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SUMMARY -

„*THEORETICAL AND PRACTICAL ISSUES REGARDING THE TRANSFER AND TRANSFORMATION OF OBLIGATIONS*"

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CONTENTS OF THE PAPER

1. Overview of the paper

The treatment of this subject is of a particular scientific interest, considering the latest legislative developments, arising from the need for a better regulation of the various institutions within our private law system, among which we should mention the ones reviewed in the paper „Theoretical and practical issues regarding the transfer and transformation of obligations ".

Therefore, we consider that this subject is of a current significance, first due to the amendments made under Title VI – *The transfer and transformation of obligations* – in the Civil Code, as well as due to the fact that, in a changing market economy, obligations have become important over time due to their determining role in the fate of any party to a legal relationship.

A comprehensive analysis of the means of transfer and transformation of obligations is, in our opinion, a real challenge, and its main purpose is to unify doctrine, case law and the new regulations in a work providing a clear, edifying view on the relevant institutions.

2. Structure and content of the paper.

As resulting from reading the contents of the paper, this is structured in six chapters, each one having several sections, and each section is formed of several subsections and paragraphs. At the same time, this contains bibliography and contents.

CHAPTER I of the paper – *Introductory issues regarding civil obligations* – contains a short description of civil „obligation", resulted from its analysis.

Thus, in this first chapter of the paper, we started to analyze civil obligation based on the definitions provided by specialist authors, both prior to the coming into force of the current Civil Code and subsequently.

At the same time, if, until the coming into force of the current Civil Code, we could speak of at least three categories of private law obligation relationships, among which we should mention civil obligation relationships, commercial obligations relationships and obligation relationships specific to family law, at present, such a classification is no longer applicable, all the categories of obligations previously listed being regulated by the Civil Code.

However, besides the obligation-based legal relationships specific to private law, in our legislative system there are also those obligation-based legal relationships specific to public law, regarding tax law (and tax procedural law).

Therefore, we considered of use a review of similarities and especially of the differences between the two categories of obligations. This review was

performed starting from the similarities between civil obligations and tax obligations when considering their constitutive elements.

As regards the differences between the two categories of obligations, starting from the facts retained by doctrine, and also based on the review of the legal provisions applicable to the two, we made a comparative analysis of them, focusing on regulation, sources, parties, content and sanctions.

The third part of the first chapter addresses the structure of the obligation-based legal relationship, namely its structural elements: subjects, content and object.

At the same time, starting from the opinions stated by some authors, according to which, besides the three elements above mentioned, there is a fourth one, namely sanction, the latter was also the subject matter of our analysis. On these lines, we emphasized the means made available to the subjects within the legal-based legal relationship for fulfilling and respectively protecting their legitimate interests.

However, as we pointed out also in the paper, we consider that, according to the current text under art. 1164 Civil Code[1], sanction is not a true structural element of obligation.

For these purposes, we should note that the article above mentioned does not refer to this fourth structural element, some authors considering that the legislator proceeded in this way by taking into account that in our law system there is also the category of imperfect civil obligations (or natural obligations). What characterizes this category of obligations is that the obligor may not obtain the settlement of their claim by using the coercion methods made available by the legislator.

Also the first chapter, starting from the provisions of art. 1165 Civil Code, contains a brief description of the sources of obligation, namely: the contract, the unilateral act, the negotiorum gestio, the unjust enrichment, the undue fulfillment, the tort. Given that obligation may also arise from „any other act or deed connected by the law with the creation of an obligation", we added to those mentioned above civil liability for damages caused by faulty products in circulation, regulated by the Law no. 240/2004 on liability of manufacturers for damages caused by faulty products, as reprinted, as well as damages caused by judiciary errors.

At the end of the chapter, we classified obligations based on the criteria considered as the most important within the doctrine, namely: object, judicial sanction and their binding character.

[1] Art. 1164 Civil Code runs as follows: „obligation is a lawful relationship, whereby the obligee is bound to fulfill a duty towards the obligor, and the latter is entitled to have the duty due fulfilled";

The second chapter of the paper – *About the dynamics of obligations* – contains an overview of the changes that may occur during the existence of obligations.

Thus, such changes in obligations appear upon their transfer and transformation, which involve the change of the initial obligation, either a change of subjects or a change in the content of the obligaiton-based legal relationship.

At the same time, we emphasized the two approaches within the doctrine as regards the meaning of the obligation-based legal relationship, which had a significant impact on the evolution of the dynamics of obligations: the subjective approach and the objective approach.

In this chapter, too, which makes the transition from the general issues of obligation to the legal mechanisms of transferring and transforming it, we reviewed universal transfer with a universal title, on the one hand, and the transfer with individual title, on the other.

Sections 3 and 4 in this chapter contain an overview of the regulation of transfer and transformation of obligations, identifying the specific means whereby these may be performed.

The end of the second chapter contains a description of the Principles of the International Institute for the Unification of Private Law (UNIDROIT) and of the Regulation (EC) no. 593 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractula obligations („Rome I"), laws adopted internationally and containing provisions regarding the means of transfer of obligations reviewed in this paper.

The third chapter of the paper – *Means of transfer of obligations* – addresses claim assignment, personal subrogation, takeover of debt and contract assignment.

Thus, the first sub-chapter of the third chapter contains a comprehensive analysis of claim assignment, made considering the regulation in the Civil Code and the doctrine opinions stated in these matters. At the same time, national case law played an important role in drawing up this section, given that we included here a number of references to the facts retained by the courts of law in our country regarding claim assignment .

This first section starts firstly by localizing it among the articles of the Civil Code and at the same time providing a definition of this means of transfer of obligations.

A novelty by comparison with the doctrine approaches under study upon drawing up this paper consists in our opinion of making an analysis of the claim assignment agreement as regards its legal characteristics.

As regards the types of claim assignment, we started our analysis from the provisions of art. 1567, Civil Code[2], setting forth that claim assignment may be onerous or free of charge. This means of regulating the types of claim assignment is a legal novelty, considering that the Civil Code of 1864 regulated expressly only the onerous claim assignment, under art. 1391 and 1398.

Pursuant to the provisions of art. 1567 Civil Code, from the point of view of the dispositions governing the creation, implementation and effects of claim assignment, this is subject mainly to the dispositions in matters of transfer of obligations. However, considering that claim assignment may take different legal forms, depending on the will of the parties, the dispositions in matters of transfer are supplemented by the ones applicable to the legal operation the parties opted for for the transfer of claim.

Thus, as regards the claim assignment free of charge, this should be executed as an authentic deed, as set forth in the Civil Code regarding the valid execution of a donation, the sanction for the failure to fulfill it being its absolute nullity. On the other hand, as regards the onerous claim assignment, this may be executed not only by means of a sale contract but also by means of other onerous contracts (for example, the exchange contract), the law obliging the assignment parties to fulfill the conditions set for the valid perfection of such legal deeds.

In the end of the section addressing the types of claim assignment, we trated partial assignment, whcih is a novelty by comparison with the former regulation. Among the facts retained as regards this type of cliam assignment, we were particularly interested in the immediate effect of partial assignment, namely the fact that the assignor and the assignee become the obligors of the same assigned obligee, acquiring equal rights and competing for obtaining settlement from the latter.

At the same time, a characteristic of partial claim assignment is that the assignor's obligation to hand over the document evidencing the cliam disappears. However, the assignee is entitled to a legalized copy of such document, as well as to the mention of assignment, containing the signatures of both parties, on the original document. The absence of the obligation to hand over the document evidencing the clainm is explained by the fact that the assignor does not lose their capacity of obligee and the legalized copy is sufficient to evidence the facts mentioned in the original document.

[2] Art. 1567 Civil Code runs as follows: „(1) Claim assignment may be onerous or free of charge. (2) If the assignment is free of charge, the dispositions of this section are supplemented accordingly by the ones in matters of donation agreement.(3) If the assignment is onerous, the dispositions of this chapter are supplemented accordingly by the ones in matters of the contract of sale-purchase or, as the case may be, by the ones regulating any other legal operation within which the parties agreed on fulfilling their duty consisting of transferring a claim".

Further, we identified the scope of the claim assignment, as resulting from the provisions of art. 1566 par. (2) Civil Code. Pursuant to this article, the provisions of claim assignment are not applicable to:

a) „the transfer of claims within a universal transfer or with universal title";

b) „the transfer of securities and of other financial instruments", except for the dispositions regarding the assignment of claims identified by means of nominal securities, promissory notes as securities or bearer securities.

The same section addressed the possibility of assignment of some future claims, the Civil Code not providing for the performance of such an operation, the condition prescribed being that the transfer deed contained clauses allowing the identification of the claim assigned.

Considering that claim assignment may be found also within the current activity of credit institutions, such operations being often subject to the review of courts of law in our country, especially as regards the right of such institutions to become a party to a claim assignment, this section contains also a decision of the High Court of Cassation and Justice regulating the possibility for such institutions to conclude such deeds within their activity.

The third section contains a review of the requirements of claim assignment, namely the main requirements, the form requirements, the consensual nature of assignment and the publicity requirements.

As regards the main requirements, we paid a special attention to the object of claim assignment and especially to the unassignable claims. The category of unassignable claims was reviewed by referring to the two types of unassignable character: the legal and the conventional.

An issue that drew our attention and which was analyzed also in this paper is that of the claims that have as their object another obligation than the payment of an amount of money. In such a case, as regards claims that have as their object another obligation than the payment of an amount of money, the legislator regulated expressly their unassignable character, if the claim assignment would make the obligee's obligation become onerous.

As regards the legal unassignable character, we provided also a number of examples of claims that may not become the object of an assignment, among which we should mention:

a) the right related to the obligation of conventional maintenance, art. 2258 Civil Code setting forth that „the rights of the maintenance obligor may not be assigned or be subject to execution";

b) the right related to the maintenance obligation arising from the law, art. 514 Civil Code setting forth that „the right to maintenance may not be assigned and may not be executed other than in the conditions prescribed by law";

c) the unassignable character of the right of use or habitation, art. 752 Civil Code setting forth in this respect that „the right of use or habitation may not be assigned and the property that is the object of such rights may not be rented or, as the case may be, leased".

Further, we analyzed the conventional unassignable character of claims. On these lines, the Civil Code makes available to the parties in the initial obligation-based legal relationship the possibility of limitation, namely the assignment of claim only in certain conditions or to certain persons or forbidding completely the claim assignment by means of a non-disposal clause.

As regards the consensual character of claim assignment, this is concluded through the simple agreement of will of the parties (the assignor and the assignee). For these purposes, art. 1573 Civil Code sets forth that a claim „is assigned through the simple agreement of the assignor and of the assignee, without the notification of the obligee".

Thus, claim assignment is a bipartite agreement, concluded between the assignor and the assignee, the simple agreement of will of these parties being sufficient for its valid conclusion, the consent of the assigned obligee not being required, in principle.

As regards the notification of the assigned obligee, this is not a condition for the validity of the assignment agreement, being just a subsequent formality whereby the assignment parties ensure its binding character for the assigned obligee.

However, the Civil Code prescribes the obligation to acquire the consent of the assigned obligee for the valid conclusion of the assignment agreement when, as the case may be, the claim is connected in an essential way with the obligor, being *intuitu personae* in character.

As regards the form requirements, although the law does not prescribe that the assignment agreement is in a certain form *ad validitatem*, the existence of the supporting document is required *ad probationem*.

Undoubtedly, in the hypothesis of a claim arising from a legal document for which the law prescribes the authentic form *ad validitatem*, the claim assignment should be in the same form, the principle of the symmetry of forms of legal documents being applicable.

Although between the contract parties, the assignment agreement becomes effective as of its valid conclusion, it becomes effective for third parties only after the publicity (binding) formalities prescribed by law are fulfilled. Pursuant to the Civil Code, the formalities whereby the claim assignment becomes effective for third parties are: the notification and acceptance of assignment, the recording of the assignment of universal claims in the archive, for becoming binding, the legal action notification, the binding character for

the fidejussor and its recording in the Land Book, all these being reviewed in detail in this work.

As regards the notification of assignment, the current Civil Code provided for a simpler means of notification of the obligee, excluding the requirement of the intervention of the court executor for the fulfillment of the notification procedure. Thus, pursuant to the current regulation, the notification may be performed by either the assignor or the assignee, by fast courier or mail, by means of the internet, as well as in person, by the assignor or by the assignee.

The acceptance of the assignment by the assigned obligee should be made by means of a signed document, bearing a certified date, this paper reviewing in short the means by which the date on a signed document becomes certified.

The fourth section of the subchapter addressing claim assignment contains a review of the effects generated by the claim assignment. Thus, claim assignment generates two categories of effects. Therefore, considering that claim assignment is a contract, this shall generate firstly the effects specific to the legal documents through which it was delivered, namely sale, exchange, donation, etc.

At the same time, claim assignment generates effects specific to the relationships established between the assignment parties, on the one hand, and third parties, on the other.

Between the parties, a first effect of such an operation is the transfer of the claim right from the assignor's property to the assignee's property, the claim being in the property of the latter exactly as it was in the one of the assignor. In other words, the assignor becomes the obligor of the assigned obligee for the nominal value of the assigned claim, whether the assignment was free of charge or onerous, that is, it does not matter whether a price was paid, or, if paid, in what quantum.

At the same time, we should mention that, in case of a partial assignment, „the assignor and the assignee are paid in proportion to the value of the claim of each of them", this rule applying also to the case in which the same claim is taken over by several assignees together (art. 1584 Civil Code).

As regards this main effect, the Civil Code sets forth that, under the assignment, the assignee is transferred „all the rights that the assignor has regarding the assigned claim", as well as „the guarantee rights and all the other accessories of the assigned claim" [art. 1568 par. (1) Civil Code].

The second issue reviewed is the one regarding the assignor's obligation of guarantee. We should mention that the legislator understood to make a distinction between the onerous assignment and the assignment free of charge, when considering the assignor's obligation of guarantee.

Whereas in case of the onerous claim, the assignor's obligation of guarantee exists as a rule, either as a legal guarantee or a conventional one, in case of the assignment free of charge, as a rule, the obligation of guarantee does not exist, the exception being the conventional guarantee. In this respect, art. 1585 par. (5) Civil Code sets forth that „unless stipulated otherwise, the assignor that assigns a claim free of charge does not guarantee even the existence of the claim as of the assignment date".

As regards the onerous claim assignment, depending on the fact whether the parties introduced in the assignment document specific clauses establishing the existence and scope of the guarantee obligation, this paper analyzed comprehensively the legal guarantee obligation and the conventional guarantee obligation. At the same time, besides these two forms of guarantee, pursuant to art. 1586 par. (1) Civil Code, „in all the cases, the assignor is liable when, through their own deed, by itself or together with the deed of another person, the assignee does not acquire the claim in their property or is not able to make it binding on third parties", this being the obligation of guarantee against eviction.

The first form of the assignor's guarantee operates according to law and appears when the parties did not agree expressly in a contractual clause on the assignor's guarantee operating for the purposes of limiting or widening their guarantee obligation.

As regards the scope of the guarantee obligation, the assignor is obliged to guarantee the existence of claim and of its accessories when the assignment deed is concluded. In other words, the assignor is obliged to guarantee that, when the assignment agreement is concluded, the claim that is the object of the agreement exists, that its holder is the assignor and that by that time no cause for settlement had appeared.

The conventional guarantee obligation consists of the fact that the parties may agree under the assignment deed on the widening or limiting the assignor's guarantee obligation. The widening of the guarantee obligation may be effected by its extension also to the creditworthiness of the assigned obligee, art. 1585 par. (2) thesis II in the Civil Code setting forth that „if the assignor obliged themselves expressly to guarantee the creditworthiness of the assigned obligee, it should be presumed, unless there is an opposite stipulation, that only the creditworthiness as of the assignment date was considered".

At the same time, under the assignment deed, the parties may limit the assignor's guarantee obligation. For these purposes, the parties may establish, for instance, that the assignor's guarantee cover only the existence of the claim and not its securities.

As regards the effects the claim assignment generates for third parties, these were reviewed separately, whether they are effects generated for the assigned

obligee or effects generated for the other third parties. Such a distinct review of the effects for third parties is based on the fact that the manner in which this is binding on the assigned obligee is different from the manner applicable to the other third parties.

At the same time, we should make another mention regarding the fidejussor, this being considered an assigned obligee as regards the publicity formalities.

Given that claim assignment is binding on the assigned obligee only after the publicity formalities (the notification of assignment or its acceptance) are fulfilled, we should distinguish between: a) effects prior to the notification or acceptance of assignment and b) effects subsequent to notification or acceptance of assignment.

Before the publicity formalities are fulfilled, the assigned obligee is a third party to the assignment and may be discharged only by making the payment to the assignor, being obliged to dismiss the claim assignment between the latter and the assignee.

Pursuant to the Civil Code, the time when the assigned obligee is obliged to pay the assignor coincides with the time of acceptance or notification, even if this found out the existence of the claim assignment under other circumstances. However, the assigned obligee may suspend the payment to the assignee, if the binding obligation to the assigned obligee is fulfilled through the notification by the assignee, in such a case the law prescribing for the assigned obligee the right to request from it the proof of assignment.

At the same time, the debtor may present the assignee the payment evidence acquired from the assignor, provided that it contains a date prior to the notification or acceptance date, even if this date is not certified.

At the same time, before the binding formalities are fulfilled, the assignor and the assigned obligee may reach an agreement on changing the assigned claim, this being binding on the assignee.

After the formalities regarding the binding character for the assigned obligee are fulfilled, the latter becomes the assignee's obligee, being obliged to pay the debt directly to the assignee. At the same time, subsequent to this, the assigned obligee may not oppose to the assignee the potential rights acquired against the assignor, and neither may the assignee request from the assigned obligee more than they acquired from the assignor.

The last section of the subchapter addressing the claim assignment contains mentions regarding the effects this means of transfer of obligations generates for the successive assignees of the claim and for the assignor's unsecured obligors.

Subchapter II of chapter III is reserved for the assignment of a claim through nominal securities, promissory notes as securities or bearer securities.

This subchapter starts with the definitions of nominal securities, promissory notes as securities and bearer securities provided for by the doctrine. At the same time, the same introductory section describes the legal characteristics of securities.

The second section contains the review of the means of transfer of securities, whereas the third section addresses the obligee's means of defense.

The final section of this subchapter contains the review of the dispositions of the Civil Code regarding the payment of a claim under a bearer security.

The subchapter regarding the claim assignment ends by a brief review of the „assignment of rights" pursuant to the regulation of the UNIDROIT Principles. Considering the international regulation in these matters currently, we made a brief comparison between claim assignment and „debt assignment", emphasizing the similarities and differences between them. A difference is the fact that, unlike the claim assignment regulated by the Civil Code, in the case of „the assignment of rights" regulated by the UNIDROIT Principles, the binding character for the obligee is performed only through notification, its acceptance by the obligee not being set forth.

The second subchapter of chapter III addresses personal subrogation and includes in the introductory part a brief description of subrogation in our law system, referring to its two forms and also to the double role of subrogation in the obligor's rights through the payment of claim: the means of payment of a debt and the means of transfer of a claim.

As regards the main issue in these matters, we showed that the Civil Code of 1864 regulated the personal subrogation in the chapter addressing the settlement of obligations – Chapter VIII – About settlement of obligations – within the section analyzing payment. Thus, the legislator of 1864 considered the role of subrogation as a mechanism of settlement of the payment obligation, considering subrogation as a means of payment.

Currently, subrogation is regulated under Title VI – The transfer and transformation of obligations -, Chapter II – Subrogation -, art. 1593-1598, the existing legislator emphasizing the effect generated by subrogation, that of transfer of a claim right.

However, the purpose of subrogation was considered also by the current Civil Code, which refers to it under the article regarding the payment of obligation to a third party. For these purposes, art. 1474 par. (3) Civil Code sets forth that „the payment made by a third party settles the obligation, if made on the account of the obligee. In such a case, the third party does not subrogate themselves in the rights of the obligor paid, other than in the cases and conditions prescribed by law".

In this subchapter, we reserved a section to the role of the personal subrogation, this being an operation that is often noted in reality.

Being a means of transferring an obligation, we considered that a comparative analysis of the claim assignment and of subrogation would be fit, if based on underlining the similarities and differences between the two.

As regards the types of subrogation, this may arise following the will of the parties, as *conventional subrogation* (which may be agreed on by the obligor or by the obligee) or, according to law, in such a case being a *legal subrogation*.

At the same time, the Civil Code distinguishes between *full subrogation* and *partial subrogation*, depending on the scope of the payment of the third party (art. 1589 Civil Code).

The first form of subrogation, the conventional one, is based on the agreement of will of the payer third party, *solvens*, and one of the parties within the obligation-based legal relationship. Depending whether the agreement is concluded with the obligor or the obligee, conventional subrogation is of two kinds: the subrogation agreed on by the obligor (art. 1594 Civil Code) and the subrogation agreed on by the obligee (art. 1595 Civil Code).

As in the case of claim assignment, as regards the conventional subrogation, we proceeded to an analysis of the legal characteristics of the agreement under which the subrogation is performed.

We should mention that, whether there is a subrogation agreed on by the obligor or there is a subrogation agreed on by the obligee, subrogation should be mentioned expressly in the agreement concluded by solvens with one of the two parties within the obligation-based legal relationship. Thus, the subrogation of solvens in the rights of accipiens does not appear following the making of the payment, if the parties did not set forth expressly the occurrence of such an effect.

As regards the subrogation agreed on by the obligor, pursuant to the provisions of art. 1594 par. (1) Civil Code, we defined it as the mechanism whereby, based on the agreement of will, the original obligor subrogates the payer third party in the rights it has against the obligee.

In order for the subrogation to be valid, the requirements extensively analyzed in this work should be met, namely:

a) *subrogation should be stipulated expressly*. As regards this first requirement, we do not consider as necessary the express mention of the rights to be transferred to the solvens by means of subrogation, given that, pursuant to art.

1594 par. (1) Civil Code, „al the rights that this would have against the obligee" are to be transferred. Per a contrario, if the accipiens wishes the limitation of the rights transferred together with the claim (for example, the limitation of the guarantees transferred), this fact should be mentioned in an express clause.

b) *subrogation should be agreed on at the same time with payment*. As regards this second requirement, considering that the law sets forth that between the *solvens* and the *accipiens* effects occur based on the agreement of will, the problem is to prove that payment and subrogation take place simultaneously. In its current form, art. 1593 par. (3) Civil Code sets forth that the obligation of evidencing subrogation in a document exists solely for making it binding on third parties. Therefore, there is no hindrance for the parties to draw up subsequently the document recording the payment.

Moreover, the absence of an express provision regarding the form of the document concluded between the payer third party and the obligor agreeing on subrogation may affect the rights of the other obligors of the oblige, due to the fact that a document without a certified date may be drawn up any time, the legal dispositions being thus circumvented.

In conclusion, considering that for the validity of the document evidencing subrogation the law does not prescribe a certain form, the proof is to be made by observing the dispositions of common law applicable to the proof of legal documents, an issue analyzed in detail in this work.

c) lack of the obligee's consent. Pursuant to art. 1594 par. (2) Civil Code, „subrogation is valid without the obligee's consent. Any opposite stipulation is considered unwritten". Thus, the subrogation agreed on by the obligor is valid without the obligee's consent, the latter not being a party to the contract concluded between the *accipiens* and the *solvens*.

Further, any stipulation setting forth the obligation to acquire the obligee's agreement is considered unwritten, having no legal effects.

As regards the second form of subrogation, the one agreed on by the obligee, the replacement of the obligor is performed by the obligee by the agreement of will taking place between them and a third party the obligee borrows from for making the payment to the obligor.

As regards the situation of the obligor, art. 1595 par. (3) Civil Code sets forth that, unless there is an opposite stipulation, their consent is not a requirement for the validity of subrogation. If the obligor refuses the payment made by the obligee, the latter may use the means made available to them by the Civil Code for notifying the obligor of default, which are reviewed in the section addressing the sanction of obligation, discharging thus themselves of any debt.

This form of conventional subrogation is also subject to the requirement that the subrogation is express.

The Civil Code establishes certain special requirements that this form of subrogation should meet, subject to the sanction of absolute nullity.

Thus, pursuant to art. 1595 par. (2) Civil Code, subrogation is valid only if the borrowing document and the receipt of payment of debt contain a certified date, the borrowing document declares that the amount was borrowed for paying the debt and the receipt mentions that the said payment was made with the money loaned by the new obligor".

Therefore, these requirements are the following:

a) *the borrowing document and the receipt of payment of debt are documents under private signature, containing a certified date*.

b) *the borrowing document mentions expressly that the amount was borrowed by the obligee for making the payment of their debt to the obligor.* As regards this requirement, there is a problem regarding the validity of subrogation, if there is a longer period of time between the time of borrowing the money and the time of making the payment.

Thus, it has been retained that the operation is not considered, as a rule, null, but the court, considering the de facto situation, may retain that the payment of the claim was not made by the obligee from the amount of money borrowed from the third party and, therefore, the operation is null because a requirement *ad validitatem* has not been met.

A similar judgment may be pronounced, if the receipt contains a date subsequent to the one when the payment was made by the obligee.

c) *the payment receipt mentions that the payment was made with the money borrowed by the obligee from the third party (the new obligor)*. As the borrowing document, the payment receipt should be in the form of a document under private signature containing a certified date. At the same time, it should contain the express mention that „the payment was made with the money loaned by the new obligor".

There are situations in which the obligee borrows money from several persons for settling the debt. Three judgments were made in such a hypothesis. Thus, a first judgment is that according to which subrogation is performed towards all the loaning third parties, based on the amount loaned by each of them to the obligee. On these lines, each of these creditors should be mentioned in the receipt, as well as the amount they contributed with to the settlement of debt.

The second judgment refers to the subrogation taking place only towards the first creditor third party. This judgement may not be retained because it is

contrary to the principle establishing that the payment receipt should mention the source of the amounts of money used for making the payment.

The third judgment covers the generation of effects of subrogation towards the last crediting third party, but such a judgment cannot be retained for the same reasons as the second judgment.

Certainly, there is the possibility that, if there are several third parties crediting the same obligee, the latter does not mention all of them in the receipt. In such a situation, subrogation takes place only towards the ones mentioned in the receipt, the other creditors being able to sue the obligee on the grounds of contractual civil iability, considering that a loan contract was concluded between them and the obligee.

At the same time, in the hypothesis in which the loan contract stipulated that the amount borrowed should be used for settling the debt and at the same time the obligee's obligation to mention the creditor in the payment receipt was stipulated, but the first does not fulfill the obligation assumed, the crediting third party may request that the damage caused by defaulting the contractual obligations is compensated for. On the other hand, if the loan was granted without the parties establishing the obligation of mentioning the creditor in the payment receipt, the latter may turn against the obligee for the recovery of the amount credited plus potential default penalties, if applicable.

We consider that the safest way for the creditor to ensure their position towards the obligee and the latter's claim is the stipulation in the loan contract of a criminal clause setting forth that the obligation the credited obligee would have following the default of the contractual obligation should cover the amount borrowed, as well as the possible damages caused.

As regards legal subrogation, this takes place automatically, the agreement of the obligor paid or of the obligee whose debt is paid not being required. Thus, subrogation takes place lawfully, without the fulfillment of any further formality being required, in the following situations expressly set forth under art. 1596 Civil Code:

a) „*to the benefit of the obligor, even if without a personal or real guarantee, who pays to an obligor that has a preemption right, according to law*". This first situation may be illustrated by the payment made by an obligor in favor of an obligor preferential in rank, in other words, the obligor without a real or personal guarantee settles the claim that a mortgage or pre-emptive obligor has against the common obligee. At the same time, the situation in which a mortgage obligor of lower rank pays to a mortgage obligor of higher rank falls also into the category of legal subrogation set forth under art. 1596 letter a) Civil Code.

b) „*for the benefit of the person acquiring a property, who pays the holder of the claim accompanied by a security on the said property*". This is a property that, being accompanied by a security (security mortgage or real mortgage or another security), is acquired by a person that settles the secured claim by a payment made to the obligor. Following such payment, the acquirer subrogates in the rights of the obligor paid in order to recover the claim from the seller of the property affected by guarantee, the extent of payment and of debt being considered when the subrogation takes place.

c) „*for the benefit of the person that, being obliged together with others or for others has an interest in the settlement of the debt*". The persons considered obliged together with others are the co-obligees of the indivisible obligation, the co-obligees of the joint obligation and the fidejussors guaranteeing the same claim, within the relationships between them.

Thus, the paying co-obligee or co-fidejussor shall be lawfully subrogated in the rights of the obligor paid for the part of the debt incumbent on the other co-obligees or co-fidejussors.

The following fall into the category of third parties obliged for another:

a) the fidejussor, namely the person that, pursuant to art. 2280 Civil Code „undertakes towards the other party, who acts in an obligation-based relationship as an obligor, to fulfill for free or in consideration of remuneration, the obligation of the obligee, if the latter does not fulfill it";

b) the person that guarantees with their own property the obligation of another person;

c) the issuer of a letter of guarantee , art. 2321 par. (4) Civil Code setting forth that „the issuer that made the payment has a right to sue for compensation the one ordering the letter of guarantee";

d) the issuer of a comfort letter, namely „that irrevocable and autonomous undertaking whereby the issuer assumes an obligation to do or not to do, for the purpose of supporting another person, called obligee, for the fulfillment of the latter's obligations towards one of their obligors" [art. 2322 par. (1) Civil Code]. The issuer of such a comfort letter, who has no longer claims against the obligor, has a right to sue for compensation the obligee, pursuant to art. 2322 par. (3) Civil Code

As regards the persons that are liable for others, we may also ascribe to them the tort civil liability for the deed of another, on the grounds of the guarantee made for the benefit of the injured party. Thus, pursuant to art. 1372 and 1373 Civil Code, the principal or the parents are obliged to compensate the damages caused by the proxies or their minor children.

d) „*for the benefit of the heir who pays with their property the debts of succession*". Thus, one of the heirs may be interested to pay a debt of

inheritance with their own property, for the purpose of avoiding the initiation of an untimely prosecution of some succession property. In such a case, pursuant to art. 1157 par. (1) Civil Code, „the universal heir or the heir with a universal title who, due to the real security or for any other reasons, paid for the joint debt more than their share has a right to sue for compensation the other heirs, but only for the share of the joint debt incumbent on each, even when the heir that paid the debt would have been subrogated in the rights of obligors".

This section addresses also other cases of legal subrogation that are found both in the Civil Code and in other special laws, as follows:

1. the case of the husband that paid the joint debt;

2. the case of the payment not owed which was received by an obligor in good faith;

3. the subrogation of the person acquiring a real property that is the subject matter of a lease agreement in the rights of the person that disposed of it, when the provisions of art. 1811 Civil Code regarding the binding character of the lease agreement are observed;

4. the substitution of the shareholder that redeems, pursuant to art. 1901 par. (2) Civil Code, „the participating interest acquired onerously by a third party without the consent of all the shareholders, within 60 days since the date when he became aware or he should have become aware of the assignment";

5. the subrogation of the insurer „in all the rights of the insured or of the beneficiary of the insurance against the ones liable for causing the damage, except for personal insurance", pursuant to art. 2210 par. (1) Civil Code;

6. as regards actions arising from the commission agreement, art. 2046 Civil Code setting forth that „in case the third party defaults on their obligations, the principal may perform the actions arising from the contract with the third party, subrogating, upon request, in the agent's rights";

7. the right of the one subrogated in the rights of the mortgage obligor or pre-emptive obligor to request the recording of the transfer of the mortgage right or lien based on the documents evidencing subrogation;

8. the right of the former owner of a real property to subrogate in the buyer's rights when the their preemption right upon acquiring it is infringed upon;

9. The subrogation set forth under art. 14 in the Law no. 10/2001 on the legal status of some real properties taken over abusively during the period 6th March 1945–22nd December 1989, which sets forth that "if the property returned under the administrative procedures set forth in this law or by court judgment is the subject matter of a lease agreement, concession agreement, management agreement or agreement of association in participation, the new owner shall subrogate in the rights of the state or of the holding legal entity, the other

contractual clauses being renegotiated, if such contracts were concluded according to law";

10. the right of the guarantor that pays the bill of exchange, acquiring „the right arising from it against the guaranteed one, as well as against the ones bound by the latter, under the bill of exchange" [art. 35 par. (3) in the Law no. 58/1934 on the bill of exchange and the promissory note].

The sixth section of the subchapter refers to **the effects generated by subrogation**. Thus, notwithstanding the type of subrogation, conventional or legal, the main effect of subrogation is that the new subrogated obligor is transferred the claim right from the original obligor.

At the same time, at the same time with the claim, the new obligor is also transferred all its accessories, namely the claim guarantees (liens, mortgage, fidesjussion), as well as all the actions the original obligor might initiate against the obligee, such as the revocation action, the subrogation action or the action for the cancellation of the contract from which the claim rose, the right to be able to initiate the execution of the real properties affected by the guarantees of the debt transferred, etc.

At the same time, in case of personal subrogation, the original creditor is not bound lawfully by any guarantee obligation, and this the reason why the new obligor may not initiate against the first an action in guarantee. Possibly he may request the return of what was paid without being owed, if the requirements prescribed by law are met.

The last section of the subchapter addresses **the effects of partial subrogation**, as regulated under art. 1598 Civil Code, which sets forth that „in case of partial subrogation, the original obligor, holder of a guarantee, may exercise their rights as regards the unpaid part of the claim preferentially against the new obligor". At the same time, „if the original obligor bound themselves towards the new obligor to guarantee the amount for which the subrogation operated, the latter is the one preferred".

The construction of the article above shows that in reality several situations may arise, as follows:

a) the first situation is when the original obligor is not the holder of a guarantee securing their claim, which means that the original obligor and the new obligor shall be obligors without a real or personal guarantee of the same obligee, no preemption right existing between them;

b) another situation is when the original obligor is the lawful holder of a guarantee right, being able to exercise preemptively against the new obligor their rights as regards the unpaid part of the guarantee. Thus, the new obligor is entitled to receive payment only after the original obligor collects the remainder of the debt.

c) the last situation, namely the exception under art. 1598 par. (2) Civil Code, is when the original obligor undertakes towards the new obligor to guarantee the amount for which the subrogation operated. In such a situation, according to the express will of the parties, the new creditor shall be preferred against the original obligor.

At the same time, partial subrogation may take place in the case of the joint co-obligee that paid the entire debt, benefiting thus from the claim accessories, without the obligation maintaining its joint character in the relationships with the other obligees, its right to sue for compensation being divisible against them. We witness a similar situation in the case of the co-obligee indivisibly bound, who, following payment, acquires only the right to receive from the other obligees the payment of their share in the debt.

Last, we witness also a partial subrogation in the case of the fidejussor that pays the debt guaranteed by them, acquiring thus a right to sue for compensation the co-fidejussors as regards the share of each.

Subchapter III of this chapter addresses the rules applicable to the assignment of claim and subrogation pursuant to the Regulation (EC) NO. 593/2008 of the European Parliament and of the Council of 17 June 2008 regarding the law applicable to contractual obligations („Rome I").

Subchapter IV of chapter III of this work analyzes the takeover of debt, as a means of transfer of obligation by the assignor obligee to another person, the assignee obligee, the latter binding themselves, as a rule, instead of the assignor obligee towards the assigned obligor.

The first section contains some preliminary explanations regarding the appearance and evolution of the takeover of debt, while the second section addresses the regulation and evolution of this legal operation.

As regards the requirements for the takeover of debt, the third section lists them as follows:

a) the existence of an older debt transferred from the assignor obligee to the assignee obligee, being accompanied by all its accessories, guarantees and means of defense and exceptions;

b) the takeover of the debt is performed based on the agreement of will between the assignor obligee and the assignee obligee;

c) the existence of the obligor's agreement, so that the transfer of debt agreed between the assignor obligee and the assigned obligee is binding on them;

d) the assignee obligee shall be in principle the only one bound to the obligor, the assignor obligee being discharged from the debt.

Art. 1599 Civil Code sets forth two ways in which the takeover of debt may be performed:

a) „under a contract concluded between the original obligee and the new obligee, pursuant to the dispositions of art. 1.605";

b) „or under a contract concluded between the obligor and the new obligee, under which the latter assumes the obligation".

These two ways were analyzed in the forth section of this subchapter as follows:

As regards the takeover of the debt under a contract concluded between the assignor obligee and the assignee obligee, we consider that this is a mechanism both of transferring an obligation and of transforming it, by means of the agreement of will between the assignor obligee, who is the original obligee of the obligation transferred, and the new obligee or the assignee obligee.

Between the parties, based on the principle *pacta sunt servanda* set forth under art. 1270 par. (2) Civil Code, the contract may be fully effective. But, on the obligor, who is a third party in the contract between the assignor obligee and the assignee obligee, this is not binding, according to the principles of the relative and binding character of the contractual effects.

Thus, for the takeover of the debt to have its transformation effect, the obligor's agreement is required, art. 1605 Civil Code establishing that „the takeover of the debt agreed with the obligee shall have effects only if the obligor agrees". Once the obligor's agreement is acquired, „the new obligee replaces the former one (art. 1600 Civil Code), subject to the provisions of art. 1601, setting forth that „the original obligee is not discharged by the takeover of debt, if proved that the new obligee was insolvable as of the date when taking over the debt, and the obligor agreed on the takeover, without being aware of this circumstance".

In order to acquire the obligor's consent, in the conditions in which this was not granted in advance, the formality of notifying the agreement of takeover of debt should be fulfilled.

The doctrine stated several opinions regarding the legal nature of the notification of the agreement of takeover of debt. Thus, on the one hand, this was considered as an offer to contract, the provisions of the Civil Code in these matters being applied accordingly. On the other hand, the opinion according to which there is no identity between the notification of the takeover of debt and the offer to contract was stated. We consider that one should remove *de plano* the hypothesis according to which the provisions applicable to the offer to contract would apply also to the case of the takeover of debt, when the special provisions in matters of takeover of debt are insufficient.

Following the notification of takeover of debt, the obligor's response regarding such an operation is also required. Pursuant to art. 1606 par. (2) Civil Code, „the obligor may not be asked their consent insofar as they did not receive the

notice" and since its receipt, they should be granted a reasonable term, set by the contractual party that serves the notice or set by default by considering the concrete circumstances.

As regards the reasonable term mentioned under art. 1607 par. (1) Civil Code, we consider that, given the absence of some special provisions on these lines, the ones under art. 1193 par. (1) Civil Code may be taken into account. Thus, the reasonable term is set in such a way that, as the case may be, the addressee of the notice has enough time to receive it, to review it and to send their agreement or rejection. At the same time, we consider that the provisions of art. 1193 par. (1) Civil Code are applicable also in the situation in which the party sending the notice does not set forth a term for the obligor to state their opinion regarding the takeover of debt (or in the case in which the notice is made by both contractual parties, in the hypothesis neither of them sets a term).

The second form of takeover of debt, which takes place under a contract concluded between the obligor and the new obligee, consists of a contract concluded between the obligor and the new obligee, who takes over the debts of the former obligee, the latter's consent not being required for the takeover to become effective.

The takeover of debt under a contract concluded between the obligor and the new obligee is subject to the dispositions of art. 1599 and 1604 Civil Code, but not to those regarding the takeover of debt under a contract concluded with the obligee (art. 1605 – 1608 Civil Code).

The fifth section of the subchapter addresses the effects of the takeover of debt, depending on its type.

Thus, in the case of the takeover of debt under a contract concluded between the assignor obligee and the assignee obligee, we distinguished between the effects occurring prior to the obligor's agreement (or in the case of the obligor's refusal) and the ones occurring subsequently to the obligor's agreement, as follows:

a) *The effects of the takeover of debt under a contract concluded between the assignor obligee and the assignee obligee prior to the obligor's agreement or in case of the latter's refusal*, where we analyzed the relationships established between the parties and the relationships established between the parties and the obligee.

As mentioned, between the parties, the contract is to generate effects according to the principle pacta sunt servanda. Therefore, pursuant to art. 1606 par. (3) Civil Code, „insofar as the obligor did not grant their agreement, the contractors may change or terminate the contract".

The term „terminate" used by the legislator may be considered inappropriate given that it may be constructed as infringing upon the principle set forth under

art. 1270 par. (2) Civil Code, establishing that „the contract is amended or terminated only with the agreement of the parties or for reasons prescribed by law". Therefore, the legislator's intention in this case was to give the parties the possibility to terminate the contract by an agreement stated to this effect.

As regards the creditor, insofar as this did not express their agreement on the contract of takeover of debt, this operation is not binding on them, the original obligee continuing to be bound by the obligor.

b) *The effects of the takeover of debt under a contract concluded between the assignor obligee and the assignee obligee subsequent to the obligor's agreement*. The corroborated construction of art. 1600 and 1605 Civil Code, shows that the main effect of the takeover of debt subsequent to the obligor's agreement consists of the replacement of the former obligee by the new obligee, the latter discharging the first from its obligation to the obligor.

However, there are two exceptions in which the discharging effect does not take place:

1. the case in which the parties to the contract of takeover of debt stipulated that the assignee obligee does not replace the assignor obligee, a possibility provided for under art. 1600 Civil Code („through the conclusion of the contract of takeover of debt, the new obligee replaces the former one, who, unless stipulated otherwise and subject to art. 1.601, is discharged"). In such a situation, the obligor shall have two obligees, who are obliged jointly to fulfill the obligation;

2. the case of insolvency of the assignee obligee. For these purposes, art. 1601 Civil Code sets forth that „the original obligee is not discharged by the takeover of debt, if proved that the new obligee was insolvent on the date when taking over the debt, and the obligor agreed on the takeover, without being aware of this circumstance".

As regards the accessories of the debt, the transfer of debt from the property of the assignor obligee into the property of the assignee obligee does not affect the obligor's rights regarding it, its takeover being performed in the condition in which it was before. Therefore, the obligor shall continue to benefit from, for example, the existence of a criminal clause stipulated in the contract concluded with the original obligee. Moreover, the obligor may perform various actions for protecting their claim.

As regards the claim guarantees, these are not in principle affected by the takeover of debt, they being maintained also after the takeover of debt.

As regards **the takeover of debt under a contract concluded between the assignor obligee and the assignee obligee**, the transformation effect operates without being conditioned upon acquiring the agreement of the former obligee.

In this case also, the discharge of the former obligee does not operate if „the new obligee was insolvable on the date when taking over the debt, and the obligor agreed on such takeover without being aware of this circumstance" (art. 1601 Civil Code).

As in the case of the first form of takeover of debt, pursuant to art. 1602 par. (1) Civil Code, „the obligor may use against the new obligee all the rights they have regarding the debt taken over".

The effects described in the section about the effects of the takeover of debt under a contract concluded between the assignor obligee and the assignee obligee regarding the transfer of claim, the guarantees of claim and the means of defense are applicable also to the case of this second form, a reason for which they were no longer reviewed in the section addressing the effects of takeover of debt under a contract concluded between the assignor obligee and the assignee obligee.

In this chapter, we analyzed also the ineffectiveness of the takeover of debt, as well as the modes of indirect performance of this operation.

At the end of the chapter, we listed the situations expressly set forth in the law whereby the takeover of debt is performed lawfully as an accessory of transferring a thing: in the case of disposal of the property that is the subject matter of the lease agreement, the lease agreement is binding on the person acquiring the said property, if the parties did not stipulate the disposal of the property as a reason for the termination of the contract, all those situations in which the law provides for certain exceptions from the principle of the relative character of the contractual effects, of the transfer of obligations *propter rem* which, being in close connection to a thing, are transferred at the same time with it, etc.

The subchapter ends with the analysis of the takeover of debt according to the UNIDROIT Principles.

Subchapter V contains the analysis of the contract assignment, a situation regulated for the first time by the current Civil Code.

Thus, a legal definition of contract assignment is found under art. 1315 Civil Code, and sets forth that „a party may substitute a third party in the relationships arising from a contract only if the obligations had not been yet fully fulfilled, and the other party agrees on it".

As resulting from art. 1315 par. (1) Civil Code, this operation involves three persons:

a) the assignor contractor or the assignor, namely the person assigning the position in the original contract (assigned contract);

b) the assignee contractor or the assignee, namely the party substituting in the assignor's rights and obligations under the assigned contract;

c) the assigned contractor or the assigned, namely the person whose position under the assigned contract is not changed following the contract assignment.

The legal nature of the contract assignment is determined by the participation of the assigned in the conclusion of the deed whereby the contract is assigned, considering that their agreement is, unless the law sets forth otherwise, required for the assignment to become effective. Thus, we may speak about a bilateral agreement concluded between the assignor and the assignee or by a tripartite agreement or multilateral agreement, when the conclusion of the contract assignment takes place at the same time with the agreement of the assigned, stated in the same document. At the same time, nothing prevents the assignor to grant their agreement in advance on the contract assignment, as a rule, under an express clause in the assigned contract.

The contract assignment may be performed:

a) with a main title, in the form of the agreements described above;

b) with an accessory title, following the disposal of some property that is the subject matter of a contract. This is the case, for instance, of the lease agreement or insurance, a situation in which we may speak about an assignment operating according to law.

c) by expressing a right recognized by law, as in the case of the preemption right;

d) in a conventional way, by means of a bilateral or multilateral agreement;

e) in a legal way, when expressly prescribed by law.

The fifth section of the subchapter addressing contract assignment reviews the requirements for its validity, whereas the sixth section contains references regarding the effectiveness requirements.

As regards the effects of contract assignment, this paper distinguishes between the effects prior to the assigned contractor's consent and the ones subsequent to it.

Legal contract assignment is the mode of transferring a contract according to law. Among legal contract assignments, we should mention:

a) the case set forth under art. 1811 Civil Code, namely the case of the lease agreement binding on the acquirer, if the parties did not stipulate the disposal of the property as a reason for the termination of the contract and the requirements prescribed by law regarding the binding character were met;

b) the case of the person acquiring an insured property;

c) by exercising the preemption right regulated under art. 1733 Civil Code;

d) in case of transferring the enterprise, the unit or some parts of it, the employees' individual employment contracts shall be transferred to the assignee within the transfer as an effect of the takeover of enterprise, unit or some parts of it, pursuant to art. 173 in the Labor Code;

e) the assignment of the contract of concession of property (land) pursuant to art. 41 in the Law no. 50/1991 on authorizing the execution of construction works („the right of concession of the land is transferred in case of succession or disposal of the construction for which this was created. The building permit is transferred in the same conditions").

The last section contains references to the contract assignment as regulated by the UNIDROIT Principles.

Chapter IV of the work addresses the transformation of obligation, more precisely novation.

Novation may be defined as that contract under which the parties in an obligation-based legal relationship settle the existing obligation and replace it with a new obligation.

As regards the types of novation:

a) art. 1609 par. (1) Civil Code describes objective novation, which „takes place when the obligee undertakes towards the obligor a new obligation replacing and settling the original obligation";

b) art. 1609 par. (2) and (3) Civil Code describes subjective novation, taking place, on the one hand, „when a new obligee replaces the original one, who is discharged by the obligor, the original obligation being thus settled. In such a case, novation may operate without the original obligee's consent" and, on the other hand, „when, as an effect of a new contract, another obligor is substituted to the original one, towards whom the obligee is discharged, the old obligation being thus settled".

What is characteristic of the first type of novation is that the object or cause of the obligation-based legal relationship is changed, whereas the parties remain the same.

Novation by a change of obligee takes place „when a new obligee replaces the original one, who is discharged by the obligor, the original obligation being thus settled" [art. 1609 par. (2) thesis I].

We speak thus of novation through the replacement of the original obligee with a new obligee, the object of obligation and the obligor remaining the same.

The novation through the change of obligee operates without requiring the consent of the original obligee, pursuant to art. 1609 par. (2) second thesis („In such a case, novation may operate without the consent of the original obligee").

At the same time, following the novation through the change of obligee, the original obligee shall be discharged, their debt being settled.

This form of novation is no longer a fact following the express regulation of contract assignment and takeover of debt, given that, unlike the two, the obligation created by novation is not accompanied, unless stipulated otherwise, by the guarantees and all the accessories of the old obligation.

Novation through the change of obligor involves the replacement of the original obligor by a new obligor, the obligee being discharged by the former obligor following the obligation assumed towards the new obligor.

Novation through the change of obligor is a legal operation requiring absolutely the consent of all the persons involved: the obligee, the new obligor and the original obligor. If the existence of the agreement of will between the obligee and the new obligor is essential for the novation to take place, the consent of the original obligor is required for discharging their former obligee. The consent may be expressed by the original obligor by taking part in the conclusion of the novation agreement or by another document than the agreement, notified to the obligee and the new obligor.

As regards the novation requirements, the novation contract should be concluded in the form prescribed by law for the valid conclusion of the original contract. For example, if the obligation that is the subject matter of novation resulted from a contract regarding which the law prescribes a certain form *ad validitatem*, the novation contract should be in the same form.

In addition, novation should meet the following special requirements:

a) the existence of a former obligation, to be settled;

b) the valid creation of a new obligation;

c) the new obligation should contain a new element by comparison with the old obligation;

d) the express intention of the parties to novate.

The effects of novation are reviewed in the fourth section and are: the settlement of the old obligation (the extinctive effect of novation) and the creation of a new obligation (the generating effect of novation).

The simultaneous appearance of these two effects generates a number of consequences regarding the guarantees (and accessories of the original claim), the relationships between joint obligees and fidejussors, as well as regards joint obligors. At the same time, novation has effects also as regards the means of defense.

As regards the guarantees of the original claim, our attention was drawn by art. 1611 par. (2) Civil Code which sets forth that „as regards novation through the change of obligee, the mortgages related to the original claim do not subsist

over the property of the original obligee without the latter's consent and neither are they transferred over the property of the new obligee without their consent".

This part of the law seems normal given that novation has a discharging nature as regards the original obligee, such an effect would not occur if the mortgages were maintained over their property.

As regards the situation of the new obligee, their consent is required for the mortgages guaranteeing the original obligation, to be settled, being able to be transferred over their property. In our opinion, the term „transfer" used by the legislator is not consistent with the effects generated by novation, especially with the extinctive effect.

We claim this fact pursuant to the provisions of art. 2344 Civil Code, which set forth that the mortgage by its very nature is accessory and „subsists insofar as the obligation that it guarantees exists". Thus, given that the mortgage guaranteed the fulfillment of obligation settled by novation, considering its accessory character, this shall have the same fate as the guaranteed obligation, not being able to be transferred over the property of the new obligee. This explanation seems useful for justifying the need for acquiring the consent of the new oblige, for the mortgage to be able to be „transferred" over their property; in our opinion, this is a genuine creation of a mortgage.

Chapter V of the paper contains a brief review of the modes of transfer and transformation of obligations as regulated in the law systems of other countries.

The paper ends with conclusions and proposals of *de lege ferenda*.