NOVATION, WAY OF MODIFYING THE LIABILITIES – THEORETICAL AND PRACTICAL ASPECTS

GABRIEL BOROI[*]
CĂTĂLIN-BOGDAN NAZAT[**]

Abstract
Although largely treated by the scholars in their writings, the novation is not a common practice in the Romanian juridical area. As a definition, the novation represents that juridical mechanism through which the parties of an agreement decide to replace a pre-existent valid liability with a new liability, by observing certain conditions.
The purpose of this paper is, mainly, to highlight the amendments brought by the New Civil Code and to explain their impact on the operation under discussion.

Keywords: *New Civil Code, novation, modify, liability, parties, agreement.*

Introduction

Defined as the convention based on which the parties extinguish an old liability and replace it with a new liability[1], the novation presumes the existence of a causality relationship between the two successive liabilities, thus: the extinguishing of the old liability depends on the generation of the new liability and, also, the generation of the new liability depends on the extinguishing of the old liability.

Regulated by the Civil Code from 1864, in Chapter VIII treating on the extinguishing of liabilities (more specifically, in articles 1128 to 1137), the novation is currently regulated in Title VI – *Conveyance and transformation of liabilities* from the Civil Code in force starting with the 1st of October 2011, respectively in articles 1609 to 1614. In our opinion, based on the current regulation regarding novation, the previous interpretations belonging to certain doctrinaires were discarded, which, taking into account the old regulation and the fact that through this operation the old liability is extinguished, considered and analyzed it as being a true juridical means of extinguishing a compulsory relationship[2].

Like many other Romanian law operations, novation, too, originates in the Roman law. The latter saw a great importance in the period when the assignment of claims, just like any other means of assignment of liabilities, was not allowed in Rome; thus, the novation appeared as a means of conveying a liability, allowing the interchange or indirect replacement of the creditor or of the debtor by another person[3]. In the Roman law, novation was defined by Ulpian as being "*a transfer of duty from a previous liability to a new liability (prioris debiti in aliam liabilityem transfusion atque translatio)*", and further on, novation occurred through the change of duty between the same parties, thus replacing an older liability with a new one[4].

Although long exploited in the specialized doctrine, the proposed theme remains, however, a subject open to interpretations and debates, with the necessity of making new determinations in order

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[1] See: L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010; Ion Turcu, *New Civil Code as republished, Book 5. On liabilities, art. 1164-1649*, "CH Beck" Publishing House, Bucharest, 2011; C. Stătescu, C. Bîrsan, *Civil law. General theory of liabilities,* 8th Edition, "ALL Beck" Publishing House.

[2] L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 250; M. Duță, *Dictionary of Private Law. 2nd Edition*. "Mondan" Publishing House, 2002.

[3] L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 251.

[4] L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 251.

to emphasize the changes brought to the matter under discussion through the legislative changes recently occurred in our country. Moreover, we consider that the proposed theme is of current interest, also due to the fact that in a market economy undergoing continuous changes, the liabilities gained, in time, a special significance due to their decisive role in the destiny of any participant to a juridical relationship.

In conclusion, the main purpose for drafting this paper consists in making a complex analysis of the novation operation, first of all from the perspective of the Civil Code provisions, recently adopted in our country.

Notion. Types of novation. In the course of time, the operation being the subject of the present study has been assigned several definitions, but we will only focus on the one according to which novation is the convention through which the parties to a compulsory juridical relationship extinguish an existing liability, and replace it with a new liability[5]. As we will see hereinafter, this definition assigned to novation is of special importance for establishing and analyzing the effects of novation.

According to the above mentioned definition, this operation is characterized by the fact that the compulsory juridical relationship turns into a new compulsory juridical relationship, the extinguishing of the old liability being only a side effect of this operation[6].

The specialized doctrine of our country classifies novation into two categories: objective novation and subjective novation[7]. Thus, *novation is objective* when it occurs between the initial debtor and creditor, but the scope or the cause of the juridical relationship is changed. *Novation is subjective* when the creditor or the debtor under the juridical relationship is replaced with another person. We will deal with the two types of novation in more detail on the course of this paper, as we progress in the analysis of novation as an operation.

Conditions for novation. We must state from the beginning that because the novation is an agreement, it presumes the fulfilment of all the validity conditions concerning agreements, as stipulated by the applicable law. Moreover, according to the specialized doctrine and to case law,[8] novation also presumes the fulfilment of the following conditions[9]:

1. *the existence of a valid pre-existing liability which will be extinguished by novation* – a few mentions should be made in relation to this pre-existing liability.

Thus, novation will not produce effects if the old liability is absolutely null and void. If the old liability is relatively null and void, the realization of novation may mean the confirmation of the liability, which becomes valid, and, consequently, it will turn into a new liability. Of course, for this effect to take place, the novation must be agreed with by the person entitled to invoke the relative null and void character of the liability.

However, in spite all that, in case the person which could ask for the cancellation of the old liability is incapable of doing that or its consent was vitiated at the time of consenting on the novation, it can be subject to cancellation for inability or vice of consent. The same thing happens in

[5]C. Stătescu, C. Bîrsan, *Civil law. General theory of liabilities,* 8th Edition, "ALL Beck" Publishing House, page 385.

[6]Ion Turcu, *New Civil Code as republished, Book 5. On liabilities, art. 1164-1649*, "CH Beck" Publishing House, Bucharest, 2011, page 686.

[7]C. Stătescu, C. Bîrsan, *Civil law. General theory of liabilities,* 8th Edition, "ALL Beck" Publishing House, page, L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 251.

[8]Civil Judgment no. 204 from the 5th of March 2009, Court of Appeal of Timişoara, Civil Section.

[9]For further details, see C. Stătescu, C. Bîrsan, *Civil law. General theory of liabilities,* 8th Edition, "ALL Beck" Publishing House, page 386 and subseq.

case the person who was not aware of the fact that the old liability was subject to cancellation, although such person was fully capable of that.

It was still the doctrine the one which stated the fact that novation cannot be completed when the old liability consists in delivering a determined individual good which accidentally dissipated prior to the completion of novation, but not due to the debtor's fault, because the old liability was extinguished by law[10].

It was unanimously apprehended that the liability subject to a condition can be replaced, through novation, with a pure and simple condition (and the other way round). However, things are different in relation to the possibility of novating a liability subject to a condition into a new liability subject to the same condition. Thus, according to some authors, if the old liability was affected by a condition, the same will be the case of the new liability, too, unless otherwise agreed by the parties[11]. On the other hand, it was claimed that the liability subject to a condition cannot be novated into a new liability subject to the same condition, being assessed that the adding or elimination of a condition which affects the juridical relationship represents the modification of the same liability[12].

Finally, an imperfect civil liability can turn, through novation, into a civil liability as such.

2. *the generation of a new valid liability* – as we have mentioned before, the fulfilment of novation is conditioned by the generation of a new liability, which is the reason for the extinguishing of the old liability.

If the new liability is not valid, being null and void, the novation will not produce effects, and the old liabilities will continue to exist. In case the new liability is subject to cancellation, meaning it is relatively null and void, it will consolidate retroactively after the expiry of the term for the prescription of the action for cancelling. Thus, if the new liability is absolutely null and void or cancelled, the old liability will become effective again, on a retroactive basis.

3. *the new liability must contain a new element (aliquid novi) in relation to the old liability which is extinguished* – novation cannot exist without this new element which, as shown before, may consist in the change of parties, of the scope or of the cause for the juridical relationship.

We have shown before[13] that this element of novelty can also consist of the transformation of a conditioned liability into a pure and simple liability or of the transformation of a pure and simple liability into a conditioned liability.

As we have mentioned in the first part of our work, based on an analysis of art. 1609 from the Civil Code, one can infer that novation can be of two types, i.e. novation when one of the subjects to the juridical relationship (creditor or debtor) is changed with another person and novation when another element under the compulsory juridical relationship between the same parties, is changed.

Further on, we will make a brief analysis of the two types of novation:

a) *Novation when the debtor or the creditor changes* – either party to the juridical relationship can be changed through the novation contract.

Novation when the *debtor* is changed is expressly stipulated in paragraph (2) of art. 1609 from the Civil Code, according to which novation occurs when a new debtor replaces the initial debtor, which is discharged by the creditor, thus the initial liability being extinguished. Art. 1609

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[10]L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 254.

[11]C. Stătescu, C. Bîrsan, *Civil law. General theory of liabilities,* 8th Edition, "ALL Beck" Publishing House, page 386.

[12]L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 254.

[13]C. Stătescu, C. Bîrsan, *Civil law. General theory of liabilities,* 8th Edition, "ALL Beck" Publishing House, page 387, L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 258.

paragraph (2), final thesis also states the fact that in this case, novation can operate without the initial consent.

According to the specialized studies from our country, novation with the change of the debtor presumes a certain and unequivocal manifestation from the creditor, in the sense of discharging the original debtor. Thus, the case law in our country, as well as the French case law decided that there is no case for novation when[14]: the creditor accepted a second debtor, without expressing its intention of discharging the first debtor; the creditor accepted a partial payment from a third party; a third party undertakes in relation to the creditor to pay the debtor's debt; the debtor empowers a third party to pay its debt to the creditor, originating from a compulsory relationship; the creditor accepted, upon the debtor's request, to invoice a third party for the payment of the services supplied by the debtor; the lessor agrees to assign the rental contract, without discharging the assigning lessee or accepts a long term payment of the rent by another person different from the titular of the rental contract.

From the point of view of the means of defence in the case of novation with the change of the debtor, the Civil Code establishes in art. 1612 that the new debtor may not oppose to the creditor the means of defence that it had against the initial debtor, or the ones that the latter had against the creditor, except for the case when, in the latter situation, the debtor can invoke absolute nullity of the act which generated the initial liability.

Novation with the change of the *creditor* is expressly stipulated in paragraph (3) of art. 1609 from the Civil Code, according to which novation occurs when, as an effect of a new contract, another creditor substitutes the initial one, in relation to which the debtor is discharged, thus the old liability being extinguished. In other words, the initial creditor discharges its debtor in exchange for a new liability which it undertakes in front of a new creditor[15].

The specialized doctrine correctly apprehended that the novation with the change of the creditor lost part of its usefulness once with the occurrence of the assignment of claims, the two operations being distinct[16]. Thus, if in the case of the assignment of claims, the initial liability remains the same, only the creditor being changed, in the case of novation, however, the initial liability extinguishes and transforms into a new liability. The assignment of claims is expressly stipulated in the Civil Code, in articles 1566 to 1592.

b) *Novation with the change of a structural element of the compulsory relationship, achieved by the same subjects* – it was claimed that the *change of the object* of the compulsory juridical relationship is when, for example, the parties agree that instead of an owed amount of money, another performance is executed.

On the other hand, *changing the cause* may occur when the buyer of a good (acting as debtor of the good's price) agrees with the seller on the generation of a new liability, while preserving the price under the title of a loan[17].

Some authors also remind of the *novation with the change of the liabilities' means*, accepting, however, that this concept of means in the field of novation is ambiguous and quite difficult to circumscribe[18].

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[14]L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 261 and Ion Turcu, *New Civil Code as republished, Book 5. On liabilities, art. 1164-1649*, "CH Beck" Publishing House, Bucharest, page 687.

[15]L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 259.

[16]See: Ion Turcu, *New Civil Code as republished, Book 5. On liabilities, art. 1164-1649*, "CH Beck" Publishing House, Bucharest, page 686; C. Stătescu, C. Bîrsan, *Civil law. General theory of liabilities,* 8th Edition, "ALL Beck" Publishing House, page 386.

[17]C. Stătescu, C. Bîrsan, *Civil law. General theory of liabilities,* 8th Edition, "ALL Beck" Publishing House, page 385.

[18]See L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 265.

One must apprehend, however, that the modification of the execution term of a liability does not represent a novation, the old liability not being extinguished, and the new liability not being generated at the same time.

4. *The parties' intention to novate (animus novandi)* – more specifically, the parties' intention to transform the old liability into a new one.

This last requirement is expressly stipulated in art. 1610 from the Civil Code. According to which novation is not presumed, and the novation intention should be certain. The absence of this mutual intention of the parties, to perform the novation, makes the novation inexistent.

Effects of novation. Based on the definition of novation, itself, it can be inferred that this operation produces a double effect, namely the extinguishing of an old liability and the generation of a new liability. Thus, a new juridical relationship occurs between the parties, always of a contractual nature, being the result of the parties' will to perform the novation[19].

According to the correct apprehensions of the specialized doctrine, between the two effects of novation there is "an indissoluble connection, in the sense that the generation of the new liability has as cause the extinguishing of the old liability and the other way round; the old liability extinguishes only if the new liability is generated and, correlatively, the generation of the new liability is subordinated to the extinction of the old liability"[20].

Once the old liability is extinguished, all the actions, the accessory clauses, the exceptions and guarantees which accompanied it.

a) *The situation of the novated claim guarantees* – according to art. 1611 from the Civil Code, the mortgages which guarantee the initial claim will not accompany the new claim, unless expressly stipulated. Thus, the initial claim mortgages are not taken over by the new liability, but, to the extent the preservation thereof is desired, this must be expressly stipulated in the deed of novation.

If the novation involves the change of the debtor, the guarantees can no longer be preserved, but the new debtor can offer its goods as guarantee. In this sense, paragraph (2) of the same art. 1611 stipulates that in the case of novation with the change of the debtor, the mortgages related to the initial claim do not subsist in relation to the initial debtor's goods without the latter's consent and they do are not correlated with the new debtor's goods without the agreement thereof. Thus, if the new debtor does not possess goods which may be offered as a guarantee, the old debtor may continue to preserve the initially established guarantees, in order to be used by the creditor[21].

If the novation operates between the creditor and one of the joint debtors, the mortgages connected to the old claim may only be transferred onto the co-debtor's goods, which takes over the obligation concerning the new debt [art. 1611 paragraph (3)].

b) *the effects of novation on the joint debtors and guarantors* – expressly regulated by art. 1613 from the Civil Code, this effect of novation consists in the fact that the novation operating between the creditor and one of the joint debtors discharges the other co-debtors in relation to the creditor. The novation which operates in connection with the main debtor discharges the guarantors. In spite all that, the exception is represented by the case when the creditor asked for the co-debtors' agreement or, depending on the case, the guarantors' agreement, in order for the latter to be bound by the new liability; the initial claim subsists in the situation in which the debtors or the guarantors fail to express their agreement [art. 1613 paragraph (2) from the Civil Code].

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[19]C. Stătescu, C. Bîrsan, *Civil law. General theory of liabilities,* 8th Edition, "ALL Beck" Publishing House, page 387.

[20]L. Pop, *Contributions to the study of civil liabilities*, "Universul Juridic" Publishing House, Bucharest, 2010, page 266.

[21]Ion Turcu, *New Civil Code as republished, Book 5. On liabilities, art. 1164-1649*, "CH Beck" Publishing House, Bucharest, page 689.

c) *the effects of novation on the joint creditors* – the novation approved by a joint creditor is not enforceable against the other creditors except in relation to the part of the claim undertaken by the respective creditor (art. 1614 from the Civil Code).

Conclusions. Although, nowadays, this operation (i.e. the novation) is not frequently used in the legal practice area, it still represents a subject of interest for the legal scholars. Thus, it is our view that new interpretations and opinions will be formulated in the future with respect to this subject, mainly due to the new provisions of the Civil code.

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