

THE CONCEPT OF PAYMENT IN ENGLISH AND COLOMBIAN LAW COMPARED

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ABSTRACT

The complex concept of payment is analysed and compared between the jurisdictions of Colombia and England; something that has not been treated in depth in the Law literature, as far known. The topics of payment, role of banks on it, payment by third parties, place and time of payment, are treated. A comparative conclusion with some suggested improvements is delivered.

Key words: payment, english, colombian, compared.

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EL CONCEPTO DE PAGO EN LOS DERECHOS INGLÉS Y COLOMBIANO COMPARADOS**

RESUMEN

El complejo concepto del pago es analizado de forma comparativa en las jurisdicciones inglesa y colombiana; algo de lo que no se había escrito en profundidad en la literatura jurídica, hasta donde es sabido. Los conceptos del pago, el papel de los bancos en él, el pago por parte de terceros, el lugar y el tiempo del pago, son analizados. Una conclusión comparativa sugiere algunos ajustes para ambas jurisdicciones.

Palabras clave: pago, inglés, colombiano, comparado.

INTRODUCTION

Little has been written in the law literature about the concept of payment, especially in the Colombian literature. This may be because payment is viewed as a relatively simple procedure, however, further exploration of the matter indicates that in fact there are a string of complexities involved with this transaction.

This dissertation will analyse the concept of payment within two different legal systems: The English Legal system and the Colombian law system; the latter founded in the French Civil ‘Code Napoleon’.

This analysis will look at the following aspects: The concept of payment in both Jurisdictions, Payment in the Colombian Civil and Commerce Codes, The Role of banks regarding payment, Payment by third parties, Place of Payment, Time of Payment and finally, a comparative conclusion

This writing will not cover every aspect to be considered regarding payment in depth, such as, to give a few examples: funds transfer, the legal actions regarding failure of payment, fraud, bills of exchange and cheques and foreign money obligations.

1. THE CONCEPT OF PAYMENT IN BOTH JURISDICTIONS

According to Goode, ‘payment in the legal sense means a gift or loan of money or any act offered and accepted in performance of a money obligation. So an

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act cannot constitute payment unless money is involved¹. Although some commentators do not share this definition², because they consider that payment as involving more than money in English law, considered that it is left to the party's agreement to treat any other act as payment³, the first view will be kept for the development of this writing.

This rigid view also implies that payment is made only when cash or the debit or credit of bank accounts is involved. Payment by a bill of exchange will only be valid until the related instrument is properly discharged. Exceptionally, the explicit intention from the involved parties authorizing payment by a bill of exchange or cheque, will only be taken as payment, which is an unusual situation anyways⁴.

Before getting into the legal definition of payment given by the Colombian law, the reader should take note that the Private Colombian legal system is of a dual nature, that is, it is governed by two codes, that focuses on the following: The Colombian Civil Code, which is the applicable law to 'the ordinary citizen', and the 'Commerce Code' (Código de Comercio), inspired in the 1942 Italian Commerce Code, which is the guiding law for merchants or people who perform what the Code defines in a restrictive way as Acts of Commerce. Also, the Commerce Code calls the Civil Code norms, to fill any vacuums regarding its texts. Therefore, during the development of this work, reference will be made to both texts.

The Colombian Civil Code on its article 1626 states: 'Payment is effective when the object of an obligation that is owed, is performed'.

The first remarkable difference that can be noticed is that the English Legal system defines payment as something that exclusively has to do with money. While on the other hand, the Colombian system comprehends not only monetary obligations, but others that can involve the obligation to transfer property of an specific good, the obligation to transfer a property of an undetermined thing, and the Ancient Roman Law concepts of an Obligation to transfer property, the Obligation to do something and the Obligation not to do something.

1 R.M. GOODE, *Payment obligations in commercial and financial transactions*, Sweet & Maxwell. 1983. p. 11.

2 MICHAEL BRINDLE AND RAYMOND COX, *Law of bank payments*, Sweet & Maxwell. 2004. p. 1: 'Whilst payment often involves the performance of a money obligation, it does not necessarily involve the delivery of money. Money may not be delivered where another sum is set off, or an account settled. Money may not be involved where for instance goods are delivered in part exchange for new goods.'

3 See RHYS BOLLEN. What a Payment Is (And How it continues to Confuse Lawyers). Available at http://www.murdoch.edu.au/elaw/issues/v12n1_2/Bollen12_1.html#Analysis%20of%20what%20a%20payment%20is_C Accessed 7th July 2007.

4 P.S. ATIYAH AND JOHN N ADAMS, *The sale of goods*, Longman. 2001. p. 301.

The English system handles the situations explained above regarding goods, employing the concept of delivery⁵. Therefore, if there is a default or breach by the party who has to deliver in the respective contract, the available remedy for the other party will be claiming via damages⁶.

2. PAYMENT IN THE COLOMBIAN CIVIL AND COMMERCE CODES

Payment for both statutes implies the performance of an act in the law. The Commerce Code states on article 878: ‘When the payment of a debt constitutes an act in the law, it is open to impugnation for the same causes as any other act in the law’.

This sentence has been considered redundant and unnecessary⁷, because it is deemed that payment on its three basic manifestations: Delivering (as transferring property), Performing and Non-performing, implies an act in the law. On the first two it implies a convention of the party’s intention. On the third one, the act of one of the parties is enough. Thus, the consequence is that payment is opened to nullities⁸ or the payment of a nonexistent debt figures⁹.

It is also noticeable that article 882 of the Commerce Code¹⁰ allows payment of obligations that were previously agreed to be paid in cash, to be paid by cheque, promissory note or bill of exchange, if no restriction has been made by the parties. But this way of paying incorporates a resolutive condition in the payment. If the instruments involved fail to be discharged, the creditor has two choices: he can return the instrument to the debtor and go back to the obligation created by the underlying contract, or, if he decides to keep the document, he can base his claims on it, being aware that a failure on this action automatically implies a failure for any claim regarding the original transaction¹¹.

5 Sections 28 and 61 of the Sale of Goods Act 1979.

6 P.S. ATIYAH AND JOHN N ADAMS, (n4) p. 304. Also see *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361.

7 JORGE SUESCÚN MELO, *Derecho privado. Estudios de derecho civil y comercial contemporáneo*. T. I, Universidad de los Andes. Legis. 2003. p. 65.

8 Articles 1741 of the Civil Code and 899 and 900 of the Commerce Code.

9 Article 2313, Colombian Civil Code.

10 Article 882 of the Commerce Code: P. 1: ‘The delivery of drafts, cheques, bills of exchange and any other negotiable instruments of a credit content, for a previous obligation, will be valid as payment of it if not agreed on the contrary; but it will implicitly carry the resolutive condition of the payment, in case the negotiable instrument is rejected or is discharged in any other way’.

11 JORGE CUBIDES CAMACHO. *Obligaciones*. Pontificia Universidad Javeriana. Facultad de Ciencias Jurídicas. 1996. p. 357.

3. THE ROLE OF BANKS REGARDING PAYMENT

In English Law, banks have an important task regarding payment. They are involved in a number of transactions everyday, as well as handling most of the value involved in the whole of the payment operations concerned¹². Cash, Bills of exchange¹³, cheques, debit cards, credit cards and letters of credit, are all matters of the bank.

Usually, banks are the holders of the accounts of one or two of the parties involved in the payment, so they do not only administer or hold someone's monies, but also, on many occasions, are agents of their account holder's¹⁴.

Banks follow instructions. Strict compliance to them is vital for determining if valid payment has or has not been performed. For instance, if the debtor's bank pays to the creditor's bank, giving specific instructions to the latter to credit his customer's account (the creditor's) at a later date, payment between debtor and creditor will only be performed at that certain future date.

Also, the bank's independence should be remarked, regarding certain businesses. If for example, a bank discounts a bill of exchange to its customer, for what it pays to him before its maturity, payment is certain between the bank and the customer. However, regarding the negotiable instrument, the bank has acquired rights as an assignee to eventually make a claim against the documents acceptor.

Another key role of banks is to effectively provide money to its customers. This as related to payment means that it will be actually done when the account holder has 'the possibility of immediate and unconditional use of the money'¹⁵. When there are 'in-house' transfers involved (these are the ones who refer to creditor and debtor being clients of the same bank) payment is deemed when the bank starts moving its internal mechanism for crediting the creditor's account¹⁶, or when the

12 MICHAEL BRINDLE AND RAYMOND COX (n2). p. 21: 'The methods of payment which have evolved both in the United Kingdom and internationally have taken many forms. What is striking is that nearly all entail the involvement of banks in some degree'.

13 Ibid. p. 21: 'Apart from cash, the oldest established method of payment is the bill of exchange which, whilst it need not involve a bank at all, nearly always does. Even if none of the parties are themselves banks, payment is nearly always stipulated to occur at the counters of a bank and banks carry out the function of collection'.

14 The Common Law Library. 'Chitty on Contracts', Volume I. General Principles. London. Sweet & Maxwell. 2004. p. 21-045: 'Where the creditor instructs the debtor to pay a sum due to him by making a payment to the credit of a specified bank account, the creditor has made the bank his agent to receive the payment, which is made as soon as the bank receives payment in cash, or by means of a banker's cheque, draft, payment order or transfer which is treated by banks as equivalent to cash'.

15 F.A. MANN, *The legal aspect of money*, Clarendon Press - Oxford. 1992. p. 85.

16 See *Momm v Barclays Bank International Ltd* [1977] Q.B. 790; *Royal Products v Midland Bank Ltd* [1981] 2 Lloyd's Rep. 194.

bank's employee starts performing acts following debiting and crediting instructions given by its customer (payer/debtor).

As it is with Colombian Law, little can be found in the literature regarding the role of banks in payment transactions¹⁷. It seems that most of this subject is left to the general rules of the mandate, representation, the theory of appearance¹⁸, on which if the creditor, by his acts or certain omissions has given solid ground for his debtors to assume that a third party validly can act on his behalf as his agent or mandatary, payment made by those debtors is absolutely valid, and the creditor has no excuse to deny it¹⁹; or the conduct a bank has to have in front of its customers, that is, behaving professionally, acting with due diligence and with the clear purpose to collaborate with the other party to aid it to achieve its objectives²⁰. Also, a recent law, 'Ley 527 de 1999', regarding Electronic Commerce, and based on the Uncitral²¹ Model Law for electronic commerce, could be used in front of an analysis of a payment transaction where a bank is involved.

One recent work remarks the role of intermediation of the banks regarding payment, and it gives some examples of this (tax payments, rent payments, payments made during a legal process), but not in depth, and also tries to use a non suitable example, stating that collection and payment, are the same concept in the end, when a bank is involved²². There are differences between collection and payment; for instance, the identity of the creditor and the faculties given to a bank to perform a determinate task, are vital to determine if payment has or has not been made.

The state of the literature also reflects the still developing stage of the banking in countries like Colombia, where a more detailed degree of specialization is still to be reached²³.

17 LUIS GUILLERMO BARBOSA Y MARLENE CASTAÑO DE BARBOSA, *Contratos bancarios*, Editorial TEMIS. 1978; NÉSTOR HUMBERTO MARTÍNEZ NEIRA, *Cátedra de derecho bancario colombiano*, Legis. 2000; FRANCISCO MORALES CASAS, *Fundamentos de la actividad y los negocios bancarios*, Ediciones Jurídica Radar. 1994; NÉSTOR RICARDO CHACÓN, *Derecho monetario*, Librería Ediciones del Profesional Ltda. 2005.

18 SERGIO RODRÍGUEZ AZUERO, *Contratos bancarios. Su significación en América Latina*, LEGIS. 2002. p. 81.

19 See articles 640 and 842 of the Commerce Code.

20 See, articles 1603 of the Civil Code and 871 of the Commerce Code, on which the duties of contractual royalty and acting in good faith are remarked. As an example of a Professional behaviour, see article 722 of the Commerce Code, on which the bank that has an open account has the duty to make the funds on it available for the customer's use.

21 United Nations Commission on International Trade Law.

22 FRANCISCO MORALES CASAS, *Fundamentos de la actividad y los negocios bancarios*, Ediciones Jurídica Radar. 2005. p. 512: 'In reality, analysing the situation in depth, it is really a noticeable intermediation in the payment, because when something is collected it is because what is paid is what is owed. Therefore, it is not understandable why it is needed to differentiate between payment and collection.

23 ERICK RINCÓN CÁRDENAS, *Servicios financieros electrónicos: aproximación preliminar*. Temas de derecho financiero contemporáneo. Editorial Universidad del Rosario. 2006. p. 337, footnote: 'In Colombia this last possibility has still not showed up, because of the tradition of the country is still linked to materiality, the use of paper and the formalism that these imply; reflected in a bigger feeling of certainty and safety.

4. PAYMENT BY THIRD PARTIES

This point has been the cornerstone of most controversies regarding payment. Do third parties always have the right to pay on behalf of the debtor? Under what basis are they entitled to do so? Undisputedly, the principle of privity is overlooked here.

English and Colombian law have answered differently to this situation as follows:

English Law proscribes payment by a third party without the debtor's consent. The main reason for this is that the debtor has the right not to be put in a more 'difficult' situation that he has been before. The debtor has chosen his creditor for a reason in some cases, and being put at the hands of a new creditor, who might have some harmful interests against the debtor gives enough reasons for not allowing this to occur²⁴.

Full respect of the relationship between creditor and debtor has been the answer of English Law²⁵. Rare cases of payment by mistake from a third party do allow reimbursement to that party²⁶. Apart from that, any payment without the debtor's authorization or express or implied ratification has no recognition²⁷.

Nonetheless, it seems fair then that the third party can recover this failed payment from the hands of the creditor. Since no subrogation has operated, it would not be fair or reasonable for the creditor to keep some value that has fallen into his hands without any justification. A restitutionary action finds its grounds here²⁸.

The approach could not be more different from the Colombian point of view. Article 1630 of the Civil Code States:

'Any person can pay on behalf of the debtor, even without his knowledge or without his will, not even taking into account the creditor's refusal.

But if the obligation is to do something, and if for the task needed, the skills or aptitudes of the debtor have been taken into consideration, the task can not be performed by somebody else against the creditor's will'.

The previous, due to the tradition of the roman-germanic system on which our legal order was built, an inconvenient that does not happen so strongly at the countries that follow the *Common Law* tradition, where contracting by electronic means, has developed more widely.

24 R.M. GOODE (n 1), p. 24.

25 See for example, *James v Isaacs* (1852) 12 C.B. 791; *Simpson v Eggington* (1855) 10 Exch. 845, 847; *Lucas v Wilkinson* (1856) 1 H. & N. 420; *Smith v Cox* [1940] 2 K.B. 558; *Owen v Tate* [1976] 1 Q.B. 402; *Pacific and General Insurance Co Ltd v Hazell* [1997] L.R.L.R. 65, 79-80.

26 See, *Barclays Bank Ltd. v W.J. Simms Son & Cooke (Southern) Ltd.* [1980] 1 Q.B. 677; *Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd.* [1981] Ch. 105.

27 See *Crantrave Limited v Lloyds Bank* [2000] Q.B. 917.

28 MICHAEL BRINDLE AND RAYMOND COX (n2), p. 17.

The fundament for this article on its first paragraph is that a creditor can not refuse to receive payment (without taking into consideration who pays) because his rights will be fully satisfied in the end. So there is no single exception to this, there is no situation where the creditor could refuse to receive payment. VÉLEZ sees this article also as the complement of a former article in the Code, article 1506, which discusses the third – party beneficiary contract. So, if a third party can make anyone become a creditor, as allowed in the said article, that same party can stop anyone from continuing to be a debtor²⁹.

The second paragraph just recognises that in certain cases, the person of the debtor is important for the fulfilment of the right of the creditor, for instance, the always quoted example, where a work of art has been ordered, the unique skills of the artist can not be replaced by no one else's.

OSPINA FERNÁNDEZ³⁰ makes a very useful classification of the payment of obligations by a “third party”, where a tripartite distinction can be made as follows:

1. Obligations paid by the representative of the debtor or mandatory.
2. Obligations paid by a party that has an interest in their payment. These parties are a joint debtor, a surety, the owner of a mortgaged or pledged object and a creditor of a lower quality in front of other creditors.
3. Obligations paid by a third party that has no interest in the payment of the debt.

For the matters of this writing, focus will be given only to the last category.

Payment by a third party, even without having any interest for doing it, finds its justification in the ancient roman principle that anyone can pay on the other's behalf, considering that this act will mean a benefit for the debtor always, and will never lead to any detriment. The Colombian Courts have recognised this phenomenon, since early stages of the country's History, as remarked by VÉLEZ³¹.

The figure of the ‘Agencia oficiosa’ or that is to say, taking care of a third party's business as long as it does not cause any harm, gives a basis to the legal text of article 1630.

29 FERNANDO VÉLEZ. *Estudio sobre el derecho civil colombiano*. Tomo Sexto. Imprenta París-América. 1926. p. 261.

30 GUILLERMO OSPINA FERNÁNDEZ. *Régimen general de las obligaciones*. Editorial Temis S.A. 1998. pp. 322-330.

31 FERNANDO VÉLEZ, (n 29). p. 258: The Supreme Court, in judgements of May the 18th of 1888 and the 30 of November y 2nd of December of 1889, resolved that the payment exception is well-founded when the one who has paid is not the debtor but a third party, but keeping alive the rights of the latter against the debtor.

Other two articles need to be analysed: Articles 1631 and 1632. The first one which guides on how to deal with payment made with the debtor's knowledge and the second, when payment is made against the debtor's will:

'Article 1631.—The one who pays without the debtor's knowledge will not have any action different than the one for reimbursement of what has been paid; and he would not be subrogated by law in the place and rights of the creditor, and is not entitled to force the creditor to subrogate his rights to him'

'Article 1632.—The one who pays against the debtor's will, **does not have any right to be reimbursed by the debtor**; unless the creditor transfers voluntarily his action'.

Thus, we can distinguish from three scenarios: 1. Payment with the debtor's consent. 2. Payment without the debtor's consent. 3. Payment against the debtor's will.

Payment with the debtor's consent

This is treated as a mandate. Therefore, the mandatary is entitled to receive reimbursement of his expenses. However, the legislator wanted that the situation of that party was of a better nature and therefore equalled it with the situation of a third party that had an interest in the payment, granting him the subrogation action. Therefore, the obligation is not extinguished, but it passes to the third party with all the features it had when it was at the hands of the original creditor.

So, the third party has two actions to choose from: The reimbursement action and the subrogation action; a cautious party may prefer to exercise the latter since this covers any privileges, accessories and guarantees the creditor had.

Payment without the debtor's consent

Here, no mandate of any nature is established. The legislator recognises, however, that the debtor has benefited, meaning that the third party has to be reimbursed. Though, in this situation, the only legal action that the third party has is the reimbursement action. So, all the privileges that the payer had in the previous scenario analysed that are included in the subrogation action do not pass here.

But if the creditor, on his own initiative, without the third party's pressure, transfers his legal actions against the debtor, then the third party is subrogated as in the first figure analysed. So the subrogation action can be exercised. It is said that this really does not mean a subrogation, but just a transfer of rights to demand payment of money or property, thus the consent of the debtor is not needed at any point. One may ask, however, why the legislator regulated the same effects in two different parts of the

Code, since the transfer of rights has a different chapter in it. At least one distinction should be found, and we believe that it is found mainly on the role of the third party, where on payment it could be noticed to be ‘more active’ than in the assignee status. That is, in the assignee perspective, the creditor’s activity is necessary; contrary to when there is payment, where the third party can act on its own.

Payment without the debtor’s consent is the point from which the payment by a third party is criticised. Why if the debtor’s consent has not been given (because he is completely unaware of what is going on) has he to take the burden of a new creditor? Why has the legislator given the creditor the ability to decide whether or not he subrogates his rights to the third party? Can this lead to a plot between the creditor and the third party at some point?

In our view, the legislator just made a subtle distinction for the first two situations analysed, and on the second, went far long as it should have gone regarding the legal actions left for the third party. On the second scenario he should had left it just for a reimbursement action always, without any further privilege.

If a third party pays, he should take as well some part of the burden or be aware of some risks. If he has had the liberality to pay, then that act equals to be ready to suffer some detriment for the supposed benefit it reports to the debtor, that is, being able to claim only reimbursement without any other special feature, after all, he was not called by the debtor. The principle of privity (‘Principio de privacidad de los actos jurídicos’), on where the effects of the acts of the parties only affect them, has been partially undermined here.

Payment against the debtor’s will

This concept starts with a legislative contradiction, as noticed by Ospina³². As it has been read on article 1632 of the Civil Code, located on a chapter in the Code that speaks about payment, it is expressly forbidden to pay back for something that has been done against the debtor’s will. However, a further article in the Code (2309), in a chapter regarding quasi-contracts, expressly allows reimbursement in the cases where a third party has taken care of someone else’s business and by doing so this has reported some benefits or prevented loses on the ‘debtor’. It reads on its first paragraph:

‘Article 2309.—The one who administers someone else’s business, against the express prohibition of that person, does not have any claim against him, unless that administration has been effectively profitable and that profit still exists by the time of

³² GUILLERMO OSPINA FERNÁNDEZ, (n 30). p. 328.

the judicial demand, for example, if from that activity it has resulted into the extinction of a debt, that, without that activity, would have been paid by the owner of the business’.

Again, several critics have been received from this view. Even the ones who accept payment without knowledge of the debtor, under the justification that some ‘emergencies’ might occur and time is of the essence, so it is preferred to save the debtor’s business before asking him something, find it impossible to justify why the legislator allowed a third party to be reimbursed when acting against the debtor’s wishes³³.

First of all, it has to be noticed that here, the intention of the third party who pays is to ‘suffer’ a loss. But he is acting at his own peril, not following anyone else’s orders or mandate, even more, he is invading the sphere of private relationships, on where each person decides how to exercise or dispose of his rights. This is also recognised in article 15 of the Civil Code: ‘The rights given by the laws, could be renounced, as long as they just concern the individual interests of the one who renounces, and that the renounce is not forbidden.’

So the effect could be perverse. Who determines what is beneficial for the debtor? It could lead exactly to the other way: The acts of the third party are deemed harmful to the debtor, because he eventually will have to pay for something he was not counting on. What if a merchant consciously wanted to ‘lose some money’ following a sales strategy? Is it then that the activities of a third party will supersede the ones from the merchant? Or what if a creditor has chosen a specific debtor because he just wants to keep an image of a debt, but in reality he will not attempt to collect any money or ask for payment, considering the specific features of his debtor?; the one who the creditor might just want to be left alone from the intervention from any third party³⁴.

The legislator again went too far, allowing repaying for someone else’s misconduct. That paternalistic view stalls the economic life of the citizens instead of installing confidence in the legal system. If the basis of this legal figure is generosity and solidarity, then it should be founded on it’s intrinsic meaning, a unilateral act of liberality, therefore, no economic recognition has to be made by the innocent debtor³⁵.

33 GUILLERMO OSPINA FERNÁNDEZ, (n 30). p. 328.

34 See VÉLEZ, (n 29). p. 266.

35 An author quoted in VÉLEZ work (n 29. p. 265: VERA. ‘Memorias y discursos, etc. T. I, p. 298), tries to make an extremely forced and confusing justification (which we do not share) on why a payment by a third party against the express prohibition of the debtor has to be reimbursed, saying that a forced donation has happened there: ‘What is established in this article is a kind of donation on where the will to create a benefit does not exist, therefore it is a forced donation. In that case, the debtor will be enriched at the other’s harm, given that the one who has paid, has no right to ask for a reimbursement, because for this right to exist, it

Unfortunately, according to the rules of interpretation of legal texts, when two articles regarding the same matter offer contradiction, preference should be given to the one who was written later, in our case, article 2309. Nonetheless, it seems that situations of fully unfairness as the one mentioned in the article, belong more to the world of academic exercises and law texts. If for any reason a case of this nature shows up before Courts, however, a solid defence could be made not only on the legal texts themselves, arguing that they both are of a different nature³⁶, but also relying on the article that makes more sense (1632), and that the basic principles of law and constitutional rules are of mandatory observance.

5. PLACE OF PAYMENT

Under English Law, the fixture of the place of payment is left to the parties' agreement. If there is a gap left on this matter, prevalence is given to the place 'where the creditor resides or carries on business at the time of the contract'³⁷. Also, according to Mann, the place of payment is where this is ought to be made, not the place where payment actually is made³⁸.

It should be also noticed that the place of payment despite being linked with the place of performance of a contract, does not necessary mean that it is the only place where it could be made. It is left again to the parties' convention specified under the contract, which places could be accepted as valid for payment or it could be left to one of the parties to choose from several places to perform payment as well³⁹.

As in any other legal system, the place of payment works as the criteria to determine the competent jurisdiction regarding payment claims. The law of the territory where payment is due will be the applicable law.

This clear and logic principle has found controversy in English Law. English Courts have made the distinction between the law of the contract and the law of the place of payment. Therefore, if an obligation is to be paid in a foreign territory

is needed that the creditor assigns his credit'.

36 As proposed by VÉLEZ, (n 29). p. 266, in reference to article 2309: 'However, it can be observed that the prohibition mentioned there, could be general, and if it is special, that is, if it consists on the express opposition from the debtor, because a tacit opposition, for an specific debt is not acceptable, article 1632 will be the used one then. For example, one person prohibits that another one administers a said business. If by administering it, that person makes a payment, it will be the case of article 2309. If he prohibits paying a certain debt, and the other pays it, it will be the case of article 1632. In the first case, the third party can demand reimbursement; in the second, no'.

37 F.A. MANN, (n 15). p. 81; *Fowler v Midland Electric Corp. for Power Distribution Ltd* [1917].

38 *Ibid*, (n 15). p. 82.

39 *Re Harris Calculating Machine Co* [1914] 1 Ch. 920.

in sterling, where for instance that payment would be deemed illegal, it is said that payment will be frustrated⁴⁰.

The critic point is that the decisions of the Courts imply that the frustrating effects of non payment do affect the whole contract as well and vitiate it also. As noticed by some commentators:

‘Frustration of a contract is an extreme result, and the court in such situations should hold not cause the contract to fail altogether. Frustration of a contract is an extreme result, and the court in such situations should hold that there remains an underlying obligation on the debtor to pay the creditor, even if he cannot pay in the precise place required by the contract’⁴¹.

Again, the strictness of English Law is noted. It does not matter if the law of the place where the contract is agreed is valid, the whole contract will be frustrated if the law of the place of payment prevents from paying. It has been mentioned that payment is not an element of the essence of the contract; therefore the obligation to pay will still remain, to be performed at a different place, looking in principle to the creditor’s domicile.

Even if the law of the place of the creditor’s domicile and the law of the place of payment forbid payment, the principle should be that the debtor’s must seek his creditor and pay. Only extraordinary circumstances impossible to avoid, would allow payment to be frustrated. Some cases in English Law⁴² are opening the gate for this view to be the guiding one⁴³.

Article 1645 of the Colombian Civil Code states: ‘Payment should be made at the place designed by the convention’.

In case of a claim, regarding one of the parties’ performance (or payment), the claiming party can choose between two jurisdictions: the first one given by the place of performance of the obligation; the second, in accordance to the place where the debtor is domiciled.

If there is silence in relation to the place where payment should be made, the Colombian Law establishes that it should be done at the debtor’s domicile regarding undetermined things, and if it consists of and specific good, it should be done at

40 RALLI BROS. v. COMPANIA NAVIERA SOTA Y AZNAR [1920] 2 K.B. 287.

41 MICHAEL BRINDLE and RAYMOND COX (n 2). p. 19.

42 *European Asian Bank v. Punjab and Sind Bank (No.1)*; *Bank of Baroda v. Vysya Bank*.

43 MICHAEL BRINDLE and RAYMOND COX, (n 2). p. 21.

the place where that good existed at the moment of the birth of the obligation of one of the parties. As seen:

‘Article 1646.—If a place for payment has not been fixed, regarding a determined good, payment will be done at the place where that determined good existed by the time the obligation was constituted.

But if it is about another good, it will be performed at the debtor’s domicile’

As noticed by Hinestrosa⁴⁴, the first paragraph of the article gives a fair balance for the interest of both, creditor and debtor, by deciding the place of payment according to the circumstances. However, this is a case of very limited scenarios, since the payment issue is left first of all to the parties agreement and negotiation, and second, because a great quantity of the goods involved in everyday transactions are related to the ones of an undetermined nature, on where the rule (of a french background) of the second paragraph applies.

Concerning the Commerce Code, there is a similarity with the English Rule, that is, payment of a sum of money should be performed at the creditor’s domicile, with the only exception of change of domicile while payment is pending, where the debtor has the choice to pay at his domicile if that change of place makes payment much difficult than it was contemplated before. Article 876 of the Commerce Code says:

‘Article 876.—Unless otherwise agreed, the obligation that has for object a sum of money should be fulfilled at the place where the creditor is domiciled at the date of maturity. If the place is different that the domicile the creditor had at the time he had the obligation, and therefore it results more difficult for the debtor’s performance, the debtor can make payment at his domicile, previous notification given to the creditor’.

But if it is about another good, it will be performed at the debtor’s domicile’

The creditor has the duty to inform his debtor of the change of domicile, and if the latter sees that is a heavy burden to pay at that new place, he can make valid payment at the place first agreed, just notifying his creditor of that decision.

6. TIME OF PAYMENT

Section 10 of the 1979 English Sale of Goods Act states:

‘10.— Stipulations about time.

⁴⁴ FERNANDO HINESTROSA. *Tratado de las obligaciones. Concepto, estructura, vicisitudes*. Universidad Externado de Colombia. p. 614.

- (1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not of the essence of a contract of sale.
- (2) Whether any other stipulation as to time is or is not of the essence of the contract depends on the terms of the contract.
- (3) In a contract of sale “month” prima facie means calendar month’.

Unless otherwise agreed by the parties, in English Law, the seller is bound to give the buyer an additional time to perform his payment obligation. This does not mean that the seller has no ground to make a claim for breach of the contract by the seller, most of the cases via damages, asking for additional costs due to default as well as lost of money interest in the period of default, as he surely is entitled to, but it is established to allow the contract to be performed. Conversely, the contract survives the buyer’s default, because time of payment is not of the essence, and the seller is not allowed to assume that the buyer has repudiated the contract.

This view, seen as a ‘compulsory credit’, although criticised by some authors, seeks to ‘keep the contract alive’⁴⁵, after read in conjunction with sections 27 and 28 of the Act, the latter putting payment and delivery as concurrent conditions:

‘27. Duties of seller and buyer.

It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

28. Payment and delivery are concurrent conditions.

Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods’.

Additionally, the seller is not allowed to resell the goods involved in the contract, unless definitely the buyer is not going to pay for them in the end. The way for reaching this point, is the seller’s notice to the buyer that he is going to resell the goods if the buyer does not pay in a reasonable time, or the nature of the goods involved in the transaction, regarding perishable goods, that allows the seller to resell without informing the buyer. As provided in Section 48(3) of the Act:

‘48.— Rescission: and re-sale by seller.

- (3) Where the goods are of a perishable nature, or where the unpaid seller gives notice

45 P.S. ATIYAH and JOHN N ADAMS, (n 4) p. 303.

to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.’

Having it clear that time for payment is not of the essence of the contract, unless otherwise stated by the parties or implied by the nature of the contract⁴⁶, when is payment performed then? The answer depends on the terms of the contract themselves, but also on the mechanism of payment chosen; therefore some conclusions can be made, following Dr Mann’s approach: ‘If a contract is as strict as saying ‘punctual’ payment is required at a Sunday, paying on Monday is too late. Or where payment has to be ‘on demand’⁴⁷, the debtor has to have it ready for the creditor to take it right away’⁴⁸.

If payment is required to be by cheque, the time of payment is deemed to be the date where the cheque was delivered to the creditor, despite it is actually paid at a latter time.

If payment is done by funds transfer, the time of payment occurs when the creditor’s account is actually credited by its bank, without any further duty to notify the creditor, and as long as the creditor has the ‘immediate and unconditional use of the money’⁴⁹. Emphasis on this last idea is required; because the point regarding time of payment in credit transfer has not been clearly decided by the English Courts so far⁵⁰:

The point of time at which transfer or credit payment into a bank account is “made” has been discussed, but not finally decided, in another House of Lords case, where “payment in cash” was required by the contract. The payment was made by a payment order from another bank, under the provisions of an interbank settlement scheme, where the system of processing might have taken 24 hours before the payee’s account was credited. Lord Salmon, without deciding the point, “inclined to think that...there is no real difference between a payment in dollar bills and a payment by payment orders which in the banking world are generally regarded and accepted as cash (which view Lord Russell was also inclined to accept); but Lord Fraser thought that the payment must be made “in sufficient time to allow for the period of processing normally required for the method of payment they had chosen”.

46 The Common Law Library. ‘Chitty on Contracts’ (n 14). pp. 21-053: ‘...thus, where the claimant contracts to work upon the defendant’s materials, and no time is fixed for payment of the agreed cost, the defendant must pay as soon as the claimant has completed the work and giving the defendant reasonable opportunity of seeing that the work has been properly done’.

47 Ibid. pp. 21-053: ‘Money which is repayable on demand must be ready to be handed over to the creditor as soon as he demands it from the debtor: the only time which the creditor needs to give the debtor is time to get the money from some convenient place, not time in which to negotiate a deal or a loan which he hopes will produce the money’.

48 F.A. MANN, (n 15). p. 83.

49 Ibid. p. 85.

50 See *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp. of Liberia* [1977] A.C. 850.

An extraordinary effort has been made by Ellinger, Lomnicka and Hooley⁵¹, to determine the time of payment regarding funds transfers.

There is no single pattern to establish when payment is made in funds transfers⁵². First of all, it strongly depends on the mechanism chosen. So a SWIFT⁵³ transaction will have a different moment of payment in comparison to other means like, BACS⁵⁴, a telegraphic transfer or even the master agreement (which involves the time of payment) between two banks, and if there are any gaps left, common law is called.

Secondly, consideration has to be made on the number of parties involved in the operation. An 'in-house' transfer is less complex than an international transfer, where up to five banks or more can be involved. Therefore, payment could be established quite easily at the start of this transaction, for the first two parties involved: The Originator's bank (The debtor's bank) and his correspondent; by an order to credit someone else's account (The Beneficiary's or in our case, The creditor's), it is deemed that payment has been made between the two, but is far from being made to the beneficiary (the last in the chain), who might not even know that the process of payment (that will end on him) has started.

Thirdly, it depends on the case itself⁵⁵. There are two extremes, depending on the beneficiary's (the creditor's) interests. If he is interested in keeping payment for himself, he will argue that his bank had the mandate and therefore is authorised to receive payment on his behalf, if there is 'danger' of a payment countermand order made by the payer (debtor). On the other hand, the creditor (beneficiary) may argue that his bank was not authorised to receive payment on his behalf, so payment was never made. This argument might be used if the creditor is interested in alleging late payment for then claiming a penalty in the contract to be paid by the debtor. Or, and for the same purpose, he could argue that payment was made between the banks, but not between his bank and himself.

Ellinger, Lomnicka and Hooley⁵⁶ propose a two type approach regarding payment by funds transfers as follows: payment in front of reversals of credit entries and 'Out of time' payments.

51 E.P. ELLINGER, EVA LOMNICKA and RICHARD HOOLEY, *Modern Banking Law*, Oxford University Press. 2002. pp. 512-528.

52 Ibid., p. 514: 'The case law in point, comprising mainly American and English authorities based on international transfers, is not easy to reconcile. This is not surprising, as the cases arose in respect of different methods of transfer and in different situations.'

53 Society for Worldwide Interbank Financial Telecommunication.

54 Run by BACS Ltd., one of the major United Kingdom inter-bank transfer system companies

55 See for example: *Pool v Pool* (1889) 58 LJ P 67; *Drew v. Nunn* (1879) 4 QBD 661, 665-6; *Salton v. New Beeston Cycle Co.* [1900] 1 Ch. 43.

56 E.P. ELLINGER, EVA LOMNICKA and RICHARD HOOLEY, (n51).

For the first of the cases, the guidelines given by the Courts⁵⁷ are as follows: 1. There is no need in most cases, for the beneficiary's assent to complete payment. Most bank transactions impliedly have the consent of the customer and in a handful of cases, the previous circumstances around the payment, make one conclude that the beneficiary has given his approval. 2. Payment is final, if at the end of the 'value date', that is the date when the funds are to be available to the beneficiary, the amount concerned still remains at his account. So the bank will have until the end of that day, to reverse payment⁵⁸. 3. The banking practice is of an extreme importance for determining if payment has been made in a specific case. 4. Attention must be put to the technology involved on payment.

In conclusion, for the first approach: '...a money transfer is complete when the funds are made available to the beneficiary's bank and accepted by it, intentionally, on the beneficiary's behalf'⁵⁹.

Concerning the second approach (out of time payments) these involve contracts where time is of the essence, most of the cases until the present, involve charterparties, on which the shipowners claim that their charterer has paid late (then arriving late) to start the journey. The leading case on this matter, '*The Laconia*⁶⁰, on where the shipowner timely notified his bank not to receive any monies from the charterer's (originator's) bank, because he was already late to pay, restates the criterion given for the payment reversal's approach: '...Payment as between originator and beneficiary will be complete only where the beneficiary's bank has the beneficiary's actual or apparent authority both to receive and accept the transfer of funds on the beneficiary's behalf'⁶¹.

The rules for assuming that a payment has been done properly, even in the doubt of late payment, involve: 1. The appearance that the creditor's bank had the authority to receive payments on the creditor's behalf without any further consent. 2. The handling of the credit (payment) made by the debtor, by the creditor himself, treating the monies as his own. 3. A conditional transfer is not deemed as payment, because the creditor cannot dispose of the cash involved. 4. The creditor's knowledge is always needed, whether it is from the beginning of the transaction, or if it did not happened until some time later.

57 See for example: *Rekstin v. Severo Sibirsko Gosudarstvennoe Akcionerhoe Obschestvo Komseverputj* [1933] 1 KB 47; [1977] QB 790, *sub nom. Delbrueck v. Barclays Bank International Ltd.* [1976] 2 Lloyd's Rep. 341; *Royal Products Ltd v Midland Bank Ltd.* [1981] 2 Lloyd's Rep. 194.

58 The leading English case on the matter is [1977] QB 790, *sub nom. Delbrueck v. Barclays Bank International Ltd.* [1976] 2 Lloyd's Rep. 341.

59 E.P. ELLINGER, EVA LOMNICKA AND RICHARD HOOLEY, (n51). p. 521.

60 *Mardorf Peach & Co. Ltd. v. Attica Sea Carriers Corporation of Liberia.* See also: *TSB Bank of Scotland plc v. Welwym Hatfield District Council and Council of the London Borough of Brent* [1993] 2 Bank. LR 267.

61 E.P. ELLINGER, EVA LOMNICKA AND RICHARD HOOLEY, (n51). p. 522.

In summary, as soon as the sum involved is unconditionally standing at the disposal of the beneficiary, payment is complete.

The two approaches link in the end on the same premise: If the funds are at the free disposal of the beneficiary (whether directly by himself, or indirectly through his bank acting as his agent), payment is integral and there is no way back.

In Colombian law, the time of payment is linked with the nature of the obligation involved. Thus, as in English Law, a definite criterion is where time of payment is of the essence of the contract. Additionally, it is left to the parties will to determine when payment is due⁶² and if this act is of the essence of the contract or some waivers can be allowed.

If the parties are silent about the period for making the payment, the law operates in a suppletory way. Article 947 of the commerce code provides: 'The buyer must pay the price in the agreed period or, in the absence of one, when receiving the goods'⁶³.

The Colombian system deals with two concepts regarding payment: exigency and wilful default. The first one is related with the mere arrival of the proper time to receive payment or, in other cases, the creditor's behaviour, when asking for payment at the due time to do so. The second is linked with the debtor's behaviour (delay), as to the time when he is already late to perform payment, determined this just by the arrival of the occasion to pay, as said before, or by the creditor's demand to the debtor or, in some few cases, by a judicial demand started by the creditor.

So, in most of the cases, due time for payment happens before the creditor's request, which sometimes could be simultaneous with the debtor's delay.

Article 1608 of the Civil Code reads:

'The debtor is at wilful default:

1. When he has not performed the obligation within the agreed period; unless the law, in special cases, requires the previous demand to the debtor to declare him in wilful default.
2. When the goods involved could not have been delivered or the obligation performed, in some time different than the agreed, and the debtor has let that time pass without

62 Just to have a clear idea about the terms involved, guidelines for the parties can be found in articles 1937 of the Civil Code and 829 of the Commerce Code.

63 Additional suppletory norms are found in article 1028 of the Commerce Code regarding carriage of goods and article 1164 concerning consumption loans.

delivering or performing.

3. In all the other cases, when the debtor has been judicially demanded by the creditor’.

Article 1608 of the Civil Code is not as benevolent as the English Sales of Goods Act in Section 10, where as it has been seen above, it is the creditor’s duty to give the debtor a “compulsory credit” period to perform, in a reasonable time, in the cases where the parties have not made any stipulation as related to time for payment., all for the objective of not resolving the contract.

The Colombian approach is that delay equals to default, in most of the cases, unless provided differently by the parties or if the law has a different compulsory view to take⁶⁴. Therefore, if the debtor is in wilful default, the consequences are being exposed to judgment execution and liability for damages that his delay has caused to the creditor.

As it is with funds transfers, as explained in the role of banks subheading, the issue regarding Colombian law texts or Court sentences is close to desert, in reflect of the state of the developing economy where the law is applied.

7. A COMPARATIVE CONCLUSION

Admitting that both legal systems are founded on the rule of giving a high degree of liberty for the parties to make their on rules, and the law will only come to fill any gaps, still, the two systems can learn some lessons from each other.

Firstly, the Colombian legal system should be modified in the payment by a third party issue, as follows: If payment is made without the debtor’s knowledge, the third party must be just entitled to reimbursement, without any further privileges. And if payment is made against the debtor’s consent, no reimbursement of any nature shall be made. The party’s assent is sacred. It is not a good message for society (and credibility in its economy) to allow a stranger to get involved in juridical relations created by the parties, that are founded in trust and good faith, becoming tainted (in a lot of occasions) by the detrimental conduct of the intruder.

Secondly, the English Law, via its Courts, should steer towards the ‘debtor must seek his creditor’ in order to pay principle. The devastating effects of a frustrated payment, due to the restrictions in the law of the place of payment, can not lead to the spread of its effects to the contract and obligations themselves. Also, a bad message is sent to future contracting parties, leaving open the door to deceive the

⁶⁴ For instance articles 2019 and 2020 of the Civil Code, regarding lease and article 1937 in relation to the agreement of forfeiture.

other, by being guarded on an unfair interpretation of the law. Helpful approaches on this matter are given by the fair view that the applicable law and place of payment, is the one where the object existed at the moment of the birth of the commitment, for instance.

Thirdly, for a still developing economy such as the Colombian, a position on which the creditor is not allowed to declare the contract breached so quickly could be beneficial for the sake of a higher and material interest: the growth of the economy. If a 'compulsory credit' is given to the debtor, as in the English view, with all the measures accompanying it, as it is in the English case, the advantages might pass by far the coming disadvantages. Contracts could be performed, the economy might grow faster. The judicial branch might be less congested, by being freed from matters that might not be of the supposed given importance. After all, the 1979 English sales of goods act is not that old. The Colombian nineteenth century Civil Code, nonetheless being a superb masterpiece of legislation, needs to be updated for the good of the economy.

Finally, the Colombian legislators do have a unique and valuable opportunity to create a law that would be precise and clear regarding funds transfers via bank payments. The cases already decided by Courts in most developed countries, such as England, give a precious guideline on where the efforts should be focussed. When the Colombian economy evolves to a stage where bank payments are the most recurred ones on a daily basis, invaluable time and money could be saved, just by having the clear rules on when payment has been made.

More decisions will be made regarding payment, more articles and laws written. It should be started to be considered by multinational institutions such as Uncitral, to develop a Model law to be used not only in international money transfers, but one to be adopted by the whole of nations widely, no matter if they are developed or developing.

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