liquidity requirement is unquestionable, while the chargeability is groundless and irrelevant for the moment, bearing in mind the insurer and preventive of the oblique action. The claim should be ensured at any risk of insolvency of the debtor, not only when it is due and will be executed by the debtor. We also consider that the requirement for charging is to be submitted along with the others (certainty and liquidity) in the debtor's rights against third parties, because they are to be made and used for meeting the court action, but not those the creditor. When establishing an oblique action, creditor's rights extinctive prescription it replaces the debtor must can not be interrupted or suspended (as shown in the art. 274-277, CC), the requirement for charging is irrelevant because the decision of the court, whatever it is, is not applicable to the claim. This requirement is excessive limits on the possibility of defending the rights of its creditors, even in the outstanding character of the variant can be extended to examine the case in court.

The possibility of formulating in court the claims which fall within the specific oblique action along with other requirements of the applicant are impossible in case when all this must be based on the same legal basis and be closely linked, so that claims in conjugation one civil case must be substantiated by a common criterion to examine the case not only possible but also efficient. The applicant to whom belongs oblique action is unrelated to the defendant by the material rapport which generated the conflict in court, for this reason can not be conceived and other categories of claims that could align oblique action. So, this oblique action can not be classified as a complex civil action one, constituting a part of it. On the other hand, does not exclude the bringing of civil actions between the other two (creditor – plaintiff and third party debtor - respondent) in civil cases relating to this report are not mediated between them.

Enforcement for the enforcement of creditor's obligations will be issued on request by the first instance, after the final decision in accordance with Art. 12 of the Enforcement Code of the Republic of Moldova (EC). The same legislation specified in par. 2, Art. 43

that the creditor is the person or entity whose interest was issued the executory document . Therefore, if the court's decision will be to meet the oblique action, enforcement will not release the applicant in the process, but to the debtor in the interest of whom he acted. Now remain that the debtor to be motivated to intervene at this stage because the release is enforceable document at the request of the creditor (part of the report execution) and only in some specific situations in office.

According to the part. 5, art. 44 EC of the Republic of Moldova the creditor is obliged to offer to the judicial executor effective support to realize the enforcement, putting him with the means necessary for this purpose. Lack of interest from the debtor could mean a vain effort of the conduct of the creditor and the debtor has failed to exercise their personal rights against the debtor (ii) is predictable, which is why we believe it would be necessary to involve the creditor and in the enforcement process.

On the other hand, in essence an indirect claim fulfillment of what has already been met by the creditor that the debtor will not be able to claim insolvency and will be obliged to execute in concrete his obligations, but it may be that his assets to be insufficient to meet obligations to all unsecured creditors and then this finality of execution, clearly, interests the creditor.

The debtor could assert and a lack of funds for payment the judicial services which must be paid at the execution document request, whether legal provisions of this obligation will be attributed to it. It is a further argument for the acceptance of the creditor in the execution proceedings, so it continues to replace the debtor till the recovery of the claim (s) in whole.

Damage which causes the debtor to the creditor who has exercised his right to address to the court with an oblique action is expressed through those effective actions they carry it and obligations (the material, included) who assumed in the name and interest of the debtor, therefore it can rely on and repair the damage, is obliged to prove that the debtor has not taken any measure to exploit personally and directly its rights in relation to its own debtors. Regulations relating to the action make no oblique reference to that effect, which leaves place for interpretation of general rules relating to causing damage.

For admission in court of an action there is not imposed requirements referring to the proportion of claims resulted from the two reports that are mediated by the creditor, that is not imposed a limit on the amount of the value of the claims which the creditor is entitled to claim from the debtor in dependence and according to claims against of the debtor to his own debtor. So it is not necessary that the creditor's claim to be higher or lower than exercising their rights of the debtor. If we assume the debtor's claims clearly higher, it does not preclude consideration of the case in court because, one way or another, all property acquired under the oblique action are received by the debtor and its creditors (Article. 601, CC).

There are situations, in which apparently an indirect action is not an oblique action, but classical civil action if the civil law provides for appeals to the court to direct claims against the target, such as for example, the attraction to account the representative who acted without powers (art. 250 CC). These situations will be the purpose of any civil action, being satisfied, entitle the one who brought the action to benefit directly from the performances of that that was obliged in the court.

As a conclusion for this investigation we invoke comprehensive proposal of specifying default rules or separate civil proceedings Moldovan legislation to govern the manner by initiating concrete courts with oblique actions in the compartment on the contentious procedure and correspondingly to the above proposals, the introduction of

amendments to legislation relating to enforcement of judgments in the cases examined in the oblique action domain.

Failure to use in practice of this legal instrument by the creditors is motivated not only by the material risks assumed by them through legal action by replacing them, but especially on procedural risks. Superficial regulations applicable to oblique action in the procedural aspect, their absence makes this form of protection claims a mysterious in the procedural aspect made from this claim's protection form an inaccessible and mysterious compartment, which would gain enormously if there will be introduced more relaxed and more permissive rules for those involved, but also would present some advantages for one who exerts the oblique action in relation with other unsecured creditors.