



The Novation - Means of Transformation Civil Obligations

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Abstract: The present work aims at the application, *in concreto*, of the new provisions on novation, providing a useful working tool for private legal practitioners. It is the result of practical experience and the interpretation approach dedicated to new provisions in the field of civil liabilities. Through the analysis of the multitude of works in this field I have highlighted the legislative evolution as well as the new orientations in the doctrine and jurisprudence concerning the processing of obligations. Far from being exhaustive, the comment wants to offer solutions to the challenges posed by the complexity and the continuous need to adapt to the liabilities to the requirements of a company found in a continuous, sometimes chaotic, development.

Keywords: obligational legal report; dynamic of liabilities; adaptability; legal effects

1. Introduction

The obligational right dominates all rights for the obligation is itself the type of legal relations that can be established within a society.

Novation represents the dynamic image of this institution by surprising its possibility to be converted depending on the need of the one operating it, depicting the complexity and power of adaptability of the obligation.

Through a conventional way, the parts of a legal report extinguish an old obligation and replace it with a new one. What is characteristic to novation is the fact that the termination of the legal obligational report does not mean cessation of its effects, but also his transformation into a new legal obligational report. The effects of the initial obligation convert in the effects of a new obligation which was born as a result of the novation process.

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2. Transformation of Civil Liabilities

The legal obligational report which is established between the creditor and the debtor has an economic content. It includes the right of claim belonging to the creditor and the debt that belongs to the debtor. The claim is part of the patrimonial assets of the creditor and the debt is part of the passive patrimony of the debtor. (Adam, 2004, p. 488).

Sometimes, the parties consider the obligation as an asset, a patrimonial value. If the object presents an interest not only for the creditor, but also for other persons, the obligation can serve as a tool of guarantee or payment. The phrase “obligations flow” means those changes which intervene in the structure of liabilities, but that do not produce their extinction but only their transmission or transformation. (Adam, 2004, p. 489). Both transformation and transmission of obligations entail an amendment of their original formula, subjects, the content of the obligational report. (Pop, Popa & Vidu, 2012, p. 633)

The transmission of obligations may take place *mortis causa*, through inheritance, provided that the obligation does not have personal character or through *inter vivos* acts. The transmission of obligations through acts between the living requires that the right of claim or duty from the content of legal obligational report to transmit from one of the parties towards a third party, without affecting the being or the content of the liability, through the assignment of claims, subrogation to the rights of the creditor by paying the debt, by taking over the debt or contract assignment.

The transformation has as effect the termination of the existing obligational report and its replacement with another obligational report that shows a new element. This effect occurs as a result of the change, through conventional route, of one of the initial liability items: topics, object, cause, sanction or modes through novation.

In the case of novation, the old obligation turns into a new obligation, the old one being paid, together with the accessories and warranties which accompany it, with certain exceptions that will make analysis of the next row. Through the assignment of claims and personal subrogation the liability is transmitted with all its accessories and warranties to the subsequent creditor. Regarding the acquisition of debt, the transmission of the liability it establishes with all accessories, less the guarantees consented by third parties, except in the case in which the initial debtor was not freed of debt and the guarantees of the initial debt were maintained in full.

In the current regulations the transmission and transformation means of the obligations are set out in a common title -Title VI of the Civil Code entitled “the transmission and transformation of obligations”, without distinguishing between the means of transmission and the transformation ones. The operation of contract assignment is regulated differently in the chapter dedicated to contracts.

2. Novation

2.1. Notion. Origin. Utility

Novatia represents a legal mechanism through which the parties of a legal obligational report terminate an old obligation replacing it with a new one. (Statescu, Barsan, 2008, p.372)

What characterizes novatia is that the termination of the legal obligational report does not mean cessation of its effects, but its transformation into a new legal obligational report. The effects of the obligation convert in the effects of a new obligation which was born as a result of the novation process.

Although the first effect of novation is the extinctive one, this institution does not depict a way of extinguishing obligations. The specifics of this operation consists in indissoluble connection that exists between the extinguishment of the original obligation and the birth of the new obligations, the two effects are indivisible – the extinguishment of an obligation has as cause the birth of the other and vice versa.

On the other hand, novation should not be confused with the simple modifications brought to an obligation. Changes of an obligation, even renewing, cannot be considered or legally qualified as novation (Pop, 2006, p. 296). After modifying an obligation it will keep its nature, characters and its accessories. On the contrary, the obligation subjected to novation extinguishes with all warranties and accessories that accompany it.

We are not in the presence of a novation if the debtor constitutes a guarantee in favor of the creditor or if the creditor in giving up such a warranty that accompanies his claim. Usually, none of the specific elements (or very few) pass to the new obligation. So, for the novation to exist, it is not enough that the original obligation be modified, but its transformation into a new obligation is necessary. (Pop, 2010, p. 287)

The origins of this type of operation can be found in Roman law. It has a special importance in the period of legal rigidity, during which the liability transmission was not permitted. In this context, novation appeared as a disguised means of achieving the transmission of an obligation by changing or indirectly replacing the creditor or the debtor with another person (Hanga & Bocsan, 2005, pp. 203-204). By its very nature - extinguishment of the initial obligation and birth, in its place, of a new obligation, made possible the connection between the new debtor and creditor or the other original part of the old legal report. Novation that was done by changing the creditor equivalents, from an economic and legal point of view, with assignment of claims and the one made by the debtor with a transfer duty.

In the classical Roman law novation was defined by Ulpian¹ - *prioris debiti in aliam obligationem transfusio atque translatio* - a transfer of debt from the old obligation into a new obligation, so that, in the time of Justinian, novation to be recognized through conversion of debt between same parties, thus replacing the old obligation with a new one.

Today all modern legal systems recognize and regulate the assignment of claims with particular title. This is why novation achieved through the change of lender is less used, practically falling into disuse because the parties have no interest to resort to novation in order to achieve, through a disguised way, the transfer of claims.

In the private law relations, novation by changing the object, cause or modalities represents a current legal instrument in the renegotiation of debt, especially when this is not possible through other legal transactions.

2.2. Types of Novation

In relation to the elements of the obligation that is going to be subjected to transformation, novation, can be: objective and subjective.

Objective novation (*mutata causa debendi*) occurs between the initial creditor and debtor, by changing the object, cause or modalities of the initial obligation. According to article 1609 paragraph (1) of the Civil Code “the debtor contracts towards the creditor a new obligation, which replaces and extinguishes the original obligation”.

¹ Roman Legal Counselor who has worked at the time of the emperor Septimius Severus (193-211 AD).

Objective novation *through object change* occurs between the creditor and the debtor's initial legal obligational report. For the existence of this type of novation it is necessary for the debtor to contract from his creditor a new debt to replace the old one and extinguish it, such as executing a particular service in the account of payment of a sum of money or vice versa.

If the debtor immediately pays something else then he owes, we are no longer in the presence of novation but commissioning payment - *datio in solutum*. (Adam. 2004, p. 519). At the same time changing warranties or modes of payment (for example, a currency in place of another) do not constitute novation, because the obligation itself remains unchanged, or may grant a term of payment, remission of a portion of the debt or taking new guarantees for the payment of the debt.

Novation achieved by changing causes requires that both the subjects and the object of the initial obligational report remain unchanged. The element of novelty is the cause of the obligation, or, in other words, its source.

This can intervene if, for example, a repository is intended to be changed into a debt in cash or the deposit of a certain good needs to be changed into a consuming loan (*mutuum*) and vice versa. The operations will take place between the same persons (identity of creditor and debtor), on the same object (the certain good in the case of loan assets of consumption), what is changing is the cause or the obligation's source, or a consumption or loan contract in the place of deposit.

In the case of novation achieved by changing the modes we assist to its transformation from a pure and simple obligation to a conditional obligation or vice versa. Changing the term does not constitute a novation by changing modes because the term doesn't modify the liability but influences only its execution.

Changing the condition means adding or removing a condition so that, as a result of operation, to find elements of difference regarding the nature, characteristics, warranties and its accessories.

Subjective Novation, according to article 1609 paragraphs (2) and (3) of the Civil Code is that which is done by changing the creditor or debtor of the initial liability.

The change of debtor occurs when a third party undertakes to the creditor to pay the debt and can operate without the consent of the initial debtor, which is liberated. In this case, novation is achieved through expromission, through the mere intervention of a third party that undertakes in the place of the initial debtor's

obligation, the obligation being validly paid by any person, even by a disinterested one.

Changing the creditor intervenes through the substitution of the original creditor with a new one, operation after which the debtor will be liberated from the creditor of the old obligation, being bound, as effect of novation, to the new creditor.

For example, a person as a seller agrees with the buyer to pay the price to a third party, as new creditor of its debt. In this case, the debtor will be freed by the initial creditor, being bound to the new one, as effect of novation. Instead, we cannot affirm that we are in the presence of a novation through the change of the debtor if he has authorized a third party to receive payment in its place and in his name.

There are some similarities between this legal operation and assignment of claims or subrogation in the rights of the paid creditor as in the case of these operations the individual creditor changes. The difference is made but the initial obligation which, in the case of novation, extinguishes together with its accessories and warranties and turns into a new obligation, which contains a new element and in the case of assignment of claims and subrogation remains the same, being transmitted to the new creditor. Also, in the case of assignment of claims, the assigned debtor may object to the assignee all the exceptions relied on by the assignor, while in the case of novation, with a new obligation being born, the debtor will not be able to oppose to the new creditor the exceptions he had against the initial creditor.

2.3. Conditions of Novation

Novation represents a convention. Therefore, in order to be valid and effective it must fulfill the general conditions of the validity of any contract - stipulated by art. 1179, paragraphs (1) and (2) of the Civil Code (capacity, consent, the determined and legitimate object, the licit and moral cause, as well as form, if applicable), as well as special ones, which are required to be fulfilled to nova an obligational report: the existence of two successive obligations in time; the parties' intention to nova and the existence of a new element in the structure of the new obligations.

The existence of two successive obligations in time is specific of novation, this being based on the indissoluble connection between the birth of a new obligation and the extinguishment of the pre-existing ones.

If there is no pre-existence obligation we cannot speak about novation and the new report would not have a basis on which to graft. If this obligation is hit by absolute nullity it cannot form the subject of a novation. In case that the obligation would be hit by a relative nullity, through novation this obligation would be confirmed so it can transform into a valid obligation, insofar as the one who could invoke the invalidity of the obligation expresses a valid consent and is fully capable (Ciochina-Barbu, 2012, pp. 251-252).

Through novation, an imperfect civil obligation (natural) can turn into an actual civil obligation. Instead, novation cannot be admitted in the hypothesis in which the old obligation had as an object the performance to had over a determined individual good which fortuitously perished, without the guilt of the debtor, at the time of the contraction of the new obligation because, at that time, the old obligation was extinguished *ope legis* by caducity. (Foliers, 1998, p. 69)

Obligation under condition cannot be novated in a new obligation under the same condition. Adding or removing a resolutive or suspensive condition that affects the initial obligation is not novation. Novation has as effect the extinguishment of the original obligation and the simultaneous birth of a new obligation, or, to add or remove a condition that affects the obligational report; it is appreciated that it has the value of a simple change of one and the same obligation. (Pop, 2006, p. 117)

The intention or the will of the parties to nova (*animus novandi*) consists in the determination of the parties of the convention through which novation is achieved so that the legal operation will have as effect the extinguishment of the existing obligation and the birth of a new obligation.

This condition imperatively arises from the provision contained in article 1610 of the Civil Code according to which “novation is not presumed. The intention to nova shall not be doubted”. The willpower to nova is removed from the sphere of presumption. In order to nova, it is desirable that the subjects of the legal report achieve a clearer, if not explicit, formulation of their intent to nova.

The new liability must contain a new element (aliquid novi) compared to the old obligation. In the absence of this element the convention that is concluded between the parties constitutes only a confirmation of the old liabilities, useless in terms of novation.

The new item can consist in changing the parties, object or cause of the original legal report subjected to novation as well as in transforming a pure and simple

obligation into an obligation under condition and vice versa. This allows making the distinction between the various kinds of novation regulated by the texts of the Civil Code.

2.4. Effects of Novation

Novatia produces a double effect: extinctive (extinguishment of the original obligation) and creator (the birth of a new valid obligation). The birth of the new obligation is caused by the extinction of the old obligation and vice versa, the old obligation shall be extinguished only if a new obligation is born, the two effects being in interdependence. This transformation entails important legal consequences:

Through novation the old liability is extinguished together with all its warranties which, by being accessories of the original debt, ceases simultaneously with it. According to the article 1611, paragraph (1) “the mortgages that guarantee the initial claim will not accompany the new debt unless it has been expressly stipulated.” Referring to the situation of non-application of the rule that the text expresses concerns the situation in which the constitutor expressed his consent – at the birth of the mortgage or later, until objective novation is achieved - as a guarantee that it will be transmitted to operate in connection with the new obligation.

In the particular case of novation by changing of debtor, the mortgages imposed on assets of the original debtor that accompany the initial claim, do not subsist without the consent of the latter, nor are relocated on the property of the new debtor without his consent.

When novatia operates between the creditor and one of the debtors, the mortgages linked to the old claim can be transferred only to the ownership of the co-debtor who contracts the new debt. The rule has a suppletive character; the liberated co-debtor can express his agreement for the guarantee on his assets to subsist.

In terms of solidarity and novation, article 1613, paragraph (1) of the Civil Code stipulates that “novation that operates between the creditor and one of the solidary debtors liberates the other co-debtors with regard to the creditor. Novation which operates with regard to the main debtor liberates the sureties”. By exception, the original claim subsist novation if the borrowers or surety do not give their consent required by the creditor to be held by the new obligation.

A freestanding hypothesis concerns the situation in which a solidary creditor agrees with the novation through the change of the debtor. According to the article 1614 of the Civil Code, in this situation, novation will be opposable only *pro parte*, by reference to what he was entitled from the claim of the creditor who novated.

The new obligation always has a contractual character, because it arises from the will agreement of the parties, no matter what was the source of the old obligations which has faded. In case of novation through change of the debtor, the new debtor may oppose to the creditor only the means of defense related to the new legal obligational report and in terms of the initial legal report only the exception of absolute nullity, which constitutes its source.

3. Conclusions

The transformation of obligations represents a contract through which at least one of the components of a civil obligational legal report are changed; they have as their main object the replacement of the initial liability with a new, valid obligation. It represents that segment of the obligational law that captures the complexity of civil liability, giving it a dynamic image.

Found in a continuous change, *jus civile* reflects the degree of development and the needs of society. Adaptability and the advantages that the novation institution brings to economical life make it to be recognized today in the majority of the modern legal systems.

Alongside assignment of claims, subrogation in the creditor's rights by paying the debt and debt takeover - that represents the transmission obligations, novation represents the institution of civil law which completes the circulation of the legal obligational report, giving the rightful subject a wide range of methods that can be used to capitalize its pecuniary civil rights.

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