"BABEŞ-BOLYAI" UNIVERSITY OF CLUJ-NAPOCA

Faculty of Law

ASSIGNMENT OF CLAIMS – LEGAL MEANS TO ACHIEVE THE DYNAMICS OF OBLIGATIONS

Ph. D THESIS

- Summary -

Coordinator:
PROF. UNIV. DR. LIVIU POP

Ph. D Candidate:
LAURA-FLORENTINA PĂLTINEAN
(married name RETEGAN)

2011

1. CONTENTS OF Ph. D THESIS

2. KEY-WORDS

assignment of claim, obligation, claim, debt, assignor, assignee, assigned debtor, third parties, opposability, publicity, acceptance, notice, electronic archive of security interests in movable property, accessories, security, dispute retraction, factoring, subrogation, assignment of debt, assignment of contract, novation.

3. SYNTHESES OF THE MAIN PARTS OF THE Ph. D THESIS

The Ph. D thesis circumscribes to the claim assignment matter, an institution with particular significance in the current context of liberalization of trade. Thus, technological progress, as well as free circulation of persons, services, capitals at community level determined an emancipation of claims in relation to tangible assets. Economic extension of the role of claims reads at legislative level as development of compliant mechanism for their circulation. And the institution of conventional claim assignment bears the emblem of translative operations on claims.

Pointing out the valences of the assignment mechanism implies progressive approach of the topic in six chapters. The contemplated methodology is also a gradual one: descriptive, analytical, comparative and constructive methodology.

The first chapter of the thesis stands for an "Overview of the Claim Assignment" starting from the inclusion of the subject in the dynamics of obligations. And this approach cannot be separated from the analysis of the notion of obligation and claim. We are currently assisting at a depersonalization of the obligation and accentuation of its patrimonial nature, which favored the development of the legal means of transfer and transformation of obligations.

Roman law was a laboratory for the appearance and configuration of the claim assignment institution, decisively influencing subsequent codifications. While in primitive Roman law the strictly personal and formalist character of the obligation relation did not allow any change of subject, in the last centuries of the Republic the trade needs brought about the possibility to detour the achievement of the claim assignment by using two methods: novation by change of creditor and a particular form of mandate named *procuratio in rem suam*. Afterwards, imperial legislation making room for the principle of transmissibility of obligations tried to eliminate the above-mentioned shortcomings by two remedies: legitimizing of the assigned party to act in its own name by conferring a useful action (*actio utilis)* and notification of the assigned debtor (*denunciatio*) for not having been able to free itself from the debt any longer by the payment made to the assignor.

The Roman law system lies at the bedrock of evolution of claim assignment institution, being the premise for the causal pattern of assignment promoted by Napoleon's Code that was transposed also in our Civil Code adopted in 1864, under the rule of Alexandru Ioan Cuza.

Objectification of claim and its becoming closer to the regime of tangible assets triggered a question mark referring to the transfer object: claim right or right of ownership over a claim? If we consider the variables of the equation (personal right – real right), but also the traditional thesis of incorporation of the ownership right in its object, the matter raised seems at least surprising. Still, gradually, a few opinions started to shape, presently minority opinions, in the sense of reconsideration of the notion of ownership and scope of its object in what regards intangible rights. Although there are questions related to the compatibility of the two rights, application of international instruments, as well as legislative evolution from our country seem to make them get closer and closer. To this end we remind that jurisprudence of the European Court for Human Rights includes in the category of assets also the claims,

granting them the protection provided by art. 1 of the First Protocol additional to the Convention.

The New Civil Code seems to make one step forward in favor of the theory of ownership of the claim, expressly including intangible things in the category of assets. Nevertheless, the New Civil Code does not suppress the regime of obligations, but deals with the matter of transfer of claims separately devoting it a system of own norms that are, indeed, here and there close to the ones set forth in the matter of transfer of tangible assets. Consequently, practical reality has imposed evolution in what regards the notion of assets, but without the configuration of a legal regime irrespective of the nature of the contemplated asset. In current context of reevaluation of the ownership field, even if generic use of the term of ownership were allowed, the protection regime granted is different, depending on whether the asset is a tangible asset or an intangible one.

All these aspects prepare the presentation of current regulation of claim assignment and anticipate the definition of this institution.

On the French model, the Romanian Civil Code dedicates the claim assignment an entire chapter named "Transfer of Claims and of Other Intangible Things", included in heading "Sales" (art. 1391-1404, chapter VIII, title V, book III). Also title VI of Law no. 99/1999, "Legal Regime of Security Interests", includes regulations on the priority order, publicity and execution of claim assignment. Despite the legislator's including the claim assignment in the part dedicated to sale agreement, this institution shows neutral character being able to materialize, as the case may be, a sale, an exchange, a donation, a *datio in solutum* or a guarantee.

In order to shape the definition of the claim assignment we should consider two elements: on the one hand, its belonging to the category of means of transfer of the obligations; on the other hand, the fact that we are dealing with a synallagmatic agreement, but whose effects produce beyond the assignor and assignee, from the moment of compliance of the opposability exigencies.

The New Civil Code, on the model of systematization of proposed by the doctrine and a few modern legislations, operates a permutation in what regards the position of the claim assignment, including it in a separate title destined to transfer and transformation of obligations (art. 1199-1210, chapter I, title V, book V), thus confirming it its own position.

Depending on the actual operation it embodies, claim assignment may have one of the following three functions: it ensures the mobility of claims, represents a payment instrument or for guarantee.

Chapter two of the thesis contemplates the ”Conditions of Claim Assignment”. The triangular character of the assignment of claims particularizes the structure of the conditions required for a classic contract, one distinguishing between conditions of validity between parties and conditions of opposability towards third parties. In their turn, the validity conditions are traditionally divided into substance conditions and form conditions.

The validity conditions of the assignment of claims follow the general law rules applying to obligations, without substantially derogating from the same.

Assignment of claims although generating tripartite relations among assignor, assignee and assigned debtor, from the point of view of its formation is a bipartite contract, as the achievement of the agreement of will between the assignor and assignee is sufficient.

A few specifications should be made especially in what regards the object of assignment. Thus, French jurisprudence enunciated as principle the possibility for the assignment of future or possible claims, irrespective of the legal or conventional origin, accessory or main character, of being the object of a contract, but subject to their sufficient identification.[1] Considering the general provisions of art. 965 of the Civil Code, assignment of future claim should be admitted in our law as well. Neither possible claims should be excluded *de plano* to the extent to which they fall within the limits provided by art. 964 and 1010 of the Civil Code.

Unlike old regulation, the New Civil Code expressly deals with the issue of assignment of future claims, setting forth that they may be the object of an assignment, but “the deed must include the elements allowing the identification of the assigned claim” (art. 1572, paragraph 1 of the New Civil Code).

Against such background one should separate the assignment of claims from a potestative right, in reference of the hypothesis of a unilateral sale promise providing the possibility of substitution of a third party for the beneficiary of the promise. Obviously we cannot talk about an assignment of claims when there are potestative rights involved. Qualification of the mentioned contract structure has generated both in practice and doctrine a

[1] Cass. 1re civ., 20 mars 2001, in “Bulletin” no. 76/2001, p. 48.

series of discussions, either the substituting of the beneficiary of a unilateral promise wit already existing institutions (stipulation for another), or use of mechanisms *sui generis* (substitution of persons, and namely substitution of contracting party) being proposed. Yet, the analysis of the effects of the operation allows us to conclude that by the exercising of the substitution faculty included in a sale promise one may achieve an assignment of contract.

At the same time, in reference of the assignment object one should discern between the scopes of a conventional non-assignability clause for the situations in which this is not absolutely forbidden by law. Such a clause included in the contract from which the assigned claim arises does not affect the validity of assignment, yet the assignor being exposed to payment of damages to assigned debtor. Certain solutions from French jurisprudence [2] modulated the reminded position, the inopposability of the clause depending on the ignorance of the assignee in what regards its existence.

In the New Civil Code the regime of the non-alienability clauses vary depending on the assignment relating to a money claim or not, but in both hypotheses, the breach of the interdiction to assign the claim stands for a case of contract default, and the assignor will be exposed to payment of damages under art. 1570, paragraph 2 of the New Civil Code.

Between parties, civil law clearly provides the formation of the assignment contract subject to the consensualism principle. "Delivery of title", meaning *instrumentum,* ascertaining written record for the claim, to which art. 1391 of the Civil Code refers, is related to the delivery obligation. in what regards free assignment of claims it is necessary to resort to the solemnity of the authenticated written record required for donation, under general law.

Although the New Civil Code follows the same rules in what regards the assignment, the provisions of art. 1578 of the New Civil Code deprive it of efficiency in the relations with the assigned debtor, if the assignee, issuer of the notice, cannot deliver it, at request, the written proof of the operation. One may not record the same conclusion when the assignment notice is made by the assignor.

Considering the triangular character of the assignment of claims, the legislator created an opposability regime that derogates from the rule according to which the rights arising from a contract are rightfully opposable.

[2] Cass.com., October 22, available on site www.legifrance/gouv.fr

Currently, assignment formalities towards third parties are differently regulated from the provisions of art. 1393 of the Civil Code and chapter 3 named "Publicity and Preference Order of Security Interest" from title VI of Law no. 99/1999.

Thus, the Civil Code requires the fulfillment of two types of formalities: either notice to the debtor of the assignment, or acceptance of the assignment made by the debtor by means of an authenticated deed. Assignment is, in principle, notified, by a summons of the official receiver sent, as the case may be, on the initiative of the assignor, assignee, the heirs of one or the other or even at the request of both parties. Notice is no longer necessary when the debtor "has accepted" the assignment by an authenticated deed, which situation is rather rare in practice and, especially, only when the very transfer is made by authenticated deed, the assigned party being invited to participate. The solution of existence of an authenticated deed for ensuring opposability towards third parties, imperatively promoted by the Civil Code, pursues the elimination of any fraud that could occur with regard to the date, as a privately signed document could be easily antedated or postdated. But the mentioned objective could be reached also by a certain date privately signed document.

The analysis of specialized jurisprudence proves a moderation of the mentioned formalities in the relations with the assigned debtor. At the same time, resorting to the extensive interpretation of the notion of fraud, corroborated with the identification of the scope of third parties in relation to the assignment, certain conditions made efficient also the mere awareness of the assigned debtor. No equivalent measures are recognized towards the other third parties for ensuring the assignment opposability.

Allowing of equipollent forms of notification, respectively acceptance in relation to assigned debtor, justifies the splitting of the qualification of the nature of the forms provided by art. 1393 C. civ. Depending on the envisaged third parties. Thus, if for the assigned debtor these are a means of information, for other interested parties they have a publicity function.

Once with the becoming effective of title VI of Law no. 99/1999 "all assignments of claim rights", without distinguishing between the existence or non-existence of the purpose of the assignment to secure the fulfillment of the obligations, are governed in what regards "priority order, publicity and execution" by the rule provided by such normative act. And chapter 3 of title VI of Law no. 99/1999 resorts to a modern system of publicity, and namely the registration of the assignment with the Electronic Archive of Security Interests in Movable Property. But this form of publicity of the assignment of claims is justified especially in the

assignment of claims with the title of security, than in the case of the other types of assignment.

As regards the conciliation of the two regulations, in relation to the successive assignees and assignor's creditors, 99, paragraph 2 of title VI of Law no. 99/1999 sets forth that the relation between the forms provided by the Civil Code and the publicity made under Law no. 99/1999 is a subsidiary one, in the sense that the first grant priority only to the extent to which such assignment was not registered with the archive. On the other hand, for the assigned debtor solution is not finally settled depending on the area of applicability of the provisions of art. 85 of title VI of Law no. 99/1999 imposing that when the "secured asset, consisting of a money claim, is assigned, the assignor must notify the assigned debtor in writing of the assignment".

One should note a few particularities in what regards the mortgage claims and the claims resulting from credit contracts concluded with a consumer with special regulation. Thus, in order to ensure the opposability of the assignment of mortgage claims, the legislator opt for a system made of formalities, depending on the envisaged third parties: in relation to the assigned debtor an informal notice, towards other third parties the registration wit the Archive, if "they have not become aware otherwise" (art. 25 of Law no. 190/1999). For the consumer from a credit contract, assignment will become opposable "by notice addressed to it by the assignor" (art. 71, paragraph 2 of the Emergency Government Ordinance no. 50/2010).

New Civil Code operates a splitting of the requirements imposed in the opposability matter, distinguishing between the assigned debtor or successive assignees. If in relation to assigned debtor authenticated acceptance and notification are replaced by acceptance by means of a certain date written record and paper written or electronic communication, the priority order towards the successive assignees will be established depending on the registrations with the Electronic Archive of Security Interest in Movable Property. Opposability formalities provided in relation to the assigned debtor have to be fulfilled also towards the fidejussor, if otherwise this cannot be bound to pay to the assignor (art. 1581 of the New Civil Code).

In the hypothesis of successive assignments made by the same assignor with regard to the same claim, to the assigned debtor the rule of priority of the first communication or acceptance with certain date will apply. On the other hand, in the relations between the successive assignees pursuant to art. 1583, paragraph 2 of the New Civil Code "the one that

first registered its assignment with the archive is preferred, irrespective of the date of assignment or its communication to the debtor".

A series of exceptions from the above-mentioned publicity formalities are regulated in certain domains consisting of either their fulfillment by other means, or by elimination or even replacement with simplified particular forms.

Both the admissibility of extenuated forms of notification, respectively acceptance in the relations with the assigned debtor, and the regulation included in the New Civil Code lead to the dissociation of the issue of discharge of the debtor from the one of claim holding capacity in case of successive assignment made by the assignor. Hence, the necessity to explain the category of third parties towards the assignment and the pointing out of the consequences of fulfillment or non-fulfillment of the formalities set forth in this matter. Starting from a restrictive definition of the notion of third parties towards the assignment, the majority of doctrine includes in the category the assigned debtor, other assignees of the same claim and the assignor's creditors.

In principle, according to art. 1395 of the Civil Code the assigned debtor that was not officially informed of the change of the creditor may validly discharge paying the assignor[3], the assignee not being allowed to claim the assigned debtor a second payment, but keeps the right of recourse against the assignor. Vice versa, since the publicity procedure has been fulfilled, the change of the creditor has full effect, so that the assignor disappears from the obligation relation, the assigned party becoming only the assignee's debtor and being able to be validly discharged only if paying the latter. In terms of jurisprudence, the presented rule has some limitations when the debtor, being aware of the assignment, acts fraudulently together with the assignor and when the debtor accepts the assignment after payment.[4]

In the conflict occurred between various assignors, like in land registration, the principle *prior in tempore, potior in iure* applies, the winner being the party whose assignment has been the first the object of the formalities set forth by art. 1393 of the Civil Code and not the one that first acquired the claim. If successive assignments occurred in what regards the same claim were recorded with the Electronic Archive of Security Interest in Movable Property again the rules of first registration priority operates. In the competition between the forms provided by art. 1393 of the Civil Code and the registration with the

[3] The High Court of Cassation and Justice, Commercial Section, decision no. 639 of February 9, 2007, available on site: www.scj.ro/jurisprudenta.asp.

[4] A. Weill, F. Terré, *Droit civil. Les obligations*, Ed. Dalloz, Paris, 1986, p. 945.

archive the registered assignment, irrespective of the date, will win. The New Civil Code establishes the priority between successive assignees by relation to the registration with the archive.

Chapter three deals with the rules governing the "Effects of Assignment of Claim". The geometry of the effects of the assignment of claims follows a dualist pattern, similar to the one contemplated on the occasion of development of the conditions of the operation, regarding, on the one hand, the relations between the parties, and on the other hand the third parties to the assignment.

The main effects of the assignment of claims between the parties of the legal act relate to the transfer of the claim with all its characteristics and the obligation of guarantee on the assignor's part. Additional obligations incumbent, as the case may be, on the assignor or on the assignee, depending on the contractual provisions, will add to these.

The essential purpose pursued by the parties on the occasion of conclusion of the assignment contract is the transfer of the claim right from the assignor to the assignee. As we are talking about a consensual contract, assignment brings about an instantaneous, immediate transfer between the parties of the claim once they expressed their consent to this end. The claim right remains unchanged, keeping its civil or commercial nature, and so do the payment conditions.

If the object of assignment is a future claim, according to the derogatory provisions of art. 1572, paragraph 2 of the New Civil Code, this is considered transferred from the moment of conclusion of the assignment contract.

According to the principle that reads *accessorium sequitur principale*, transfer refers also to the claim accessories, whose contents depend on the meaning ascribed to this notion.

First of all, from the very wording of art. 1396 of the Civil Code the transfer as accessories of the securities created for the payment of the claim, such as surety, privileges and mortgage, is obvious. Analysis may be extended also to: pledge, retention right and property reserve clause. Autonomous securities, by their very nature independent from the fundamental relation, may be automatically transferred simultaneously with the transfer of the claim, only if the parties expressly have provided so in the deed by which such securities have been created.

Transfer of accessories envisages also the clauses referring to the determination of the payment object, respectively financial accessories, from which we enumerate: interest and other income of the claim that has not yet reached maturity.

Another category of accessories is that containing the accessories relating to the due fulfillment of the assigned claim if the debtor does not understand to willingly pay, as well as the ones allowing the obtaining of compensation as a consequence of the deed of a third party with consequences on the claim execution. In principle, the shares that belonged to the assignor and are attached to the claim will be rightfully transferred, except for the non-patrimony or strictly personal ones of the assignor. First of all, we refer to the actions protecting the creditor's rights, such as guarantee action, paulian action, derivative action, but also to the action aiming at the execution of the claim, and namely action for payment, which are transferred to the assignee as accessories.[5] Strict relation to the assigned claim, which could be reduced or even lost as a consequence of a previous act of a third party, also justifies the transfer of the contractual or delictual liability actions. On the other hand, resolutory action shall be considered transferrable only in the hypothesis in which it has compensatory function, and not when its purpose is the release of the assignor from its obligation. The transferrable or non-transferrable character of the annulment action gives rise to real controversy. A series of arguments tend to consider the non-transferability as accessory of the action for total relative nullity. Yet, the rightful transfer as accessory of the actions seeking partial nullity could not be excluded, which could be useful when the basic contract would contain clauses impeding the recovery of the claim.

In this context we should consider also the clauses referring to disputes, from which we mention the arbitration clauses and the competence-assigning clauses, whose transfer may be justified rather by their categorizing as elements relating to the claim regime establishing.

The assignor is bound towards the assignee to fulfill the delivery obligation consisting of the delivery of the title ascertaining the claim and corresponding to the delivery of the sold thing.

Moreover, the Civil Code sets forth for onerous assignment a legal guarantee, also called rightful guarantee partially corresponding to the one accompanying a sale of assets. Still, because the assignor and the assignee are parties of a contract by which they can arrange

[5] B. Starck, H. Roland, L. Boyer, *Droit civil. Les obligations*, Ed. Litec, Paris, 1999, p. 22; Ph. Delebecque, F.-J. Pansier, *Droit des obligations. Régime general*, Ed. Litec, Paris, 2007, p. 159.

the relations between them, they may derogate from the suppletive rules established in this matter limiting or amplifying such guarantee, in which case we are talking about a conventional guarantee.

The New Civil Code provides similarly an obligation of guarantee for the existence of the claim and, in addition, distinctly regulates the guarantee obligation for the eviction resulting from assignor's own deed.

The mandatory minimal obligation, provided by art. 1392 of the Civil Code envisages both actual existences of the claim itself and of its accessories. Legal guarantee covers neither the solvency of the debtor, nor the solvency of subsidiary debtors. If all the conditions of the rightful guarantee are met, by the cancellation mechanism, except for the situation of sale of the claim when a nullity action of the assignee is recognized, the assignor will have to return the price of the assignment, the contract charges, the charges of the pursuit uselessly initiated by the assignee against the assignor, possible the ones related to call on guarantee and damages.

Conventionally, the assignor may decrease its liability and resort to its full elimination, in the limits of the law. Oppositely, the assignor may increase its guarantee obligations compared to the ones it is bound to under the law. A clause of this kind consists in the guaranteeing of both the claim existence and debtor's solvency. Articles 1397 and 1398 of the Civil Code, but also the provisions of art. 1585, paragraph 2, thesis two and paragraph 3 of the New Civil Code establish the legal regime of such a clause from two points of view: the assignor, guaranteeing the debtor's solvency undertakes only up to the price paid by the assignee, and in absence of formal provision, this does not guarantee future solvency.

The assignee's obligations in its relations with the assignor do not have specific characteristics, but shape themselves depending on the type of operation the assignment is considering.

In what regards the effects of the assignment on the assigned debtor, since the exigencies provided by art. 1393 of the Civil Code are met, this may be validly discharged only in the hands of the assignee under the sanction of making the payment twice. The assigned debtor may be employed by the new creditor only to the extent to which it was engaged towards the assignor, because the assignment of claim cannot aggravate its situation.

Thus, the assigned debtor may avail itself against the assignee of all nullity clauses, cancellation that could result from the claim-generating contract, before notification. It will

also oppose its new creditor the guarantee exception that it used to owe the assignor, based on eviction caused by the latter, non-fulfillment exception, payment exception, prescription, authority of judged thing or other exceptions regarding the diminution of the assigned claim and not its paying-off.

The principle of opposability of exceptions thus set forth is yet eliminated in a few hypotheses. We refer to compensation if the assigned debtor accepts the pure and simple assignment of claims ascertained by nominative titles by order or nominative bearer titles.

The New Civil Code basically provides the same rules, but it also brings in a few important specifications and distinctions. Thus, the assigned debtor's right to oppose the assignee all the defense means it could have invoked against the assignor is expressly worded, and art. 1582, paragraph 2 of the New Civil Code regulates a particular application in the assignment area of the discharging effect of the payment made in good faith to an apparent creditor.

As soon as the opposability formalities are fulfilled, the assignor's creditors will lose their general pledge right with regard to the assigned claim, because towards third parties it is completely out of the assignor's patrimony and enters the one of the assignee, becoming the pledge of the latter's creditors.

The effects of the assignment of claim have certain particularities when the operation focuses on a dispute claim or is made for guarantee purposes.

The fact that a claim is contested does not prevent, in principle, its being transferred by assignment. Still, in order to fight back excessive speculation, Civil Code provides in articles 1402-1403 a means of defense regarding its effects: dispute retraction. By means of retraction, the assignor's opponent, becoming the retracting party, will substitute the assignee, named retracted party, revoking the assignment by a kind of coercive expropriation and ending the trial. Specific provisions for this matter infer four conditions necessary for valid exercising of dispute retraction: existence of a trial at the assignment moment, the trial regarding the right substance, the right to maintain its dispute character at the date when the retraction is invoked and transfer be made in exchange for a price.

It operates between the retracting party and the retracted party as a legal resolutive condition, resulted from the dispute nature of the assigned right. Consequently, the retracting party is retroactively vested with the dispute right, it being deemed that the assignee has never

been its holder. Despite the intervention of the retraction, the assignment deed continues to exist, further producing effects in the relations between the assignor and assignee.

The New Civil Code, following the criticisms expressed in older doctrine, as well as the model of other legislations such as the Italian Civil Code, German Civil Code (BGB), does no longer keep the dispute retraction institution.

In absence of own regulation regarding the shaping of the regime of assignment of claim under the title of guarantee is oscillating, in doctrine, between the variant of assignment under suspensive condition and the one of full, but temporary transfer of the claim. This assignment is different, on the one hand, from a classic claim assignment made for selling such claim, and on the other hand, from a security on a claim right.

The New Civil Code analyzes the claim assignment under the title of guarantee as being an operation assimilated this time to the mortgage of the claims. At the same time, the New Civil Code creates also the premises of a fiduciary assignment in the conditions in which title IV, art. 773-791 introduces the trust institution, although the authenticated form of the trust contract will be rather difficult to conciliate with the flexibility required to the assignment mechanism.

Chapter four of the theses continues the study of the claim assignment mechanism integrated in a complex commercial contract, and namely, the factoring contract.

Brief regulation of factoring has generated a series of discussions on the typology of such contract. Considering jurisprudence in this matter, organizing of factoring in other law systems from the European Union, as well as UNIDROIT Convention from Ottawa of 1988 on international factoring, the assignment mechanism seems sufficient in order to ensure the transfer of the claims and the substitution of factoring in the adhering party's rights, without it being necessary to double the transfer operation through subrogation.

The complexity of the factoring contract resides in the additional obligations assumed by the factor, compared to the ones resulted from a classic claim assignment. Depending on the scope of the services offered by the factor, several forms of factoring have been developed in practice, such as: old line factoring, maturity factoring, factoring with or without right of recourse on the adhering party, factoring without notification or factoring with notification.

Nevertheless, a few essential elements characterizing factoring contract may be distinguished, irrespective of the modality in which they present themselves, as follows:

commercial contract, synallagmatic contract, onerous contract, commutative contract, consensual contract, successive performance contract, *intuitu personae*.

The New Civil Code does not expressly organize the factoring regime, but from the mentions comprised by the description of reasons of the adoption law it results that the legislator understood to base the contract in question on the claim assignment mechanism.

Although claim assignment stands for the general framework of regulation of factoring ensuring the transfer of the claims, by its contamination with elements from the area of other legal operations this tends to manifest in a particular way. Thus, as related to a classic claim assignment, the factoring contract includes a few specific conditions and effects: assigned claim may origin only from a act of trade and must be expressed by specific title – invoice; the parties of a factoring contract, named adhering part and factor, will necessarily hold the capacity of traders; it is an essentially onerous contract; contains specific clauses such as the globality clause, and the exclusivity clause; obligations assumed by the parties are more extended than in the hypothesis of an assignment and vary depending on the agreed factoring type.

Chapter five of the thesis named "Delimitation of Claim Assignment from Other Triangular Legal Operations" adds to the picture of the assignment of claims the investigation of their similarity and difference elements as compared to other legal operations with three persons, such as: subrogation in the creditor's rights by payment of the claim, debt assignment, contract assignment, novation by change of creditor.

Subrogation in the creditor's rights is the closest institution to the assignment of claims, in the sense that, like the latter, it substitutes a creditor by another and realizes a transfer of the same claim, and not its payment-off accompanied by a new one. Therefore, the New Civil Code detaches subrogation from payment, and claim assignment from the sale matter, and treats them together in title VI named "Transfer and Transformation of Obligations". Even if close, the assignment of claims and subrogation are notably different, especially in terms of purpose, conditions and effects of each of them. One should note that the opposability forms required in the hypothesis of assignment of claims do not appear in the case of a subrogation, be it a conventional or a legal one. In order for subrogation to be opposable, one should consider the provisions of art. 1182 of the Civil Code referring to certain date, and in accordance with art. 1593, paragraph 3, last thesis of the New Civil Code, "in order to be opposable to third parties, it must be ascertained by written record".

Recent doctrine studies tend to shade off the differences between the two institutions, drawing them near up to identification in order to cumulate the advantages that each of them is offering. Subrogation consented by the creditor justifies its success due to minimum formalism, and the assignment of claims due to scope of transfer, not being limited to the assignment price.

Not only that the Civil Code in force does not organize a system of assignment of the debt similar to the claim, but it also does not regulate such an institution, so that it is traditionally considered that similar results may be obtained by detoured means. Some of them achieve what we call imperfect assignment without discharging effect for the initial debtor (stipulation for another, imperfect delegation), and other perfect assignment engaging its discharge (perfect delegation and novation by change of debtor). Besides the mediated forms of achievement of debt assignment, doctrine and jurisprudence consider that based on the principle of contractual liberty it could be agreed that a person undertake towards the debtor to pay its debt. Therefore, this is about a direct assignment of debt, but whose legal regime moving away from the assignment claim by the fact that its efficiency will depend upon the assigned creditor's consent.

Following the amendments to the initial project, the New Civil Code regulates, after the patter of German and Swiss legislation, as well as according to the codification projects at European level (UNIDROIT Principles, Principles of European Law of Contracts) the institution of debt take-over. Art. 1599 of the New Civil Code refers to two modalities of achievement of debt take-over, and namely: by the convention between the initial debtor and the new debtor, whose efficiency depends on the creditor's consent, or by the convention concluded between the creditor and the new debtor.

Consequently, in both cases the creditor's consent is required, as the transfer of the passive side may affect the creditor's position, the realization of its claim depending on the debtor's solvency and the ability to execute it. As regards the hypothesis of the debt take-over by contract concluded with the debtor, the creditor's consent appears to be an effective one, so that until obtaining the creditor's consent or in case of its refusal, we are in the presence of an internal debt take-over[6], producing effects only between the initial debtor and the new debtor, in the sense that the latter "must discharge the debtor executing the obligation in due time"

[6] Notion of internal debt take-over may be found in the Swiss doctrine: P. Engel, *Traité des obligations en droit Suisse*, Ed. Ides et calendes, Neuchatel, 1973, p. 278-280.

(art. 1608 of the New Civil Code). In what regards this aspect, debt take-over is different from the correlative mechanism of claim assignment, which takes place without the consent of the assigned debtor, it being notified being sufficient.

In terms of effects of take-over, we may distinguish between two categories: take-over of discharging debt and take-over of cumulative debt. In reality, we may talk about an assignment only in the first case, when debt leaves for good the patrimony of the initial debtor in order to enter the patrimony of the second debtor. In this situation, with a few exceptions, the take-over of debt manifests at the level of effects as a correspondent of the claim assignment, operating a substitution of the debtor, the initial debt remaining identical.

Currently, both doctrine and jurisprudence allow the possibility of conventional contract assignment, but there still are serious disputes related to its nature, the role of the assigned party, and the very name of the operation. In absence of express provisions, its regime is not finally set.

If initially contact assignment was seen only as a result of the joining of a claim assignment and debt assignment, gradually the institution of contract assignment started to state its legal autonomy in doctrine, analytical theory being replaced by a unitary conception of the operation.

Systematic analysis of French doctrine and jurisprudence proves the absence of unitary conception in what regards the valences of the assigned party's consent with regard to the operation. Opinions expressed can be grouped in three large categories. Thus, the assigned party's consent to the operation has the value of a formatting consent, of an effective consent or authorization. Still, we note that the authors supporting the hypothesis of authorization of contract assignment dissociate from this institution the discharge issue, which, in its turn, would involve the assigned party's consent.

Romanian doctrine of the last ten years took over a significant part of the differences expressed in the French law area. Recently, our jurisprudence was called to deliver judgment on the qualification and validity of legal operations, on which occasion the autonomy and translative character of the contract assignment was recognized.[7] Mentioned practice, although its does not settle all legal issues relating to the value of the assigned party's consent, still admits the discharging effect of the convention in what regards the assignor.

[7] The High Court of Cassation and Justice, Commercial Section, Decision no. 2255 of June 15, 2010, available on www.scj.ro/jurisprudenta.asp.

Starting from a syncretic analysis of the contract, the assigned party's will is useful for authorizing an operation by which its situation would be affected due to the effects accompanying it. In other words, in this hypothesis the assigned part's consent is configured as being a necessary authorization for the achievement of the totality of effects of the contract assignment.

The importance of contract assignment is confirmed by the New Civil Code allotting it a special section in its "Contract" Chapter (Section 8, art. 1315-1320). As conceived in the new regulation, contract assignment appears as a unique operation, producing an indivisible effect, but for whose achievement the assigned party's consent is required. It is not clear what the role of this consent is, but we are of the opinion that solution should be correlated with the one recorded in the debt take-over matter.

Despite the discussions referring to the determination of the contract assignment regime, a few common and different aspects may be pointed out in relation to the claim assignment. Thus, contract assignment, like claim assignment, allows the realization of a succession with particular title, and not the creation of new rights between the assigned party and the assignee. Even if tended to believe that there are only quantitative differences between them, in the sense that the claim assignment transmits the active side of the obligation relation, and contract assignment envisages both its active and the passive side, the unitary conception on the latter operation proves us the contrary. Contract assignment does not mean only the transfer of the rights and obligations resulting from it, but of the very capacity of party with all prerogatives granted to it.

Novation by change of the creditor is also partially analogous to claim assignment realizing a substitution of the initial creditor, but there are also significant differences between these two institutions.

In order for a novation to be involved, debtor must concur to the operation, while an assignment is made without the necessary participation of the assigned party. The main element of distinction between novation and claim assignment resides in the level of the effects of the two. Novation, unlike claim assignment, does not operate the transfer of the same claim, but the payment-off of the old one and the creation of a new one.

The last chapter of the thesis renders "Elements of Compared Law and Regulations regarding Cross-border Assignments".

Extension of use of the assignment claim institution determined a series of preoccupations for creating international instruments in this matter. We remind to this end the United Nations Convention on the Assignment of Claims in International Trade adopted in New York in 2001. A special place in the context of the trends of harmonization of European legislations is occupied by the principles elaborated for international contract, with facultative application, to the extent to which the contracting parties referred to them explicitly. This is the case of UNIDROIT Principles that in 2004 edition deals with the assignment of claims, of the Principles of European Law of Contracts, a project published by the Commission of European Law of Contracts, supported by the European Community, of the European Code of Contracts of the Academy of European Private Lawyers ("Gandolfi Code") and of the Common Reference Draft. These transpose a modern conception on the assignment with minimum exigencies in what regards opposability.

Comparative study of the assignment of claims in the internal order of several states allows us to outline a general chart with regard to the legislative tendencies followed in relation to the formalities of assignment towards third parties. We are considering the Belgian law, the French law, the Italian law, the Canadian law, the German law, the Swiss law, the Spanish law and the English law.

In the conditions in which assignment is subject to distinct regulations depending on the law system in question, obviously the matter of rules applicable to cross-border assignment occurs, solved either by instituting a mechanism of conflict norms, or by using a mixed method, and namely the combination of uniform material law rules with rules regarding the conflict of laws, as in the case of the United Nations Convention on the Assignment of Claims in International Trade adopted in New York in 2001. At the level of the European Union, a possible conflict of laws occurred in relation to the contractual obligations in civil and commercial matter will be solved in accordance with the uniform norms of the (EC) Regulation no. 593/2008 of the Parliament and Council of June 17, 2008 regarding the law applicable to contractual obligations (Rome I). Art. 14 of Rome I Regulation provides specific conflict rules referring to the conventional assignment of claim.

Also Law no. 105/1992 regarding the regulation of international private law relations contains a series of conflict norms referring to the hypothesis of claim assignment. Still, Rome I Regulation, a community normative act with direct applicability, will prevail in the matters that are the objects of its regulation against Law no. 105/1992.

Book VII named “International Private Law Provisions” of the New Civil Code does not contain special provisions regarding the settlement of a conflict of laws in the claim assignment matter of general law, but in what regards the claim assignment for guarantee purpose (assimilated operation), art. 2632 of the New Civil Code mentions that the provisions referring to publicity and its effects comprised in Chapter III, Section 7 providing for real estate mortgages shall apply accordingly, yet taking into account their specific nature.

Further analyses in connection with the subject of the assignment of claims allow us to draw certain general **conclusions** and make proposals of *lege ferenda*.

Comparative approach proves that the principles elaborated in the matter of international contracts and the majority of the legislations analyzed provide simplified forms of “warning” the assigned debtor with regard to the assignment, sometimes mere awareness being sufficient. There are few cases when additional formalities towards other third parties are necessary and are applicable only in certain areas.

Evolution of jurisprudence, in the interpretation of the provisions of art. 1690 of the French Civil Code (corresponding to art. 1393 of the Romanian Civil Code) and the remediation solutions proposed prove the necessity of redimensioning the conditions of opposability of the claim assignment and the return to the general law of contracts.

As a matter of fact, the parallel analysis of the institution of subrogation in the creditor’s rights, another means of transfer of the claim, may question the legal reasons justifying the maintaining of a distinct and formalist opposability system only in the assignment area.

Consequently, the aspects pointed out prove the complexity of the claim assignment subject and justify the systematization and analysis of its dynamics.