

# ASSIGNMENT OF CREDIT-AS A WAY TO ACHIEVE THE TRANSFER OF CREDIT THROUGH INDIRECT LEGAL MEANS IN THE ROMANIAN PRIVATE LAW AND OTHER COUNTRIES' LEGISLATIVE SYSTEM

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## 1. Notion. Characteristic features

### Definition. Features.

Since credit transfer through mortis causa documents means regulating the inheritance matter in details, its transfer through inter vivos documents does not have an express regulation in the Romanian Civil Law. In the legal literature, they considered<sup>1</sup> that the main reason why this institution has no regulations is the focus on the creditor's interests. What characterizes the assignment of credit is the replacement of the debtor that is a reverse operation to the assignment of credit which implies the replacement of the creditor. However, in the relationship on duties, the debtor is not to be excluded, as the creditor always takes into account certain qualities of the debtor, like: solvency, honesty etc. Therefore, the lawyer did not consider it right to adjudicates a form of credit transfer which, implying the replacement of the debtor without the creditor's assent, would hurt the latter's interests<sup>2</sup>.

Although it is not regulated, they pointed out that<sup>3</sup>, considering the principle of the freedom of conventions, nothing overrides the fact that parties could proceed to a credit transfer.

Definition: Assignment of credit is a convention through which the debtor (the assignee) transfers his credit to another person (the assigner), who makes a promise in his place towards the creditor (assigned)<sup>4</sup>.

By definition with the assignment of credit, the assignment of credit would be performed without the assent of the creditor assigned, who could be notified only on the assignment contract between the two succeeding debtors. However, unlike the assignment of credit, where the creditor did not matter in the legal relationship on credit, in the assignment of credit the observance of rights does not allow the replacement of the debtor without the assent of the creditor, because the personality of the debtor has a vital importance<sup>5</sup>. That is why the debtor assigner, performing an

<sup>1</sup>Păul Mircea Cosmovici- Drept civil. Legislație, All Publishing House, Buc., 1998, p. 253;  
Ibidem;

<sup>3</sup>C. Hamangiu, I. Rossetti Bălănescu, Al. Băicoianu- Tratat de drept civil roman, vol. II, 1929, Buc., "Națională" S. Ciornei Publishing House;

<sup>4</sup>Tudor R. Popescu, Petre Anca-Teoria generală a obligațiilor, Editura Stiințifică, Buc., 1968;

<sup>5</sup>Ibidem;

assignment of credit which would represent a homologous act to that of an assignment of credit, focusing on the passive side of the relationship on credit. The principle of law adjudicated by the French Civil Law “nul ne peut être contraint à changer de débiteur” (nothing can be agreed on through the replacement of the debtor) – fosters the above mentioned rules.

However, there are cases where the creditor can require the credit from other person than his initial debtor<sup>6</sup>, through means that we will study further on.

But the creditor cannot be deemed to be given another debtor without his assent. That is why, the legislations that regulate the assignment of credit do not include but an imperfect assignment in their regulations, where for the freedom of the former debtor, it requires the assent of the creditor<sup>7</sup> or an assignment of contracts<sup>8</sup>. In practice, however, they use an imperfect delegation<sup>9</sup>.

Some authors<sup>10</sup> argue for the lack of regulations on the assignment of credit in our Civil Law through a lack of practical interest of this legal operation motivating that as a rule, they lease (and, as a result, they acquire), active elements of the patrimony, among which the bonds, but there are no powerful interests to acquire passive elements of the patrimony. However, we will point out, what is the practical of this institution.

Characteristic features. Because of a lack of an express and special regulation, the features of the assignment of credit cannot be identical to those of the assignment of credit. The initial the replacement of the debtor is of interest both to the persons who made a promise to guarantee that credit (the owner of the pledged or mortgaged good) or made a promise together with the debtor (the associate co-debtors)<sup>11</sup>.

The main features of the assignment of credit are:

1. The existence of an old debt which could be transferred to the debtor assigner with all the characters, warranties and exceptions which accompany it;
2. The initial obligation persists irrespective of the replacement of the debtor;
3. The initial debtor is reassigned and in his place another debtor is kept by the creditor, without changing the content of the credit;
4. It is only achieved by the assent of the two debtors.

Since in legal systems influenced by the French Civil Law or by the Common Law there is no regulation proper on the assignment of credit, which led to the appeal made to other institutions which run similar but not identical results, in other legal systems this institution by which the credit transferred between the debtors keeps its identity is already known.

This silence of our Civil Law was interpreted by some authors as having the meaning that the assignment of credit is non-admissible, because by introducing another person in his place, the debtor breaks the personal character of the credit to perform and the principle of the relativity of contract effects.

<sup>6</sup>Cf. Mestre, De quelques changements de débiteur – Rev. Trim. Dr. Civ., 1991, 531;

<sup>7</sup>Cf. Art. 176 of the Swiss Law of Obligations, art. 415 of the Civil Law of RFG (B.G.B.), art. 477 of the Greek Civil Law;

<sup>8</sup>Cf. Art. 1400 and the next of the Italian Civil Law;

<sup>9</sup>Henri, Leon and Jean Mazeaud- Leçons de droit civil, Paris, 1996, vol. II, p. 1045

<sup>10</sup>See Tudor R. Popescu, Petre Anca- the quoted work, p. 395; P.M.Cosmovici - the quoted work, p. 253

<sup>11</sup>Liviu Pop- Teoria generală a obligațiilor, Lumina Lex Publishing House, 1998, p. 466;

Both jurisprudence and the majority of the authors consider that the assignment of credit is admissible, based on the contractual freedom and on the analogy reasoning on the admissibility of the assignment of credit, namely: either indirectly by means of innovation, of perfect delegation or of stipulation for another, or even directly by the assent of the creditor<sup>12</sup>.

#### Brief History

The pre-classic Romanian Law did not admit the assignment of credit for the same reasons why it did not admit the assignment of credit, that is the interdiction of the replacement of the initial persons in the relationship on credit. Later on, during the classical period, they admitted to directly achieving the assignment of credit through the useful act granted to the assigner, which otherwise replaced the assignee on the original credit which was not admitted and to directly achieving the assignment of credit which could happen indirectly through innovation by means of the replacement of the debtor and by judicial empowerment (*mandatum in rem suam*). In the last case the debtor delegates a person to replace the plaintiff in the trial against his creditor and to pay him the amount of money provided in the sentence.

#### Practical Utility of the Assignment of credit

The utility of the assignment of credit proves its validity when faced with a judicial relationship: the creditor (*Primus*) has a credit to cash from his debtor (*Secundus*) who, in his turn has the capacity of a creditor towards *Tertius*. Supposing that the debt of *Secundus* from *Primus* is equal to that of *Tertius* from *Secundus*, the assignment of credit will serve to free *Secundus* and his exclusion from the relationship on credit: *Secundus* will lease his credit to *Tertius*, lease accepted by *Primus*; the latter will have *Tertius* as debtor in place of *Secundus* and this is neither the creditor of *Tertius* nor the debtor of *Primus*.

We can notice that we can obtain the same result through an assignment of credit<sup>13</sup>, too. So, *Secundus* can lease to *Primus* his credit against *Tertius*. What would be then the utility of the assignment of credit? It lies in the fact that in the case of the assignment of credit *Primus* will have the credit of *Secundus* against *Tertius*, as compared with the assignment of credit where *Primus* keeps his own credit. Either one of these credits may be more profitable than the other, either through the creditor or through the debtor. They can have characteristics, neither the same warranties nor the same due term. So, it is relevant the fact that credit of *Primus* or the credit of *Secundus* resist the operation. Therefore, we infer the utility to use either the assignment of credit or the assignment of credit.

## 2. Procedures to Indirectly Achieve the Assignment of credit

As to the replacement of the passive subject of the legal relationship, we mention the fact that they assign those debts which shall be personally returned by the debtor, since they were established according to him (*intuitu personae*)<sup>14</sup>.

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<sup>12</sup> Ioan Albu – *Contractul și răspunderea contractuală*, Dacia Publishing House, Cluj-Napoca, 1994, p. 207;

<sup>13</sup> C.Hamagiu and co. – the quoted work, p. 662

<sup>14</sup> Gh. Beleiu- *Drept civil. Privire generală asupra dreptului civil*, Buc., 1976, p. 140;

We also mention the fact that the project of the Civil Law R.S.R. comprised, in art. 395-398, a regulation on replacement, directly, of the passive subject of the legal relationship, that is “assigning credit”.

The assignment of credit shall release the ex-debtor, a particular transfer of credit and shall achieve it by the convention of the two succeeding debtors, depending on the assent of the creditor.

The assent of the creditor. Thus, the release of the initial debtor cannot be performed without the consent of the creditor. What interests us most, however, is the way the creditor intervenes in achieving the operation. According to the authors of the legal literature<sup>15</sup>, the only item relying on the traditional legal principles, the willingness of the creditor plays a vital role; assignment of credit may be achieved only through his intervention; until the consent of the creditor, it cannot exist except as a draft, as an offer made for him by the two debtors to release one and take on the other.

The German Civil Law, in art. 415, align. (1) diminished the role of the creditor to a minimum: the convention is concluded on the agreement of the two debtors, and the agreement of the debtor only makes the operation to be opposable<sup>16</sup>. But to justify such a solution theoretically is not easy<sup>17</sup>. When credit transfer operates with a particular title, there is a substitution of a person with another one as debtors, in a prior legal obliging relationship, the replacement of the passive subject not affecting the very legal relationship and its accompanying advantages: the creditor’s warranties and exceptions it might raise<sup>18</sup>.

Speaking about the procedures to indirectly achieve the assignment of credit, we can say that they fall into two categories:

1. Procedures to achieve the assignment of credit through which the creditor acquires a right against a second debtor keeping the right against the initial debtor, that is the transfer of credit with the creditor protection;
2. Procedures to achieve the assignment of credit through which the creditor acquires a right against debtor, the first debtor being reassigned, or the transfer of credit without the protection of the creditor.

## 2.1. Assignment of credit with Protection of the Creditor

The main mechanism of achieving this transfer is the delegation<sup>19</sup>; but an almost identical transfer may be achieved through means such as: the stipulation for another one, payment notice, and sub-contract.

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<sup>15</sup>Salleilles- De la cession des dettes, in *Annales de droit commercial*, Buc., 1890, Coviolo- Della successione ne’ debiti, a titolo particolare, in *Archivio giuridica*, t LVI and t LVII, 1896-1897; Delbruck- Die Uebernahme fremder Schulden nach gemeinen und preussischem Rechte, Berlin, 1853;

<sup>16</sup>Marcel Planiol- *Traite elementaire de droit civil*, Tome deuxieme; Les preuves. Theorie generale des obligations. Les contracts. Privileges et hypotheques, Paris, 1912, Librairie generale de droit et de jurisprudence, p. 137;

<sup>17</sup>Eng. Gaudement- *Etude sur le transport de dette a titre particulier*, these, Dijon, 1989;

<sup>18</sup>Salleilles- *Theorie de l’obligation d’apres le projet du Code civil allemande*, Paris, 1890, no. 106-108;

<sup>19</sup>Cf. Billian – *La delegation de creance*, L.D.G.J., 1989;

In this case we cannot speak but of a credit viewed individually, that is of a transfer with a private title. But this transfer may not be imposed to the creditor against his will, a third party becoming his debtor that he did not choose, but who do not have the qualities and the same warranties as the debtor. So, the protection of the creditor, is practically always ensured. It may be achieved through two means: either the credit transfer is achieved by the assent of the creditor, or the transfer does not release the initial debtor who will continue to be liable for the credit performance in front of the creditor. Sometimes the two means are performed in association, like in the sub-contract<sup>20</sup>.

## 2.2. Imperfect Delegation

Without getting into details, as this institution will be dealt with in a separate section, we will outline only the procedure to achieve the assignment of credit through the imperfect delegation.

Imperfect delegation occurs when the creditor delegator accepts the debtor delegated but does not consent to the delegate being reassigned, keeping two debtors, both the delegator and the delegate<sup>21</sup>.

Within the delegation, the third party (delegate) accepts to pay the creditor (delegator) the debt of the initial debtor (delegator) and many times, the cause is the fact that the delegate is himself debtor of the delegator and, as a result, paying the delegator, pays his own debt.

Imperfect delegation does not determine an innovation and implies a match of the willingness of the three participants to this operation, and the consent of the creditor as well. It is used because the creditor (delegator) obtains a personal direct action against the delegate, without releasing the delegator.

## 2.3. Stipulation for Another

Obligation-with the meaning right of credit had, in the Roman Law, two effects- a normal one, consisting in the right of the creditor to ask for the obligation to be performed and an accidental one, which consists in the right of the creditor to obtain liquidated damages when the obligation is not performed.

One of these normal effects was the stipulation for another, besides the adjacent actions (*adiecticiae qualitatis*) and representation – in case the obligor was a “*sui iuris*” person.

In Rome, one of the standing principles, with some exceptions, was that of the relativity of the contract effects, “*res inter alios acta, aliis neque nocere, neque prodesse protest*”.

Implicitly, from this principle there come two other principles – the nullity of the stipulation for another and the nullity of the promise for another.

The stipulation for another, the stipulation to another’s interest, is a verbal contract (through the use of the verb “*spondeo*”) by which a credit comes into being in favour of a third party, who becomes creditor without taking part in the conclusion of the

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<sup>20</sup> Alain Benabent –*Droit civil. Les obligations*, Paris, 1995, Montchrestien Publishing House, the 5<sup>th</sup> edition, p. 383;

<sup>21</sup> Liviu Pop- the quoted work, p. 466;

contract. For example, Primus sells his house to Secundus and deals through a stipulation with this one for him to pay the price of the house to another person, Tertius. As shown above, this document was null as to the provider (Primus), since to possess means having a financial interest. The document is null as to Tertius, because he did not take part in its conclusion. The Romans expressed invalidity by the rule “*alteri stipulari nemo potest*” (nobody can stipulate for another).

However, ever since old times, they indirectly came to such a contract producing its effects. Thus, after the stipulation for a third party took place, the provider concluded with the same person a verbal contract, called “*stipulatio poenae*” (the stipulation of damages), by which the promisor shall pay an amount of money in case the first contract would not have been enforced. This may not cover the nullity of the first contract.

But the promisor will execute it not to pay the amount of money provided in the second contract, normally this amount being larger than the value of the object in the first contract<sup>22</sup>.

In time, they also accepted some exceptions from the principle *nemo alteri stipulari potest*.

In the current legal system- the stipulation for another constitutes the only real exception to the principle of relativity of the legal document effects.

Definition. Regulation. Stipulation for another or the contract in favour of a third party is the bilateral act by which – the provider- agrees with the other party- the promisor – that the latter to perform a service in favour of a third person – the third beneficiary party, neither directly nor through representation<sup>23</sup>.

The right of the third beneficiary party comes out directly, by the power of the convention between the provider and the promisor. But the exercise of this subjective right depends on the will of the third beneficiary party.

The Civil Law applies the stipulation for another in matter of life income (art. 1642) and donation with an assignment – *donato sub modo* (art. 828 and 830).

Terms of validity:

- a) it shall meet the terms of validity of any contract;
- b) it shall comprise a clause by which the third beneficiary party could acquire, indirectly, with the agreement of the contract parties, a right in itself against the promisor;
- c) it shall determine or indicate sufficient elements to be able to determine the beneficiary party.

The effects of the stipulation for another. The main effect is creating, by the common will of the provider and the promisor, of a direct right for the beneficiary, with no acceptance being necessary from his part. However the beneficiary entitled to refuse this right or expressly waive the right to refuse it, confirming it<sup>24</sup>.

<sup>22</sup>St. Tomulescu- Drept privat roman, Tipografia Univ. din Buc., 1973, p. 241;

<sup>23</sup>h. Beleiu- Drept civil roman. Introducere în dreptul civil. Subiectele dreptului civil. “Sansa” S.R.L. Publishing House, Buc., 1993, p. 176;

<sup>24</sup>Dumitru Rădescu- Dicționar de drept privat, Mondan '94 Publishing House, Buc., 1997, p. 926;

As a result, we cannot speak of the capacity of the beneficiary, his will does not play any role in creating this right. His assent may intervene any time even after the death of the provider or the promisor, as his assent is not the acceptance to an offer. If the beneficiary does not refuse the right he was granted, this takes shape when the contract is concluded between the provider and the promisor and not when the acceptance occurred.

The beneficiary right may not be repealed by the provider, except when the law and the parties' contract expressly provide this possibility. However, even in this situation, the repeal is no longer possible after the beneficiary accepted to acquire his right<sup>25</sup>.

In the relationship between the provider and the promisor, the duties they accepted towards each other produce their effects normally. The provider has also the capacity of a creditor of the stipulation for another, that is he may ask the promisor to execute his duty towards the third party beneficiary, and in case of default, he may claim the exception of default, and the fulfillment by force of the agreement or the contract resolution by returning the duty he executed to the promisor, and if the case, with liquidated damages.

In the relationship between the third party beneficiary and the promisor, the beneficiary becomes the creditor of the promisor at the very moment the contract is concluded, and, directly, without the right to be passed through the provider's patrimony. In his capacity of creditor, the beneficiary may claim the promisor the fulfillment of the stipulation in his favour, as well as liquidate damages in case of default, and he may not claim the contract resolution, as he is not a party to the contract and does not have any interest in terminating it.

The promisor may oppose the third party beneficiary all the duties he may oppose the provider, including the exception of default of the provider's duties toward him.

Between the provider and the beneficiary, the stipulation for another does not determine any legal relationship on duty to perform.

If the provider was a debtor of the beneficiary, the fulfillment of the provision stipulated for him, shall have the value of a payment, repealing the duty to perform.

If the real intention of the parties was that the provider should donate to the beneficiary, the beneficiary will have to report his donation to the inheritance, if he attends the provider's succession and has to comply with its reduction, if it exceeds the available amount.

As to the other situations, when the beneficiary does not attend the provider's succession, he will be protected both by the heirs and by the provider's creditors, who will not be entitled to claim the relationship or the suppression of freedoms made under the shape of the stipulation for another, as its object is never part of the succession.

The stipulation for another may lead to an assignment of credit when the provider is a debtor of the third party beneficiary within another prior legal relationship. In the contract between the provider and the promisor, they may consider that promisor shall pay the provider's credit to the third party beneficiary, the provider's creditor<sup>26</sup>.

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<sup>25</sup> Ibidem;

<sup>26</sup> Liviu Pop- the quoted work, p. 466;

The third party beneficiary may claim the fulfillment by the promisor, his right directly derives from the contract concluded by the provider with the promisor, and at the same time, he will keep his original right against the provider. So, here there are two different obligations – the right of the third party beneficiary against the promisor, which is independent from the legal relationship between him and the provider and the right of the third party beneficiary to claim the promisor the fulfillment of the duty. However, the beneficiary third party may not claim against the promisor the warranties he agreed on with the provider, within the initial legal relationship. But the promisor may oppose the creditor all the exceptions he could oppose the provider.

By the stipulation for another<sup>27</sup>, you may create rights for the third parties, but you may not enjoy their rights. In practice, instead of a duty transfer, you could have a new credit right.

The prevalence of this operation as compared with the imperfect delegation would mean that the right of the creditor against the new promisor is achieved when the convention between the debtor (provider) and the second promisor is concluded.

In case of the imperfect delegation and the stipulation for another, although a new obligation arises, we may notice that none of the former obligations are repealed.

#### 2.4. Method of Payment

In order to simplify the execution of one party, the debtor can designate to the creditor a third party who shall pay in the debtor's change. Such as a debtor's loan bank by giving a credit or the debtor bank on the strength of a deposit.

This mechanism does not affect in any way the debt – the debtor shall be still liable and the creditor has no right (no action) against the third parties who are not personally engaged in it. It is about a material operation which we can see as a trust – the debtor gives the right of agency to the third party to pay in his change. Should the agent fail to pay in the conditions stipulated when he had the necessary funds – his contractual liability to the debtor principal shall be held liable; the debtor principal shall pay the delaying penalties on his own account because the payment was not fulfilled on time and he also shall be liable of the tort liability for the creditor who could bear the risk of the debtor insolvency.<sup>1</sup>

In these conditions, the debtor could withdraw the trust deed and give an interdict to the third party to make the payment.

In the French Law and usually in the occidental countries there is a modern technique which illustrates the Method of Payment, the so-called “avis de prélèvement” – the titleholder of a bank account who receives by bank revolving debts (taxes, insurance bonuses, phone and electricity bills etc.) empowers the bank to pay his debts to the creditors. By this method of payment the creditors could draw upon the receivable from the debtor's account. It is obvious that the bank shall not satisfy these receivables but only in the account sum limit, and if it is not sufficient, the creditors shall act against the debtor.

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<sup>27</sup>Tudor R. Popescu, Petre Anca- the quoted work, p. 387;

<sup>1</sup> Alain Bénabent – op. cit., p. 387;



### 2.5. Debt Internal Takeover

In the event that a third party assumes to pay for the debtor, there is an internal assignment.

In this case the creditor protection is assured by the debt standing in its original form. If the third party fails and does not pay, the creditor keeps his right against the third party, by contrast of the agency, because the third party did not make any commitment to the creditor. The debtor can make a complaint against the third party because this one did not pay for the debtor.

The assignment of duty could be found in the board takeover of a trading company – the buyer (the one who takes over the company) promises to pay the debts of the ones who operate before.

### 2.6. Subcontract

Some contracts allow one of the parties not to execute the assumed obligations on his own account, but to transfer the execution obligation to a third party. For example, in the construction entreprising contract<sup>2</sup>, the entrepreneur can charge some subentrepreneurs with the execution of a part of the working, making with each of them (plumber, electrician, floorer etc.) a subentreprising contract<sup>3</sup>, or the subagent who executes some labor conscription for the agent (it is often in the transport field).

We can observe a kind of obligations transfer, but it is in fact an economical, material transfer. In the juridical field the creditor protection is realised under two forms:

- on one way, the creditor must have consented that the former entrepreneur had substituted another executor. Because it is about making obligations – they often have a binding character that permit to the creditor to refuse their accomplishment by another person. The judiciary practice established that this substitution is allowed without the creditor consent when, according to the contract the executor's person is not established (carrier, exchanger etc.).

- on the other way, the original debtor proceeds to be liable for the obligations execution; the entrepreneur is liable for the subentrepreneur's errors even if the last one was accepted by the creditor.

Moreover, the creditor has an action against the subentrepreneur.

The assignment of duty by subcontract produces the same effect like as the imperfect agency and the covenant for another person- the supplementation of a new debtor to the initial one.

## 3. The Assignment of Duty without the Creditor Protection

The assignment of duty could be realised by releasing the former debtor by perfect delegation and novation.

In fact, the perfect delegation is a novation by debtor changing. But both of the proceedings are different from the genuine duty off assignment because:

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<sup>2</sup>Subentreprising is possible in other entreprising contracts, but it is applied only in the construction entreprising field;

<sup>3</sup>The rules stipulated for entreprising are stipulated in antreprenur si subantreprenur reports: art. 1470-1490 C. civ.;

- either the novation by the debtor changing or the perfect delegation can be realised only by the the creditor consent;
- both of the proceedings have the same effect: to relieve the old obligation together with its warranties and accessories and the rising of a new obligation.

### 3.1. Novation by the Creditor Changing

The novation<sup>4</sup> is also used in exchange for the assignment of duty. It could be realised by two ways – when the new debtor is binding upon to the creditor in return for the original debtor, the last one being released without his consent (art. 1274 C.civ.fr.) or when it is about the perfect delegation.

When the third party is binding upon to the creditor to pay the duty without the debtor consent (stipulated by art. 1164 C.civ.) it is said that novation is realised by *ex-pledge* (*expromisio*)<sup>5</sup>.

When it is asked the debtor consent, the novation by the debtor changing is a perfect delegation.

In case of novation by the debtor or creditor changing, a receivable is relieved and rises out a new receivable.

In case of novation by the creditor changing, the second creditor ceases to be the creditor of the third one, being replaced by the first creditor who gains two receivables in this way, his original receivable against the third creditor. In case of novation by the debtor changing, the second one ceases to be the debtor of the first debtor, being replaced by the third one, who becomes twice a debtor, because he did not cease to be the debtor of the second debtor and he also became the debtor of the first one. These effects can be cumulative realized by the perfect delegation because the second one is superseded as a creditor of the third and as a debtor of the first, the two obligations being replaced by a single obligation of the third one to the first one.

In case of the assignment of receivable and of the assignment of duty it is not about the relieving a debt or the confinement of a new obligation, an obligations replacement by novation, but about a transfer by assignment of the receivable of the second against the third party or of his duty to the first party, the second one becoming the direct debtor of the first one.<sup>6</sup>

### 3.2. Perfect Delegation

The third party (delegate) agrees to pay to the creditor (agent) the debt of the original debtor (principal) and this is usually because the delegate is the principal debtor and he can discharge his own debt by paying to the principal.

By perfect delegation the agent releases the principal and keeps the new obligation of the delegate.

The delegation does not transfer the old duty but creates a new one which, by the parties agreement, could be added the old accessories and could establish that the old debtor's exceptions could be reversed by the new debtor.

<sup>4</sup> Stipulated in art. 1271 and acc. to C. civ. fr.;

<sup>5</sup> Gh. Beleiu – op. cit., p. 318

<sup>6</sup> Paul Mircea Cosmovici – op. cit., p. 255;

In this way, the delegation could approach more to the assignment of duty.<sup>7</sup>

The perfect delegation supersedes the original obligations of the parties by a new, unique obligation producing an innovation effect. It is rarely met in practice because the creditor prefers to receive the new debtor besides the original one than to free the last one.

The imperfect delegation is used because the agent-creditor gets a personal direct action against the delegate without releasing the principal.

In French Law it is commented upon if the delegation is an act with a legal cause or an abstract act. In supporting its abstract feature it is invoked the fact that the delegation is available and the delegate is binding on the agent even if he was not the delegate's debtor, too, and the impossibility of the delegate to prevail over the agent of the exceptions that could have been invoked in his potential reports with the principal, in case of perfect delegation. Although the original debtor was released by the creditor this one could hold the right to appeal against the first debtor supposing that the debtor would be insolvent. French Law allows (art.1276) such an appeal if the new debtor had been insolvent or had become insolvent in the moment that the delegation came into force. Regarding the juridical nature of the right of appeal it is commented upon how the initial warranties constituted in the creditor's favour could exist anymore in this case.

From one point of view, the creditor appeal is independent of the old obligation that remains relieved together with all its accessories.

From another point of view, the creditor does not release the principal only if the delegate really pays the debt. In this situation, if the pay is not made, the creditor shall be able to take legal action against the original debtor, action that had existed in the old juridical report and had been relinquished. So he could prevail over all his personal and real warranties of that receivable.

We must emphasize that whatever form it has, the delegation needs the delegate consent. In this case, the imperfect delegation does not lead to immediate results because the agent shall not gain the direct cause against the delegate, but only after that the delegate was bound by to pay the debt, subsequent to the principal's asking. Because of that, in practice it is preferred the covenant for another.

To sum up the system of the French Law for solving the juridical reports between the three parties, in which the first one is the creditor of the second and the second is the creditor of the third, to simplify, the third party is binding by to pay to the first party, establishing a direct binding report between the first and the third party. This simplification could be obtained by different ways: novation by creditor changing, novation by debtor changing, assignment of receivable, imperfect delegation, stipulation for another and assignment of duty.

The perfect delegation by which the new debtor commitment is obtained towards the same creditor does not transfer the old debt, but creates a new one which by the parties agreements could be added to the old debts and it could be decided that the old debtor's exceptions shall be made contrary by the new debtor; in this way the delegation could be closer to the assignment of duty.

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<sup>7</sup> Tudor R. Popescu, Petre Anca – op. cit., p. 396

### 3.3. Transfer of Patrimony Assets

In the French Law it was considered that<sup>8</sup> – if the creditor is always protected in case of the transfer of an isolated debt, the situation is not the same if the debt is a part from a general transfer made by the debtor in favour of a new third party. In this case, the debtor changing shall operate without the creditor protection and consent. It could be realised by the transfer of patrimony assets or by the transfer of the contract.

In this paper we comment on the transfer of the obligations between living persons (transfer *inter vivos*), but we shall also comment on the descent of an individual in the matter of the assignment of duty, because this transfer will produce its effects like as an assignment of duty in juridical reports which arise between living persons – towards the creditor and the new debtor.

In case of the death of the debtor his liabilities shall be transferred to his heirs, either to the legal heirs or, in case of the existence of a testament, to his devisees. The devisees are answerable for the decedent's liabilities if they did not reject the legacy or they are answerable for the hereditary assets if they accepted the legacy in form of the inventory; or they are answerable for these liabilities even in case of their own patrimony assets if it exceeds the hereditary assets.

In this way, the creditor is enforced to change the debtor for the liabilities which do not involve a personal inference of the debtor, especially for the monetary ones. Moreover, if there are not any other heirs, it could be enforced a bond distribution, each of the heirs being answerable for a part of the bond proportional to his hereditary quota. This distribution of the bond shall not operate if the bond is indivisible, either by its nature (like as the obligation to deliver any goods or perform any working) or by the effect of any cause of indivisibility inserted in the contract.

The transfer of patrimony assets and implicitly the assignment of duty are accomplished by amalgamation merger. According to Law no. 31/1990, the companies merger has two forms: the merger and the consolidation. (art. 176 alin.5)

The merger consists in the fact that a company integrates one or more companies and these companies ceases their individual existence.<sup>9</sup>

The consolidation consists in the fusion of two or more companies which constitutes a new company.<sup>10</sup>

In both cases, the absorbent company, meaning the new company becomes the debtor of the absorbed company commitments - it is enforced a debtor changing to the creditor.

For protecting the three parties incentives, the law stipulates that the merger effects are produced only after three months from the publication date in "Monitorul Oficial". The merging companies creditors interests are also protected by a right of opposition against the merger decision at the creditors hand (art. 175 alin.3 – Law 31/1990).

If a creditor exerted his right of opposition, the merging decision could be brought into force only after the final ruling by which was ordered the opposition rejection.

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<sup>8</sup> Alain Bénabent – op. cit., p. 389

<sup>9</sup> Stanciu D. Cărpenu – Drept comercial român, Ed. All, Buc., 1995, p. 233;

<sup>10</sup> ibidem;

In case that the opposition was conceded, the merger ruling could be enforced only after giving satisfaction to the other creditor receivables.

#### 3.4. Assignment of the Contract

In different systems of law it is said more and more about the assignment of the contract, analyzing the way in which this could be an atomous juridical operation opposing to the assignment of receivable and transfer of duty. We shall shortly present the way in which the assignment of contract operates in the transfer of duty field.

Some law works stipulates the transfer of the contracts with consecutive execution by induced terms as an attachment to the asset transfer which builds the object of the contract (Leasing Agreement, Insurance Agreement, Labour Agreement) or, sometimes, the transfer of the Leasing Agreement to the descendants or to the spouse, as a result of the divorce, which has been awarded a right of habitation, the transfer of the contracts needed to redress a company in case of reordering by assignment.

In this case a new debtor is enforced to the creditor, too. The creditor does not have any other means of protection than the original debtor obligations preserving and this debtor is released in the future. As we demonstrated at the beginning of this chapter, one of the reason for which the assignment of duty was not regulated in our system of law is the subjective, personal feature of the debt; considering the personal qualities of the debtor, the creditor draws his solvability, too. In this case, by the assignment of the contract without the creditor consent, the creditor has not got the ability to consider the debtor's demureness and solvability and of course this fact is in his disadvantage.

But the original debtor keeps on to comply to his bonds which corespond to the prior period of the transfer of the contract. Such as in case of a leased premises selling for a deposit, the Seller shall be debtor of the deposit restitution to the tenant.

In some case law does not allow to a third party to substitute himself to one of parties before the contract closing. It is about the refusal according to art.5, Law no 54/1998, regarding the juridical circulation of the lands given to the co-lenders, neighbours and tenants who shall be able to buy a land for the price asked by the Seller, before any other person preferred by the Seller. This right compels the Seller to change the debtor; the refusal titleholder is asserted by law to the Seller, as the debtor of the asked price under the penalty of cancelling the contract of sale and purchase that was concluded by overriding this legal stipulation.

This thing does not prejudice too much the Seller because if the new debtor fails to pay the price, the Seller can adopt a resolution in order to recover the asset and after that he can sell it to anyone.

The assignment of duty, as the fixture of the transfer of an asset, of a right universality or a contract.

a) The assignment of duty as the fixture of the transfer of an asset is taken for the situations stipulated in case of the assignment of contract where we mentioned that the assignment of contract was achieved as a fixture of the transfer of the asset which made the object of the contract.

- art. 1441 C.civ. stipulates the following: if the tenant sells the leased or sub-leased premises, the Buyer must comply to the demurring carried out before the

selling because it was made by authentic deed or by private signature with certified date; ~~except the case in which was expressly stipulated the demurring abating because~~ of the premises selling. Although the premises buyer must comply with the closing, the original owner is binding on the obligation execution towards the tenant, just in case of the imperfect delgation.

- the assured asset buyer is binding on the insurance agreement terms (for example, to pay the insurance bonuses), but the parties can cancel the contract. The insurance keeps on going to the buyer benefit; henceforth the buyer is not anymore binding on his insurer liabilities and the Seller is released of the liabilities by the mutual agreement of the insurer.

b) As a fixture of the transfer of the right universality (pertaining to a patrimony of assets), we have already talked about the assignment of duty without the creditor protection (sub-head2.2) in case of the merger and amalgamation of the companies and in case of an inheritance of an individual.

c) The assignment of duty, as a fixture of the assignment of contract is achieved in our legislation in the residential matter. It is stipulated in art.33 Law no.114/1996<sup>11</sup>– the residence excahange between two or more principal tenants. By the effect of residence exchange, the tenants releases each one another the obligations towards their landlords.