UNIVERSITY OF CRAIOVA
FACULTY OF LAW
DOCTORAL SCHOOL

PhD THESIS

ABSTRACT

"NOVELTY AND CONTINUITY IN MATTERS OF LEGAL MEANS FOR DISCHARGING OBLIGATIONS"

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Craiova

2016

Regulating the discharge of obligations, the Civil Code provides that the following are ways of discharging an obligation: payment, compensation, confusion, remission of debt, fortuitous impossibility of performance, as well as other ways expressly provided by law (art. 1615 of the Civil Code.).

Although it lists payment along with other ways of discharging obligations, the legislature regulates it under the title on the performance of obligations, giving preference as far as the regulation of payment is concerned, to the way of discharging an obligation (by voluntary performance) and not to the effect that payment produces (discharge of obligation).

Payment is regulated by the Civil Code in Book V ("On obligations"), Title V, entitled "Performance of obligations", Chapter I, called "Payment", divided into six sections, each called, depending on the regulatory part it contains, as follows: Section 1 contains "General provisions" and refers to the notion of payment, the grounds for payment and the payment of natural obligations; Section 2 regulates the subjects of the payment; Section 3 contains provisions on the conditions of payment (object of payment, place of payment, date of payment); Section 4 contains provisions relating to the proof of payment; Section 5 regulates the imputation of payment; Section 6 contains provisions relating to the formal notice to the creditor.

This paper, which aims to perform a comprehensive and in-depth study of the issues specific to the discharge of obligations by payment, is divided into five chapters, consisting of sections, in which we analyze both aspects relating to payment as a way of discharging and performing civil obligations, and adjacent aspects, yet necessary for a scientific study of this kind.

Thus, **Chapter I, entitled "Introductory notions regarding civil obligations"**, is divided into four sections, which approach preliminary issues, essential to the understanding of this legal operation, such as: the definition of the obligation, sources of obligations, elements of the legal relation of obligation, classification civil obligations.

With regard to the definition of civil obligations, we have shown that the 1864 Civil Code did not define the civil obligation, the legal doctrine assuming the task and merit to highlight the essential elements of this notion. While defining payment, the 2009 legislature specifies that it means the voluntary performance of a promise making the object of the obligation and it consists not only in the remission of a sum of money (meaning found in everyday speech), but also in the voluntary performance of any

promise owed by the debtor, regardless of its object (art. 1469 of the Civil Code). As a consequence, the object of the payment may be the promise to give, to do or not to do.

With reference to the sources of obligations, the comparison between the 1864 Civil Code and the 2009 Civil Code helped us to see the essential regulatory differences. The old Civil Code considered the contract, quasi-contract, delict and quasi-delict as sources of obligations.

The contract was defined under art. 942 of the Civil Code as the mutual agreement between two or more persons in order to establish, modify or extinguish a legal relation of obligations between them.

The quasi-contract was defined under art. 986 of the Civil Code as "a lawful and voluntary act that gives rise to an obligation towards another person or mutual obligations between the parties"; the management of affairs (art. 987-981 of the Civil Code) and undue payment (art. 992-997 of the Civil Code) were regulated as quasi-contracts.

The delict was defined as a wrongful act committed by a person intentionally, causing injury to another, and forcing the person guilty of causing damage to remedy it (art. 998 of the Civil Code.).

The quasi-delict was defined, similarly to the delict, as a wrongful act committed by a person, causing injury to another and forcing the person who "negligently or recklessly" caused damage to remedy it (art. 999 of the Civil Code); so the distinction between delict and quasi-delict is the fact that in the former case the wrongful act is committed with intent, and in the latter case out of negligence, and the similarity is that in both cases the wrongdoer has the obligation to remedy the damage in full.

As noted in the thesis, the classification of the sources of obligations in the 1864 Civil Code has been criticized by the doctrine for the following reasons: the classification was considered incomplete, the classification of quasi-contracts within the category of sources of obligations was inaccurate, and the category of quasi-delicts as sources of obligations was unnecessary; i) the classification of the sources of obligations was considered incomplete because it did not include some sources of obligations, such as unjust enrichment of a person to the detriment of another and the unilateral legal act; ii) the inclusion of quasi-contracts into the category of sources of obligations was considered inaccurate, because the sources regulated under the name of quasi-contracts (a name which suggests similarities to contracts), namely the management of affairs and undue payment, were part of the legal facts, not contracts; iii) the category of quasi-delicts as sources of obligations was considered unnecessary because in civil law there is no difference between the legal regime of wrongful and voluntary acts and the legal regime

of those caused by negligence or recklessness, in both cases the wrongdoer being bound to remedy the damage in full.

Art. 1165 of the new Civil Code states that "Obligations arise from the contract, unilateral act, management of affairs, unjust enrichment, undue payment, wrongful act, and any other act or fact to which the law relates the creation of an obligation". In the doctrine it has been noted that the wording at the end of art. 1165 of the Civil Code (obligations may arise from "any other act or fact to which the law relates the creation of an obligation") permits the inclusion, in the category of sources of obligations, of facts or circumstances other than those expressly enumerated in art. 1165 of the Civil Code, such as those provided in other texts of the Civil Code (such as the following: art. 1375 of the Civil Code, regulating liability for animals that we have in our legal guard, art. 1376 of the Civil Code, on the liability for things that we have in our legal guard, art. 1378 of the Civil Code regulating the liability of the owner for the ruin of the building) or in other laws (such as Law 240/2004, which regulates the liability of the producer for damage caused by defects of the products marketed; art. 53 of the Constitution of Romania and art. 505 of the Criminal Procedure Code, on liability for damage caused by judicial errors).

In Section 3, entitled "Landmarks regarding the structure of the legal relation of obligation", we start from the premise that the legal relation of obligation consists of four elements: subjects, content, object and sanction, thus differing from other civil law relations, whose structure comprise three essential elements: subjects, content and object.

The subjects of the legal relation of obligation, also called the parties to the legal relation, may be both natural and legal persons, including the state, when it acts as subject of civil law (iure gestionis), not as the holder of sovereignty (iure imperii). The active subject of any legal relation is called creditor (reus credendi) and the passive subject is called debtor (reus debendi); these are generic names, but the subjects (parties) of various civil legal relations, bear names specific to the legal act or legal fact out of which they were created: seller-buyer, in the sales contract; donor-donee, in the donation contract; person benefitting from maintenance – person owing maintenance, in the maintenance contract, etc.

The content of the legal relation of obligation consists of the creditor's right to claim from the debtor the fulfilment of his promise and the obligation corresponding to this claim right, that lies with the debtor. In most cases, both parties to the legal relation have rights and obligations, so the content of the legal relation is bilateral (especially in the case of contractual legal relations), but the content of the legal relation may be simple,

i.e. one of the parties has only rights and the other only obligations. The right of claim is a patrimonial right that gives the creditor of a legal obligation the possibility of claiming that the debtor shall perform a promise for his benefit or refrain from certain actions. The promise which must be performed and the abstention which must be attained make the object of the legal relation.

The right of claim is also called personal right (jus in personam), because the debtor personally assumes an obligation [art. 2324(1) of the Civil Code]. Rights of claim make with real rights the category of patrimonial civil rights. The legal instrument that holders of claim (personal) rights have for their protection is the "personal action".

The object of the civil legal relation refers to the promise that the active subject is entitled to and the passive subject owes. The promise may be positive or negative.

The sanction of the obligation consists of all coercive means that the parties to the legal relation of obligation are legally entitled to, i.e. the debtor and the creditor for the performance of the promise result owed by the debtor.

In Section 4 of the first chapter, we approached the classification of civil obligations. The classification of obligations is important from a legal standpoint and it is reflected in the special rules applicable to obligations from different categories, each category of obligations having its own legal regime. Among the various criteria according to which civil obligations can be classified, the doctrine argues that the following criteria are relevant: the criterion of the sources of obligations, the criterion of the object of obligations, the criterion of the sanction of obligations, that of the enforceability of obligations, that of the subjects of the civil relation of obligation, and that of the modalities of obligations.

Chapter II, entitled "Constants of payment as the main way of discharging an obligation", is divided into five sections which analyze all issues concerning the payment of the civil obligation.

After analyzing in the first section the general issues relating to payment, i.e. the voluntary performance of the debtor's promise, payment grounds, the legal nature of the payment, payment of the natural obligation, in the second section, we analyze the issues referring to the subjects of the payment, conditions of payment, proof of payment, how the imputation of payment is made, the formal notice to the creditor.

Thus, the subjects of payment are considered to be the person who can make the payment and the person who can receive the payment of the obligation.

The rule established by the Civil Code is that the payment of the obligation can be made by any person, even if that person is a third party in relation to that obligation.

Accordingly, if the third party made a payment intended to discharge the obligation of the debtor and not by error, the creditor cannot refuse payment by third parties, as such payment is valid. The law provides the following exceptions from this rule: i) the creditor is obliged to refuse the payment offered by a third party if the debtor notified him in advance that he opposed this payment, unless such a refusal prejudiced the creditor; ii) the creditor may refuse payment by a third party when the nature of the obligation requires that the obligation be performed only by the debtor; iii) the creditor may refuse payment by a third party if the agreement of the parties requires that the obligation be performed only by the debtor. Since subrogation operates only in cases provided by law, the payment made by a third party is not valid if it is made in his own name; consequently, the payment must be made on behalf of the debtor, because otherwise the payment is not valid and the debtor will not be released of payment.

Pursuant to art. 1475 of the Civil Code, the following persons are qualified to receive payment: i) the creditor, and upon his death, his heirs; ii) the legal representative (parent, guardian, trustee) or conventional representative (agent) of the creditor; c) the person indicated by the creditor; iii) the person authorized by the court to receive payment. Other persons who are not legally entitled to receive payment, are considered third parties and payment made to third parties is not valid, so it does not release the debtor and therefore, the creditor may require that the debtor make the payment.

Exceptionally, the payment made to a third party is valid in the following situations: i) payment made to a person other than those who had a legal right to receive it is valid if ratified by the creditor; ii) payment made to a person other than the legally entitled person to receive it, but who later becomes the holder of the claim; iii) payment made to a person who claimed payment under a releasing receipt signed by the creditor; iv) payment made to a third party under conditions other than those provided by law extinguishes the obligation only to the extent that it benefits the creditor.

While approaching the conditions for the payment of the obligation, we analyzed the diligence required by law on the part of the debtor in performing his obligations, object of the payment, place and date of payment, indivisibility of payment and payment costs.

As for the diligence required on the part of the debtor in the performance of his obligations, it should be noted that the legislature has regulated differently the diligence required in the case of non-professionals and that required for professional activities, as follows: i) when the debtor does not carry out a professional activity he is bound to perform his obligations with the diligence of a good owner who administers his property;

ii) when the debtor fulfils obligations related to his professional activity, diligence is assessed taking into account the nature of the work performed, the specific standards for each activity [art. 1480(2) of the Civil Code].

Regarding the object of the payment, the law provides that, for the payment to be valid, the debtor must perform his promise; the debtor cannot be released if he performs a promise other than the one he owes, even if the value of the promise offered was equal to or greater than the promise owed. The legislature regulates the object of the payment according to the type of obligation making the object of the legal relation, distinguishing between obligations of result and obligations of means, between the obligation to constitute a guarantee and the obligation to move the ownership of an asset, the obligation to deliver goods of a type and the obligation to deliver an individually determined asset.

One of the most important principles enshrined by the legislature in the matter of payment is that of indivisibility, in compliance with which the creditor may refuse to receive a partial payment, even if the performance was divisible.

Determining the place of payment is particularly important from a legal standpoint: i) in order to determine the necessary costs of transporting the object of the payment to that place; ii) in order to determine the law applicable for the performance of the obligation.

The rules for determining the place of payment are established by law in case it has not been expressly established by the parties; in the absence of any express clause regarding the will of the parties, the place of payment can be determined by taking into account, where appropriate: the nature of the performance, contract terms, practices established between the parties or usages in the field.

Unless the parties have expressly established the place of payment and it cannot be determined in accordance with any of the criteria enumerated by the legislature, the place of payment may be determined based on the following complementary rules, which take into account the object of the obligation: i) the general rule is that payment is made at the debtor's domicile, i.e. the obligation is performed at the domicile or headquarters of the debtor at the time of concluding the contract; ii) monetary obligations must be performed at the domicile or headquarters of the creditor at the time of payment; iii) the obligation to deliver an individually determined thing must be performed in the place where the asset was at the time of concluding the contract.

To set the payment date the law first takes into account the will of the parties; in the absence of express contractual terms, the payment date can be determined "under the

contract", in accordance with the practices established between the parties or usages; when the time limit cannot be determined based on these criteria, the debtor's obligation must be performed "immediately" i.e. at the time of concluding the contract.

As for payment costs, the Civil Code has established the rule that they are covered by the debtor, unless otherwise stipulated in the contract.

As for the means of proof that can be used by the debtor in order to prove the payment, the law provides that the payment can be proved by any means.

The person who makes the payment (debtor, co-debtor, fidejussor) is entitled to a releasing receipt, possibly the remission of the original document of the claim, and if the creditor refuses unreasonably to issue a receipt, the debtor has the right to suspend or refuse payment. The costs for preparing the releasing receipt are covered by the debtor. To facilitate the task of the debtor to prove that he made the payment, the Civil Code has established a number of payment presumptions.

Given that there are situations where a debtor has several debts towards the same creditor, the object are goods of the same kind and the payment that he makes does not suffice to extinguish all debts, and therefore it is necessary to determine the order of payment of the debts under the name of "imputation of payment", the legislature has established a set of rules on how to determine the order of payment of the debts.

From the provisions of the law it first results that the payment is imputed in accordance with the agreement of the parties. In the absence of such an agreement, the imputation of payment can be made in the following order: the debtor has priority in determining the debt that will be extinguished by payment; without an option of the debtor, the creditor has the right to determine the order in which the debts are extinguished by payment; if the imputation of payment has not been made by any of the parties, it will be made by the effect of the law, i.e. by following the rules established by the legislature in this regard, namely: i) payment shall be imputed with priority on debts falling due, where not all debts are due; ii) if all debts are due, the unsecured debts or those for which the creditor has the fewest guarantees shall be deemed extinguished first; iii) if all debts are due, imputation shall be first on the debts that are more onerous for the debtor; iv) if all debts are equally due and equally guaranteed and onerous, older debts shall be extinguished first; v) if all debts are equally due and equally guaranteed and onerous and have the same length, imputation shall be proportional to the amount of debt; vi) in all cases in which the law established rules on the legal imputation of payment, the payment shall be first imputed on performance and court costs, then on instalments,

interest and penalties, in chronological order of their maturity, and finally, on capital, unless the parties otherwise agree.

With regard to the formal notice to the creditor, we have noted that unlike the 1864 Civil Code which did not regulate the debtor's right to formally notify the creditor in the event of his refusal to receive the payment offered by the debtor, or the liability of the creditor for damage caused to the debtor due to the unjustified refusal of receipt of payment, but only the actual offer of payment followed by the deposit, the current Civil Code has regulated both the debtor's right to formally notify the creditor in order to accept payment of debts when they fall due, and the consequences of the creditor's refusal to receive payment.

The new Civil Code has not given up the offer of payment and deposit, but it includes only a rule of reference to them, the procedure on payment offer and deposit being governed by the Civil Procedure Code.

The legislature has regulated two cases in which the debtor has the right to formally notify his creditor: i) the creditor unjustifiedly refuses the payment offered accordingly; ii) the creditor refuses to perform preparatory acts without which the debtor is unable to perform his obligation.

The effects of formally notifying the creditor are: i) the formally notified creditor takes over from the debtor the risk of impossibility of performing the obligation; ii) the creditor is obliged to remedy the damage caused by delay and to cover the costs for preserving the asset owed. The grounds for such liability is the fault of non-performance of his obligation to accept payment; iii) the debtor is not bound to return the fruit collected after formally notifying the creditor.

In Chapter III, called "Abandonment of payment and enforcement of obligations", divided into seven sections, we analyzed the following aspects: formal notice to the debtor, enforcement in kind of the obligation, enforcement by equivalence, assessment of damages, criminal clause, earnest money. As provided by law, so that the creditor may proceed to enforcement, the law requires the fulfilment of two conditions: i) the debtor's refusal to perform his obligation is unjustified; ii) the debtor is notified by the creditor or the formal notice operates automatically.

Roman civil law consecrated the rule that after the obligation had fallen due, the creditor must formally notify the debtor, unless the debtor is notified de jure. The formal notice to the debtor is necessary in order to award damages to the creditor, so that he can use the legal means for the achievement of his right (for instance, enforcement of the obligation). From the interpretation of legal provisions it results that the formal notice is

necessary where the parties have set a time limit for the performance of the obligation and where such a time limit has not been set. Under the law, formal notice to the debtor can be achieved at the request of the creditor or by the effect of the law.

Whether formal notice to the debtor was made by the creditor or the debtor is notified as a result of the will of the legislature, this formal notice has effects which are divided by the doctrine into two categories: effects of a general nature and effects of a special nature.

The effects of a general nature of the formal notice to the debtor are: a) the debtor is liable, from the date of the formal notice, for any loss caused to the creditor by fortuitous circumstances (art. 1525 of the Civil Code); b) from the date of the formal notice, the debtor owes damages to the creditor for unjustified non-performance or, where applicable, negligent non-performance of his obligation.

The effects of a special nature of the formal notice to the debtor are: the creditor's right to declare unilaterally the rescission or cancellation of the contract; interruption of the extinctive prescription; interruption of the limitation period for the exercise of legal action; failure to perform the obligation to do; solidarity between debtors or creditors; interest payable by the agent for the amounts that he owes to his principal; interest owed by the depositary for the funds deposited and not given back.

As for the effects of a special nature of the formal notice to the debtor, the legislature has established the following rules: i) the creditor has the right to unilaterally declare the rescission or cancellation of the contract by giving written notice to the debtor (if the parties have so agreed by a resolutive clause) when "the debtor has been formally notified de jure or when he has not performed his obligation within the time limit set by the formal notice". The commissary pact takes effect if it expressly provides the obligations the non-performance of which entails de jure rescission or cancellation of the contract; ii) in case of failure to perform the obligation to do, the creditor may, at the expense of the debtor, perform it himself or make the obligation be performed; iii) in the case of solidarity between debtors, if after formally notifying one or more joint debtors the performance in kind of an obligation becomes impossible, due to one or more joint debtors or after they were personally and formally notified, the creditor may require additional damages only from the debtors who had been formally notified when the obligation became impossible to perform. The other co-debtors are not responsible for additional damages that the creditor would be entitled to, having only the duty to pay the creditor by equivalent. The notification by the creditor to one of the joint co-debtors (in the case of passive solidarity) takes effect on the others as well; iv) in the case of active

solidarity (between creditors), the notification by one of the joint creditors to the common debtor takes effect on the other creditors as well; the judgment obtained by one of the creditors against the common debtor benefits the other creditors too; v) in the case of the mandate contract, the agent owes interest on amounts that he owes to the principal from the date he was formally notified; vi) in the case of the deposit contract, the depositary owes interest on the funds deposited only from the day he was formally notified to return it.

With respect to enforcement in kind of the obligation, the Civil Code has established the rule that, if the debtor has not performed the obligation voluntarily, the creditor can always request that the debtor be coerced into performing the obligation in kind, since the accurate performance of the obligation involves its performance in kind. From the rule of enforcement in kind, there is an exception when such enforcement is impossible.

Performance of the obligation varies from one type of obligation to another; therefore, the creditor's right to obtain enforcement in kind of the debtor's obligation was regulated by the legislature in view of the object of the obligation undertaken by the debtor (obligation to give, obligation to do or not to do).

In the case of enforcement in kind of the obligation to give (which requires that the debtor transfer or create a real right over a particular asset and deliver that asset to the creditor), the Civil Code regulated only the creditor's right to remedy in the event of defective performance, i.e. if the debtor delivered an asset inconsistent with the contract. The issue of enforcement in kind of the obligation to give is approached by the doctrine according to the object of this obligation; thus, the following have been analyzed: the obligation to give a sum of money, the obligation to give an individually determined asset and the obligation to give a generic asset.

The enforcement of the obligation to do cannot be in kind, because it would require physical constraint on the debtor in the performance of the contract, which is considered unacceptable because it would interfere with the freedom and dignity of the debtor; so the debtor cannot be forced directly, but only indirectly, to perform the obligation to do, the only constraint admitted by civil law being the patrimonial one. The ways of enforcing obligations to do are different, depending on whether the law requires for the enforcement of certain obligations the existence of an enforceable title and in this case the enforcement bodies are resorted to, and other obligations can be enforced by the creditor directly, by private means, i.e. by his own means or with the assistance of third parties.

The enforceable title is necessary for the enforcement of the obligation to deliver immovable property, individually determined movable property and for the enforcement of obligations which implies the personal act of the debtor. For the enforcement of the obligation to do which has as an object the conclusion in the future of a contract constituting or transferring real rights, one should consider the legal provisions on the promise to contract and those on the promise of sale and promise of purchase.

In the case of obligations contained in an enforceable title, the enforcement procedure differs according to the object of the obligation: in the case of an obligation to do which has as an object the delivery of immovable property or its evacuation, the rules laid down by art. 895-901 of the Civil Procedure Code are to be followed; in the case of an obligation to do which has as an object the delivery of individually determined movable property, the enforcement in kind shall be made in accordance with the rules provided in art. 892-894 of the Civil Procedure Code; in the case of the obligation to do intuitu personae, if the debtor refuses to perform the obligation, the creditor may ask the court to force the debtor to pay penalties for each day of delay in accordance with art. 905 of the Civil Procedure Code, in order to constrain him to perform the obligation in kind or he may choose enforcement by equivalent; in the case of other obligations to do enforcement in kind is done according to the procedure regulated by art. 903 et seq. of the Civil Procedure Code.

There are also obligations for the enforcement of which an enforceable title is not necessary; to this category belong obligations to do having as an object promises which do not involve the personal act of the debtor, but can be performed by anyone, such as: demolishing a building, moving a fence, digging a ditch, delivering goods, executing works, providing services, etc. In the case of these obligations for the enforcement of which an enforceable title is not necessary, the creditor may choose to obtain an enforceable title for the enforcement while resorting to the coercive force of the state or he may make the enforcement by private means, under art. 1528 of the Civil Code.

Thus, the legislature has provided that in case of failure to perform an obligation to do, the creditor may perform the obligation at the expense of the debtor, i.e. to perform himself the contractual obligation of the debtor or to make it be performed by resorting to a third party for this purpose; an application of the rule established by art. 1528 of the Civil Code is, for example, art. 1788 of the Civil Code, which provides that "If, after the conclusion of the contract, there arises the need for repairs which are incumbent on the lessor, and the latter, although notified, does not begin to take the necessary measures immediately, repairs may be made by the lessee. In this case, the lessor is obliged to pay,

in addition to the sums advanced by the lessee, interest calculated from the date of expenditure".

To apply the provisions of art. 1528 of the Civil Code, two concurrent requirements must be met: (i) the creditor has formally notified the debtor, if he is not notified de jure; (ii) the creditor has announced the debtor, either formally or subsequently, that he will exercise this right.

The obligation not to do can be enforced in kind by the creditor through private means; he may perform himself the contractual obligations that the debtor undertook or may resort to a third party for this purpose, at the expense of the debtor.

Regarding enforcement by equivalent, one should start from the premise that it is subsidiary, since enforcement in kind is the first option of the creditor, and through enforcement by equivalent the original claim is replaced by another claim, whose object is the amount of money which is equivalent to the loss suffered by the creditor; but this replacement does not mean changing the original obligation in another obligation; the consequence of the survival of the original obligation is that the guarantees constituted for the performance of the original obligation ensure the award of damages. Only when the original obligation was not performed voluntarily or forcibly, or when the creditor is no longer interested in performance in kind, or it is no longer possible, the creditor exercises the second option, which is to seek performance of the obligation by equivalent, i.e. award of damages. Neither party has the right to choose ab initio between the performance in kind of the obligation and its performance by equivalent, i.e. unilaterally change the object of the obligation. Instead, the parties may agree to change the object of the obligation, operation called giving in payment.

Enforcement by equivalent can be done both in the case of obligations to give (for instance, when the obligation can no longer be performed by the debtor because the thing has perished or has been sold), and in the case of obligations to do (for instance, if the obligation is intuitu personae) or not to do, regardless of the actual obligation that the debtor must perform. Monetary obligations cannot be enforced by equivalent, for pecuniary obligations can be performed in kind at any time.

Chapter IV, entitled "Considerations on the means of protecting the rights of creditors", is divided into four sections. The Civil Code regulates the following "means of protecting the rights of creditors": protective measures, the indirect action and the revocatory action. Each of them is subject to analysis in one section.

Art. 1558 of the Civil Code considers that the following are protective measures: securing evidence, performing publicity formalities (for instance, registration of a

guarantee), fulfilling information formalities on the debtor's account, initiating an indirect action or taking precautionary measures, and art. 1559 of the Civil Code specifies that the main precautionary measures are seizure (precautionary seizure and judicial seizure) and precautionary attachment (regulated by the Civil Procedure Code).

The enumeration of protective measures made by the legislature is illustrative and, as a consequence, the doctrine considers that the following are protective measures as well: a) action for simulation brought by the creditor of one party, who is prejudiced by the apparent act and has an interest to invoke the secret act, which is favourable to him; b) direct action exercised by the creditor, under the contract of enterprise or mandate, against a debtor of his debtor to achieve his claim right up to the amount that the debtor-third party owes to the debtor-defaulter at the time of bringing the action; c) the right of the inheritance creditor to request the competent notary public to order an inventory of the goods belonging to the succession patrimony; d) the right of the inheritance creditor to give consent to the appointment of the administrator by the competent notary public, when there is a danger of alienation, loss, replacement or destruction of the inheritance goods; e) the right of the inheritance creditor to lodge a complaint with the competent court if he considers himself prejudiced by the inventory drawn or protective and administrative measures taken by the notary public; f) the right of the creditors of the heir who disclaimed the inheritance and defrauded them to ask the court to revoke the waiver in respect of them; g) the right of the creditors whose claims were created before the opening of the inheritance to ask to be paid from the joint property before the distribution of the inheritance; h) the intervention in the debtor's trials, as regulated by art. 61 et seq. of the Civil Procedure Code; i) the right of the inheritance creditors to be preferentially paid against the personal creditors of the heir from the goods of the inheritance attributed upon distribution, as well as the goods replacing them in the patrimony of the heir.

Chapter V, entitled "Other legal means for the discharge of obligations", is divided into five sections dealing with: compensation, confusion, giving in payment, remission of debt, fortuitous impossibility of performance. Each of them addresses specific issues such as legal definition, scope, validity conditions, effects.

Chapter VI, entitled "Conflict of laws on civil obligations in European Union law and Roman law" is divided into three sections.

The first section, which includes preliminary issues, starts from the premise that civil legal relations sometimes contain one or more foreign elements which may give rise to conflicts of laws, thus leading to the need to determine the law applicable to the legal relation in question. The legal relation containing at least one foreign element is a relation

of private international law. The foreign element is not a distinct structural element of the legal relation, along with subjects, content and object, but any of these elements may constitute foreign elements. Thus, there are foreign elements that may be connected with the subjects of the legal relations as follows: citizenship, domicile or residence (for natural persons), headquarters, nationality, goodwill, etc. (for legal persons); these are foreign elements when they are foreign or they are abroad. In relation to the asset-derived object of the legal relation, it is a foreign element if it is located abroad or in the country, but is under a foreign law (the property of a foreign embassy in Romania). In connection with the content of the legal relation, we have argued that these are foreign elements: the place of concluding the legal act or of performance (in the case of legal acts) or the place of commission of tort or where the damage occurred (in the case of legal facts stricto sensu), the place of death of the individual, etc.

The mere existence of a foreign element in a legal relation leads to the creation of a conflict of laws, i.e. the legal relation becomes subject to the application of two or more legal systems belonging to different states, but finally, a single legal system determined by the norms of conflict will be applied to such a legal relation.

The second section is called "the regulations of private international law in European Union law". The study of this aspect assumes that after Romania joined the European Union, one must distinguish between intra-Community private international law and extra-Community private international law. As regards intra-Community private international law, we highlighted issues relating to its development and regulatory framework.

The last section (the third section), aims to study the regulatory framework of private international law relations in Roman law. The provisions on private international law relations are contained in the Civil Code and the Civil Procedure Code. Both Codes specify that those provisions are applicable to relations with foreign elements insofar as it is not otherwise provided by international treaties to which Romania is party, by European Union law or by special law; therefore, these provisions are applicable to extra-Community legal relations.

In the chapter "Issues of notarial practice in the matter of discharging obligations" we analyze some professional obligations of notaries public, with regard to authentication of legal documents, either unilateral or bilateral, which have as a consequence the discharge of civil obligations through some of the ways regulated by the Civil Code, namely by payment, giving in payment, compensation, confusion, remission of debt. Thus, the remission of debt is encountered in the notary's activity when this legal

operation is made by the creditor by an authentic will. In this case, the legacy exempting the debtor must meet all the formal and substantive legal requirements for the validity of the will. The duties of the notary public in authenticating such a will are provided by the law on notaries public and notarial activity

At the end of this abstract of the PhD thesis, we will review the five de lege ferenda proposals that we made in the paper:

1) Observing that the doctrine has expressed the opinion that the legislature's view on distinguishing between pure and simple obligations and simple obligations is not justified, for it would be ambiguous (for in the Code there is a regulatory hypothesis in which the distinction is denied, more precisely art. 1054 of the Civil Code provides that the legacy may be "pure and simple, with a term, under condition or encumbered"), we showed that we did not share this opinion because in art. 1054(2) of the Civil Code, we can see an error of expression of the legislature and not a denial of the distinction made by the legislature in art. 1396(2) of the Civil Code; to remove this inconsistency of expression, we proposed, *de lege ferenda*, a correction of the material error committed by the legislature.

2) In the event that an obligation undertaken by the debtor under the contract has not been performed in kind, the doctrine has formulated two opinions: one which argues that "damages" is the monetary equivalent of the non-performed obligation of the debtor, an obligation which is converted into a sum of money, called "damages" and another which argues that due to the non-performance in kind of the debtor's obligation, inappropriate performance or delayed performance, the creditor is prejudiced and damages that are owed to the creditor to remedy this prejudice are called "damages" by the legislature.

The first opinion, based on the premise that if the debtor's obligation is not performed in kind, either voluntarily or forcibly, the creditor is entitled to its performance by equivalent, i.e. the promise of the debtor, regardless of its nature, is converted into an amount of money which represents the monetary equivalent of the original obligation. If due to non-performance in kind of the obligation or delayed performance the creditor suffers a prejudice, the debtor has the duty to remedy the damage. The author of this opinion (Professor P. Vasilescu) shows that traditionally, due to the confusing regulation of the performance of obligations by equivalent made by the 1864 Civil Code, the doctrine identified the performance by equivalent of the debtor's obligation with the remedy of the damage to the creditor as a result of the debtor's failure to perform the

obligation (pursuant to art. 1073 of the old Civil Code, "The creditor is entitled to acquire the exact performance of the obligation and, otherwise, is entitled to remedy").

The new Civil Code is confusing with regard to the distinction between the monetary equivalent of the non-performed obligation of the debtor and the monetary equivalent of any possible damage to the creditor due to the failure to perform the obligation; so, pursuant to art.1530 of the Civil Code, "The creditor is entitled to damages for the remedy of the prejudice that the debtor caused to him and which is a direct and necessary consequence of unjustified non-performance or, where appropriate, negligent non-performance of the obligation". This confusion is not removed by the corroboration of art. 1530 with art. 1537 of the Civil Code, which provides that "The proof of non-performance of the obligation does not exempt the creditor from proving the damage, unless otherwise provided by law or by the mutual agreement of the parties".

The author of the first opinion emphasizes the fact that the practical stakes of the distinction between damages that the creditor is entitled to for the contractual obligation that is not paid by the debtor and damages owed to the creditor if he has suffered damage because of non-performance of the obligation consists in determining as precisely as possible the conditions under which the debtor shall be bound to pay damages. Thus, in the case of damages which represent the monetary equivalent of the non-performed obligation, the creditor must only determine the amount of such damages, whereas if the damages represent the compensation owed to the creditor who has suffered damage out of the negligence of the debtor who has not performed the obligation in kind, the creditor must prove that the conditions of civil liability are met. In conclusion, the damages referred to in art. 1530 of the Civil Code represent not only the monetary equivalent of the unpaid contractual obligation of the debtor, but also compensation for the damage which is caused by the non-performance in kind of the obligation, but their evidentiary regime is different.

The second opinion, traditional and shared by the majority, argues that by the non-performance in kind of the debtor's contractual obligation, inappropriate performance or delayed performance, the creditor is prejudiced, which results in the debtor's contractual liability for damages; the compensation to which the creditor is entitled to remedy this prejudice is called "damages".

De lege ferenda we proposed that, in order to remove the ambiguity of the notion of damages, the legislature should specify that the damages due to the creditor represent both the monetary equivalent of the original obligation and the monetary equivalent of any possible prejudice to the creditor because of non-performance of the obligation.

3) The third de lege ferenda proposal is related to the principle of full remedy of the damage [art. 1531(1) of the Civil Code]. This principle requires the debtor to pay both the actual damage (lucrum cessans) and the loss of earnings (damnum emergens) of the creditor [art. 1531(2) thesis I of the Civil Code], as in the case of liability in tort. In this sense, it has been decided in the jurisprudence that, if the seller of an apartment fails to perform the obligation to deliver it to the buyer on the date established in the contract, and the latter has to rent a house during that period, the seller may be forced to compensate the buyer for the prejudice suffered because he was deprived of the use of the property, the criterion that can be used to calculate compensation being the rent provided by law or agreed to by the parties with regard to the rented house; the actual damage to the buyer is the sum paid by him as rent for the rented house; the loss of earnings is the rent that the buyer would have got out of the renting of the extra space, if the sold apartment had been delivered on time.

As regards the evaluation date, the date of determining the amount of the damage, art. 1386(2) of the Civil Code provides that one should consider the date of the damage (although these provisions relate to compensation in case of liability in tort, they are also applicable to the remedy of the damage in the case of contractual obligations, since the provisions referring to liability in tort are the general law in the matter of liability). We support the opinion which argues that such a provision does not comply with the requirements of the principle of full remedy of the damage, for in terms of currency depreciation, monetary compensation that the creditor will get at the time of the enforcement of the judgment will not provide full compensation for the damage or will be higher than the real value of the damage to the creditor.

Our de lege ferenda proposal is to consecrate the solution of determining compensation based on the amount of damage on the date of the judgment, a solution that is likely to give satisfaction to the principle of full compensation for the damage suffered by the creditor as a result of the debtor's failure to perform the obligation and reinstatement of the parties.

4) Our fourth de lege ferenda proposal has to do with regulating the criminal clause; pursuant to art. 1538(2) of the Civil Code, if the criminal clause was stipulated for the non-performance of the obligation, if the debtor does not voluntarily perform the obligation, the creditor cannot require both the enforcement in kind of the principal debt and the payment of the penalty; so, the creditor has the right to choose between the enforcement in kind of the principal obligation and the enforcement of the criminal clause; instead, pursuant to art. 1538(3) of the Civil Code, the criminal clause does not

entitle the debtor to be released by providing compensation agreed to by the criminal clause (the justification of such a provision is given by the fact that the criminal clause does not convert the original obligation into an alternative obligation); noting that this provision reiterates the idea contained in art. 1492(1) of the Civil Code, in accordance with which "The debtor cannot release himself by performing a promise other than the one he owes ..." and in the provisions of art. 1516(1) of the Civil Code, in accordance with which "The creditor is entitled to the full, accurate and timely performance of the obligation", I have proposed *de lege ferenda*, to eliminate the provisions of art. 1538(3) of the Civil Code, which are signs of regulatory redundancy.

5) The fifth de lege ferenda proposal is related to the discharge of civil, contractual and extra-contractual obligations; I have found that the legislature took over art. 2643(1) of the Civil Code, tale quale the text of art. 122 of Law 105/1992, now repealed, disposing that delegation and novation are subject to the law applicable to the obligation that makes their object; therefore, we proposed, de lege ferenda, that the legislature should harmonize art. 2643(1) of the Civil Code, Book VII, which contains private international law provisions on the settlement of conflicts of laws in matters relating to obligations with the regulations of Book V ("On obligations"), Title VII, on ways of discharging obligations, while providing the following reasons: i) firstly, the delegation is no longer regulated by the new Civil Code (the old Civil Code regulated the delegation in the section devoted to novation) and therefore there is no justification for the existence of a provision on the law applicable to a legal operation unregulated by law; ii) secondly, the novation is not qualified by the new Civil Code as a means of discharging obligations (as described by the old Code), but it is considered a way of converting obligations; so, referring to novation in an article with the marginal title "Discharge of obligations" proves the superficiality of the legislature.