STUDY ON THE OBJECTIVE NOVATION OF AN OBLIGATION

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Abstract

In view of the fact that there is no consensus among the authors not only with regard to the precise nature, but also with regard to the unitary or dual character of the effects stemming from novation, we have decided to prepare a study on the novation of the legal obligation report which concerns the changing of the object or its cause.
In the legal literature relating to the regulation of novation in the former civil code, novation covered two forms, objective and subjective.
In the new civil code, the regulation of novation is based on the same primary categories of novation. Certain changes of this legal figure being expressly regulated in the Civil Code.
Subjective novation (Article 1609(2) and (3) of the Civil Code is that which is carried out by changing the creditor or debtor of the initial obligation. The change of the debtor takes place when a third person undertakes to a creditor to pay the debt and it can be operated without the initial debtor's consent which is released (Article 1609(2) Civil Code). The change of the creditor intervenes by substituting the initial creditor with a new creditor, operation as a result of which the debtor will be released from the creditor of the former obligation, being bound, as effect of novation, to the new creditor (Article 1609(2) Civil Code). Thus, a new legal obligation report is created between the parties.
In addition to the theories already consecrated, the study proposes to explore the objective novation of the obligation in the light of the following analysis directions:
• Novation as a way of settling the obligation versus the unsatisfactory fulfillment of the obligation;
• The structure and characters of objective novation;
• The legal nature of objective novation.

Keywords: *novation, obligations, objective novation, subjective novation, obligations transformation, animus novadi, aliquid novi, novum debitum.*

1. Introduction

Novation has gradually lost the centrality that characterized it in the past within our private law system, being replaced and suffering a regression that has benefited the other institutions. Novation has also been the target of intense criticism on the part of those who, *de iure condendo*, questioned even the desirability of a typical discipline, remembering a presumed, irreversible crisis of the institution; vice versa, there were also attempts of reassessment and revitalization, including by enlarging its scope of application to relations different from those of binding nature even through its transposition to different sectors by private law[1]. The fervor which characterizes, even at present, the debate around the nature, role and importance of the institution and of the implications from the point of view of law's general theory, up to its possible transposition into other sectors of the system, attests the always renewed interest of the doctrine for this institution's characters and morphology.

Consequently, in spite of novation resizing within the modern and contemporary legal systems, the theme remains one of the most frequented by the doctrine, due to its indubitable conceptual and practical relevance.

As it has been noticed, the need of a study on obligation novation is presented, in fact and first of all, strictly from a theoretical standpoint; and it is reflected in the direction of investigating up to which point *nova ad priorem obligationem* allow the persistence of the origin report identity. The study of novation constitutes, therefore, a logical-cognitive prerequisite for the phenomena of conventional amendment of obligation's subjects or content, not being able to discuss, consistently, the change of the binding relation, unless the obligation's novation is realized at the same time[2]. The intention of the parties to novate (animus novandi), consists of the parties' wish to transform the former obligation, which is the essential element of novation. In the absence of parties' desire to novate, even if the other conditions of novation exist, we cannot conclude that novation exists. The contracting parties's wish within the meaning of novation must be explicit. Whereas "novation shall not be presumed. The will to perform it must obviously result from the document" - Article 1130 Civil Code - from 1864.

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[1] Baias Fl.A., Chelaru E., Constantinovici R., Macovei I. (coord.), New Civil Code. Comments on articles, Ed. C.H.Beck, Bucharest, 2012, p. 289-292.
[2] Constantin Stătescu, Comeliu Bârsan – Civil Law – General Theory of Obligations, 9th edition, reviewed and completed, Hamangiu Publishers, 2008, p. 153.

2. Content

2.1. Novation as a way of settling the obligation versus the unsatisfactory fulfillment of the obligation:

In view of the aspects mentioned above the Supreme Court has established that the will to perform a novation must result in an unequivocal manner from the contract in which the parties were engaged through a legal binding relation to settle an existing obligation by replacing it with another new obligation. The absence of creditor's wish express manifestation to release the initial debtor, by signing a novation agreement, leads to the failure to comply with the conditions of validity for novation. In this situation, the legal document thus concluded cannot produce effects as a novation agreement, the initial debtor being bound to comply with the obligation undertaken[3].

In other words, in addition to the relevance give by its intrinsic value, a complex investigation of (objective) novation would allow the demarcation of its limits from the adjacent phenomenon of the contractual amendment of the contents of such obligation, the latter being allowed, inter alia, in Article 1182 NCC., where parties' power to "adjust" a matrimonial legal report existing between them is provided[4]. The practical relevance of this analysis is linked to the fact that, as long as they do not exceed the limits of the primitive obligation, the regulation and its associated guarantees remain intact.

In terms quite broad, it can be said that novation is included among the methods of extinguishing the obligation different from fulfillment, since it is reduced to an event which settles the binding report, even without the adequate *direct* satisfaction of the underlying creditor interest by direct achievement of the benefit provided by the obligation.

With regard to its compliance (or not) nature, the opinions in the doctrine are divided; there were also views that aimed to qualify novation in terms of claim settlement instrument, based on the required correlation - established via novation - between the effect of constitution and the effect of settlement, in relation to a mutual exchange.

It is therefore necessary to remember that, by novation, the good owed based on the primitive obligation will not be taken to its final value, but it will be used at its exchange value by exercising the power of "novation" which the holder of the right has on it; fact that, in itself, emphasizes the double plan of the interests involved, i.e. to receive the good which is the object of the initial benefit and the different interest of obtaining the new receivable right to be created through novation.

The primary interest is not intended to receive, under this plan, any "direct" satisfaction, because the right holder does not obtain the essential good which made its object; instead, he consciously waives the expectation to receive this good by "exchanging" it with the usefulness, considered equivalent, represented by the setting up of a new binding relation, i.e. a legal situation with instrumental character. The judgment with regard to the equivalence is left entirely on creditor's account, "except where, in a concrete manner, the existing economic difference is so high that it impedes and it does not allow, objectively, the identification of the novation instrument function, or event scheduled to constitute the expression of a contract concluded by error (Article NCC 1207), in the event of danger (Article 1216 NCC) or for a state of need (Article 1221 NCC)". The equivalence between the benefit due and the assignment of assets is only the result of a pure internal appreciation of the creditor which not only that may prove to be contrary to the reality, but it can also be excluded by a contrary, conscious opinion of the creditor. In these cases, we would be able to talk only about fiction of equivalence if the artificial arbitrary character of this trick was not obvious, at first sight, all the more so as the respective appreciation not only that may be ignored in a concrete manner but, in an abstract way, it is even irrelevant, given that the creditor, as debt holder, may freely dispose of it, up to causing immediate extinguishing with or without compensation[5].

Clarifying that satisfaction has only an "indirect" nature, the precise remark with regard to the instrumental nature of the lien created by novation makes us suspect also the "immediate" nature of satisfaction; however it is true that the immediate interest is designed to obtain an attribution different from that due (which shall be constituted by novation) from a new lien. However, being the case of an instrumental situation, the implicit interest is to obtain the final utility: so that creditor's satisfaction is delayed at that time and any different conclusion is presented as corrupted by excessive formal rigor.

Starting from these premises, it does not seem sufficient to assert that "the extinguishing by novation should be assigned a satisfaction nature (although of the other interest, still included within the obligation), representing the interest to obtain a different attribution than the benefit due".

By way of novation, the parties determine the settlement of the primary obligation by assuming a new debit soluto pro / without solvency guarantee.

The mechanism based on which novation acts on the primary interests structure being clarified, the qualification of novation in terms of means of settlement of satisfactory or unsatisfactory nature may be reduced to a matter rather semantic, depending on the amplitude which shall be deemed to be assigned to the attribute of "satisfactory" and hence to the concept

[3] ee C.S.J., Commercial Section, ruling no. 5394 dated October 10, 2001, in the Jurisprudence Bulleting, 1990-2003, p. 309; as well as I.C.C.J., Commercial Section, ruling no. 1213 dated March 28, 2006, in Law no.2/2007, p. 221-230.

[4] Art. 1182 - Law 287/2009 regarding the New Civil Code.

[5] Stătescu C., Bîrsan C., Civil Law – General Theory of Obligations, 9th edition, reviewed and completed, Hamangiu Publishers, 2008, p. 274-279.

of "satisfaction"; however, it is true that from the point of view of substance, novation does not bring the creditor a final usefulness (therefore, the satisfaction of the essential interest cannot be considered immediate), and, in particular, it does not comply directly with the interest to which the primary relation was subordinated[6].

In conclusion, taking into account the fact that any right (and any good which is its subject) has two usefulness profiles, a direct one, by its value of use, and an indirect one, by its exchange value, the creditor, by novating the primary obligation, makes use of this second usefulness profile, having as purpose a substitute interest for the one transmitted in the debit-credit primary relation.

The reason for which the doctrine does not include any consensus with regard to the satisfactory or unsatisfactory nature of novation, may be attributed to the fact that the concept of creditor interest has multiple meanings and that this unique concept is the basis of the distinction between the two categories of settlement cases.

Therefore, when account is taken of creditor's interest of obtaining the specific owed good, it must be compulsorily admitted that novation brings no satisfaction in respect of this interest and, from this point of view, it should be classified as a means of obligation settlement of unsatisfactory nature.

In theory, opposite conclusions might be drawn if it is presumed that the creditor has contracted the original obligation to protect not only the interest of obtaining a direct usefulness from the good which is the subject of the right, but also that of being able to take advantage of the indirect usefulness, from the exchange, which can be obtained to an equal extent, from this good, and that these interests have been placed by the creditor, from the very beginning, on the same level. However, thus structured, the obligation would be, from the very beginning, designed as an alternative and therefore the subsequent case would not be qualified as novation, but as the mere choice of the benefit to be achieved[7].

On the other hand, the typical replacement of creditor interest seems to be aiming at the attainment, by the creditor, of the object subject to obligation, that can express itself a final usefulness and that may respond immediately to a need within the meaning specified above.

Therefore, the conclusion seems necessarily oriented toward the unsatisfactory character of novation.

The procedure designed to lead to the attainment of final usefulness by the right holder, will certainly involve, in the case of novation, an additional transition, because between the right holder and the essential good not one, but two instrumental situations are positioned in sequence.

From this point of view, the power of disposition by novation is placed on the same level as the power of transfer disposition of the right, because both accomplish creditor's interest to obtain a new utility (i.e. the lien) instead of the original claim that goes out (novation) or is alienated (claim assignments).

Still from the point of view of satisfied interests, some authors considered inappropriate the joining between novation and other typologies of typical negotiations having an analogue function.

The negotiations diagrams which seem to be closest to novation are *datio in solutum* and the compensation on a voluntary basis. Indeed, by such contracts, the debtor assigns an *aliud* to the creditor, considered by the parties as the equivalent of the benefit due and able to achieve the *domestic* interest of the mandatory relation, to settle the obligation.

In a critical note it can be argued that, including in the cases mentioned by the benefit instead of achievement and voluntary compensation, the primary compulsory relation does not find its correspondent in an accurate fulfillment; the right which is its subject is not obtained *recta via*, but it is used for its exchange value.

Therefore, even in such cases, the primary right cannot bring its holder the final usefulness, which is not different from what happens in case of novation.

The only difference from novation consists, in the best case, of the fact that the substitute interest (and therefore, by definition, *external* to the initial contract, because it has not been taken into account, in advance, by the parties - except if they had intended to create the obligation as alternative) receives satisfaction (although still indirect, just as in the case of novation, but) immediately (via the different benefit provided instead of fulfillment or concomitant settlement by payment of a compensation which is not certain, liquid and payable, whose holder is the debtor); in the case of novation, it has already been proven that satisfaction is mediated by the establishment of a new binding relation.

We cannot share the assertion according to which the interest underlying *datio in solutum* and the compensation is identical from a legal point of view to the one found at the basis of the primary contract because the requirement of achieving a new negotiation itself attests, once more, duplicity of interests.

Finally, the diversity of novation from the point of view analyzed is presented clearly and unequivocally compared to the other two ways of settling an obligation, more precisely the direct fulfillment of the debtor and the fulfillment of the third party which, not incidentally, does not require an additional negotiation filter. The same conclusion may be drawn also with regard to the legal compensation (i.e. when the compensation is a certain, liquid and payable: indeed, in this case, the potential negotiation would have the nature of recognition of a compensation

[6] Dogaru I., Elements of law, University Course, Reprography of the University of Craiova, 1971, p. 145 and foll.
[7] Dogaru I., Drăghici P., Civil Law – General Theory of Obligations, All Beck Publishers, Bucharest, 2002, p. 156-172.

incurred at the moment of coexistence of the two reasons offset by debt, up to the competition of the lesser debt).

2.2. Structure and characteristics of objective novation

Given that the objective novation involves a succession between two subjective legal situations which refer to the same subjects, so that the first is used for its exchange value and in this way, is settled by the constitution of the new relation, it comes out that this event implies, necessarily, the existence of a relation in force, of a legal situations still *in itinere*, which is used for its exchange value and which is intended to be settled just as a result of this "exchange", carried out by novation. *Obligatio novanda* must not be settled in the meantime, inter alia, by debtor's direct fulfillment, but it will be an obligation not met or complied with only partially[8].

Also, it is considered necessary that all subjects of the relation that changes to take part to the corresponding agreement; however, the structure of the contract, the source of novation could be bilateral as well as unilateral and in accordance with the conditions of the legal relation which is settled, as well with the conventional power attributed, within a configuration contract[9] that is positioned prior to novation, to one of the parties to the primary relation.

On this point, the conclusions drawn by a part of the doctrine, which deny the admissibility of a unilateral novation created during the performance of a configuration contract previously stipulated between the parties, do not seem to be sufficient. It was argued in this issue that the difficulty in recognizing that, by a proper act of negotiation, the creditor or the debtor can constitute a novation event, unilaterally, is not based solely on the finding that, by this mode, the act of novation would pave the way for an unjustified interference in the debtor's or creditor's legal sphere. The difficulty lies in the structure of the novation event. In addition, a correct assessment of parties' will, allows to note that, if one of the parties was granted, at the time of obligation undertaking, a power of <<novation>>, an alternative obligation or an obligation with alternative right was intended (rather than predefining the configuration of a <<new>> obligation with a unilateral source) to be created (depending on the structure of interests identifiable in this case) between the same parties, recognizing to the creditor, or to the debtor, the power to transform through a unilateral declaration, the <<complex>> obligation into a simple obligation[10].

The alleged obstacle reasons which relate to novation limits of a structural nature would disappear if the assumptions under which novation must be necessarily qualified as a bilateral contract supported by a specific *animus* were rejected. But, in a critical note, it should be added that, in accordance with the theory shown above, we would not have a configuration contract, but an alternative or with alternative right obligation *ab origine* (or even *ex intervallo*, if performed by a contract subsequently intended to modify the content of the initial relation).

However, we do not take into account the fact that, in the alternative obligation, the debtor may be able to choose the benefit to perform, thus causing a concentration of the obligation from the alternative to the simple one, or may proceed directly to fulfillment, by the execution of one of the two benefits without passing through the negotiation conduct which has as purpose to stipulate a new obligation, not even unilaterally; the differences in terms of regulation seem obvious, for example, in matters of risk of extinction (this aspect is subject to a specific regulation in the alternative and with alternative right obligation, which does not extend to simple obligations), discharge of guarantees and accessories (which would not take place as a result of debtor's choice and of the concentration corresponding to the obligation), the invalidity of novation due to the inexistence of the primary obligation (which obviously would not be configurable in the same terms in the event of alternative or with alternative right obligation). Therefore, these are case which may be both prospected, but which are certainly different and independent of one another[11].

The legislation in the field of novation seems also to require a character of novelty for the obligation to be undertaken instead of the primary one.

However, the actual consistency of this requirement is strictly correlated with the exegesis of the rules which provide it: the latter, only easily understandable *prima facie*, have caused numerous controversies of interpretation in the doctrine and in the case law.

In particular, the first of these rules contained in Article 1609 NCC, mentions that the novelty must relate to the object or to the subjects of the obligation. On the other hand, it comes to confirm that the issue of a document or its renewal, the introduction or elimination of a deadline or any other ancillary

[8] By compliance understanding the „performance of benefit. The benefit designates what it is owed, namely the compulsory program; the compliance is the implementation of such program" and, vice versa, by noncompliance (understanding) the failure to implement such program.

[9] This phrase identifies those negotiations which, far from being exhausted in an actual or mandatory effect, are proposed as programming instruments of a form of actual capacity to contract, intended in a natural way to be carried out in time, through the succession of acts or behaviors whose causal relevance is predetermined by the *program agreement*. Precisely referring to these cases, therefore, *stare pactis*, in which the connection irrevocability is finally concretized, obtains independent consistency and becomes an effect meant to protect the common connection given but which, in our case, is not sufficient to exhaust the entire case from which the final effects will be arising. Irrevocability intervenes and acquires a special significance in the cases in which the contractual connection does not cover the entire complex case from which the effect should arise and is used for the qualification of this connection, specifically and particularly, when the connection itself is not solved immediately in the real or mandatory impact.

[10] Dogaru I., Drăghici P., Bases of civil law. Vol. III, General Theory of Obligations, C.H. Beck Publishers, Bucharest, 2009, p. 255 and foll.

[11] Pop L., Popa I.F., Vidu S.I., Elementary Treaty of Civil Law. Obligations, Universul Juridic Publishing House, Bucharest, 2012, p. 233-240.

modification of the obligation, do not produce novation. The changes also brought to the deadline up to which an obligation was to be executed, does not constitute novation, this change not having as a consequence the discharge of the former obligation concomitantly with the constitution of a new obligation – and it represented only an amendment to the initial contract terms, being essential to distinguish between a simple contractual amendment and the novation of the contractual obligations.

2.3. The legal nature of novation

We consider that it is useful to begin analyzing novation and its relationships with the event of obligation amendment, by exploring the classification of the institution in generalized terms.

In this respect, it is preliminarily noted that there is no consensus in the doctrine not even with regard to the legal nature of novation.

The view that is, perhaps, predominant at present, notices that a typical negotiation diagram is chosen, i.e. a genuine contract.

On the one hand, it is claimed that the novation event, even if it is separated into two actual distinct situations (discharge of the primary obligation and the constitution of "new" obligations), does not compromise the unitary essential structure of the act of novation and, therefore, does not legitimate the construction of novation in terms of case consisting of two independent conventions, one meant to determine the settlement of an obligation and the other having as purpose to constitute a "new" obligation, so that the two effects (independent, because each derive from a different and independent act) be connected to each other by a specific intention of the parties, translated in each of the two conventions, into a contractual assembly.

On the other hand, we find the unifying time of the "essential unitary structure" of the act of novation, which expresses, therefore, the common determination of the parties (showing a constant and invariable interest thereof) to discharge an obligation existing between them in order to create a "new" obligation "instead" of the previous obligation.

The first theoretical prerequisite on which this reconstruction relies is represented by the alleged irreducibility of the effects of which novation is composed (settlement and constitution) for one alone; these effects, yet, find an independent legal qualification in a contractual case with a bilateral structure and synallagmatic nature.

According to this opinion, therefore, novatia would be concretized in a contractual diagram whose typical character should be identified, in contraposition with the ability to find, within novation (bilateral) diagram, a waiver to the debt[12], in its irreducibility in the individual moments that compose it and they compete, together, to the outlining of the typical contractual effect, and therefore, in necessary correlation between the two opposed events.

The thesis which qualifies novation as a contract leaves, therefore, from the denial of the unitary nature of the effect and from the conviction that there is, in exchange, a duality of distinct effects, but not necessarily correlated depending on the exchange operation which, in a broad sense, represents the purpose of novation: the unifying moment would be accomplished on a contractual level, through the overall effectiveness of the contract, which is presented as unitary in a necessary way, and not more radically, on the actual level.

The settlement and constitution effects maintain distinct, although they represent, from this point of view, as many fragments which, with a perfect equivalence, draw up a uniform case, that of novation contract: if the settlement of the primary obligation and the creation of a "new" obligation are two contractual, independent and distinct effects, but connected by a mutual interdependence relation, which, within the global novation event, have the same value, then they are two contractual equivalent effects.

It is necessary, further, to pay attention to another thesis, according to which novation should be understood as an effect which can result from a multitude of fortuitous heterogeneous contractual cases: any contract, characterized by an independent and specific function and occurring between the subjects of the obligation (with or without the participation of a third party), may create, within its own system of effects, a "new" compulsory relation and the loss of the primary obligation validity. In the light of those exposed, the obligation novation could occur regardless of a specific will of the parties relating to the settlement of the existing obligation for the creation of a "new" obligation and it would exist in all cases in which the "new" obligation, as is desired by the parties *ex contractu*, would be objectively incompatible with the primary obligation original. After a critical reading of this wording, it was noted that the difficulties emerge taking into account that the two obligations, even if "incompatible" between them, may, however, coexist and also that even if it is assumed, in general terms, that the institution of a "new" binding relation, "incompatible" with the "survival"" of the old one, implies - despite the lack of a punctual and unequivocal will of the parties - from a technical point of view, the discharge of the primary obligation, the situation in which the "new" "incompatible" obligation would appear ant it would reveal, within the global event, as *fact* (which produces the discharge effect), thus

[12] The will of disposal of the debt, which can be seen within novation, could not even be qualified as an onerous waiver (to the debt). In fact, whenever the act of disposal does not have a purely abdicative nature, but proposes, based on the onerous nature of the act (which, therefore, falls within a wider structural context), to determine the construction of a binding relation, we will not be able to have any waiver (although onerous) in a technical direction.

outlining a irreducible dynamic for the novation of obligation (even) understood as *effectus iuris*[13].

The doctrinal elaborations presented until now, with all their diversity, place, therefore, predominantly on the path of *reductio ad unitatem* of the novation phenomenon. This is done by qualifying novation, alternatively, as contract or as effect, without taking into account the possibility that a same institution be able to receive a double qualification, in the light of the context in which it is introduced.

It is necessary, at this point, to prospect another reconstructive hypothesis, according to which novation would be characterized, in reality, in a syncretic mode, of a double nature: it could have traits, depending on the circumstances, both of independent contractual case fortuitously (when the minimum actual unit of the contract is exhausted only under the effect of novation, *unitarily undertaken* as actual moment of an independent contractual event of a settlement – constitution nature), and of individual effect produced by a complex and heterogeneous case fortuitously - a fragment of a minimum more extensive actual unit, which, although not exhausted in an individual novation effect, is meant to include it[14].

In (apparent) compliance with this prospecting, the doctrine emphasized the duplicity and ambivalence proper to the novation phenomenon, without reaching, however, to assign equal importance to the two different senses of novation, of contract and effect: we can speak of genuine novation only in the first case.

In fact, the independence of the effect of novation might be rejected, by postulating instead that the unifying feature of those corresponding effects would be represented by the contract with settlement - constitution effectiveness.

In this case only the subsequent application, by an integral and direct way, of the regulation proper to the institution would become possible, because, assuming that the settlement of the primary obligation was done by objective incompatibility, irrespective of the contractual moment, a irreducible dynamic would be triggered at obligation novation (even) understood as *effectus iuris*.

However, if we look carefully, the *obligatio novanda* settlement, for those who reconstruct novation (and) as *effectus iuris*, cannot be achieved by objective incompatibility (which would necessitate a duality of antithetic effects), so that the constitution of the new relation is not presented as a simple logical antecedent, as *fact* alien to the effective event.

On the contrary, the effect of novation understood unitarily, expression of a power of disposition of the right holder, synthesizes and transcends the individual effects of settlement and constitution.

In the same way in which, for the supporters of the contractual thesis, the cause of novation cannot be broken down into individual fragments that make up the typical contractual case, and the effect of novation constitutes an overrun of the settlement and constitution events and is, by itself, able to independently describe the case[15].

In order to be able to solve once and for all the dilemma concerning the nature of novation, we must therefore, first of all focus the speech on the analysis of novation effects, but without losing sight of the questions above with regard to its structure.

3. Conclusions

Finally, it should be specified that the novation about which we discussed until now is of objective type and, as such, it must be differentiated from subjective novation, which shall be concretized in a contract intended to substitute the primary debtor, which is released, for a new debtor[16]. Even if it is also an event which discharges the binding relation, the subjective novation takes place, by definition, on a subjective level of the relation and involves, in accordance with the express referral made by the legislator, the application of the rules in matter of delegation, expromission and subrogation.

Changing the creditor or the debtor of a legal binding relation is mandatory in order to deal with subjective novation. When a third party undertakes to a creditor to pay its debt, without seeking the assistance of the initial debtor to do this, this is novation by change of debtor. Expromission operates in such a novation. Within this type of novation (via change of creditor) the substitution of the former creditor with a

[13] Pop L., Popa I.F., Vidu S.I., Elementary Treaty of Civil Law. Obligations, Universul Juridic Publishing House, Bucharest, 2012, p. 198 and foll.

[14] Adam I., Civil Law. Obligations. The legal fact in regulating the new Civil Code, C.H. Beck Publishers, Bucharest, 2013, p. 264-269.

[15] Unlike, for example, the alleged substitutive effect or, from the contractual perspective, the relation expressed in terms of substitution, we realize that, as the doctrine has not forgotten to underline, the need to call attention to the content of the "substitution" formula betrays its insufficiency in qualifying, itself, the phenomenon of novation. However, it seems excessive to deny, solely for this reason, the opportunity to express a definition of novation within the meaning of "substitution" and, thus, to consider clearly preferable to focus on the intercurrent connection between the two effects of settlement of the initial obligation and of constitution of a new obligation. In exchange, it seems that these two ways of dealing with the phenomenon are equally suitable to identify it correctly and that subsequent questions on this subject represent, more than anything, mere discussions of a lexical nature.

[16] It should be recalled that the „contract for undertaking the debit of another person, when it is not presented, as effect of the express will of the parties, as case of settlement (by novation) of the pre-existent essential report, generates a succession with a particular title in the debit, determining the entry of the new debtor in the passive subjective situation in which the initial debtor was, as a result of the change caused by convention, which implements the respective event. Also, we cannot let unnoticed the absolute relevance of the difference between the effect of novation and the effect of deprivation of undertaking the debit of another person, by attributing different relevant consequences of settlement to each of the two effective methods and confirming the absolute actuality of the analysis on the effect of succession in our system; the distinction between settlement by novation of the initial compulsory report in the succession in it with a particular title maintains its relevance as regards the regulation of prescription, of privileges, of the succession in the controversial position from the trial point of view, or of the criminal clause, of *pactum non petendo* and of the arbitration clause contained in the initial contract.

new one takes place. The consequence resulting from this type of novation constitutes the debtor's release from the initial creditor and its obligation toward a new creditor. The difference of novation in relation to debt assignment and subrogation in creditor's rights is constituted by debt payment. By comparing debt assignment and subrogation in creditor's rights with novation, we notice that, in the case of the first two legal mechanisms, the initial obligation remains the same and is forwarded to the new creditor while in the case of novation the initial obligation is settled at the same time with its conversion into a new obligation which will necessarily contain a new element as compared to the initial obligation[17].

Considering this summarized preliminary characterization of the institution, many profiles which, in time, have triggered heated debates that have never calmed down between the authors who were in charge of this matter, remain to be clarified.

Indeed, in novation regulation there are a few normative moments that seem to be difficult to reduce to the system.

For this purpose, a useful reading key is represented by the attempt to correctly classify the relationship between the events that change the relation and novation, because the study of novation means, in the background and on a theoretical level the " terminal point" of the events which modify *idem debitum*, coinciding with the very event of novation in which *nova*, inherent *prior debitum*, replace *idem debitum* "opening towards" *novum debitum*".

The doctrinal traditional statement according to which the requirement of novelty, or "*aliquid novi"*, understood as a substantial modification of the benefit object or of the relation title, is co-essential to novation, arises from the reading of these rules. On the contrary, it is concluded that this event can occur in connection with the renegotiation which leads to a new contract regulation of the only methods for the carrying out of the pre-existing benefit.

The other normative feature traditionally attributed to novation relates to the psychological scope and is deducted also from the provisions of Article 1610 of the Civil Code, according to which the intention to novate, the will of discharging the previous obligation "must be indubitable", it must be an unambiguous result[18]. So, it is common practice to say that "*animus novandi*", which consists of the joint and clear intention of discharging the primary obligation, given its substitution to a new one, must be considered, together with *aliquid novi*, in the form of an essential element of the novation contract, in the same way as the subjects and the cause.

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