

# THE REGULATION OF THE BANKING CONTRACTS IN THE NEW CIVIL CODE

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## **Abstract**

*Starting with the enactment of the New Civil Code have been regulated for the first time contracts and legal institutions specific to the banking activity. The new regulation even if they brought important solutions for certain problems regarded in the commercial activity and especially in the banking sector, have also raised new questions regarding especially their domain of applicability, their imperative or dispositive character or the possibility for the parties to conclude contract other than those expressly regulated. By taking into consideration the special character of the operations involving the administration of money as well as the sensitivity from a legal and especially social perspective of the ownership relation regarding money, we have focused in our analysis on the relations resulting from the contracts regulated by the chapter “the bank account and other banking contracts”.*

**Key words:** deposit, ownership right over money, credit, credit institution.

**JEL Classification:** K12

## **I. Highlights regarding the banking contracts in Romania**

Starting with the enactment of October 1<sup>st</sup>, 2011 of the Law no. 287/2009 regarding the Civil Code<sup>2</sup> (hereinafter “the New Civil Code”), as further amended by Law no. 71/2011 for the enactment of the Law no. 287/2009 regarding the Civil Code, the Romanian legislator abandoned the dualist conception of law (dichotomy civil law-commercial law) adopting in the New Civil Code the monist conception.

Furthermore, in the New Civil Code have been regulated for the first time the banking contractual relations (the bank account, bank deposit, credit facility and renting of the safe deposit boxes), this actually creating the common law for this matter.

However, the synthetic regulation of the banking contracts in the New Civil Code pursues only the legal confirmation of the parties intention who are taking part to the banking relations, without specifying or giving any detail about the *contract mechanics*. The reason why the legislator avoided a detailed regulation of such contracts may, on one hand, be represented by the impossibility of the legal act of covering all the banking operations, and on the other hand, because of the high complexity and mobility of such operations.

Having in mind the above, the common aspects of the banking contracts will remain subject to the general contractual regime, as regulated by the New Civil Code, the rules and regulations issued by the National Bank of Romania, as regulatory and supervisory authority of the credit institutions, and the general terms and conditions specific to each credit institution and used in relation with their clients.

## **II. The bank account and the bank deposit**

Although along time the way we are using money has suffered several transformations, we consider that money have to be analysed from the perspective of the key elements identified by Aristotel in his work *Politics*<sup>3</sup>: means of exchange (the possibility to use them to pay for

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<sup>2</sup> Law no. 287/2009 regarding the Civil Code, published in the Official Gazette, Part I, no. 505 of 15/07/2011;

<sup>3</sup> Aristotel, *Politics*, published by Antet, Bucharest, 2001;

certain goods or services), means of value (a standard for establishing the price or the market-value) and store of value.

Furthermore, Karl Marx, in the first volume of his book “Das Kapital”<sup>4</sup>, has considered money as being an independent form of capital, which has resulted, concerning the capitalists societies, in a fight for gathering as much money as possible, this departing from the Aristotelian theory.

Currently money is no longer limited to the amount of printed banknotes and coins but it is represented by a monetary value universally convertible (capital value, the value of credits, value of proceeds. In order not to miss any of the understandings that term *money* have, in the following we will use the expression *monetary value* through which we are trying to stress on the essence of the operations with funds.

A. The regulation of the bank account in Section I of Chapter XV (**The bank account and other banking contracts**) of the New Civil Code represents a novelty from the Romanian legislative perspective. The provisions of the previous Civil Code<sup>5</sup> do not contain a regulation for this kind of contract. Moreover, neither the Commercial Code<sup>6</sup> contained any provisions regarding the bank account. In the banking legislation there is no clear regulation of the bank account as the one indicated in the New Civil Code. Nevertheless, references regarding the bank account can be found in the Government Emergency Ordinance no. 99/2006 regarding credit institutions and capital adequacy as well as in the account regulations consistent with the European directives, applicable to credit institutions, non-banking financial institutions and Bank deposits guarantee fund.

Even so, we want to underline the fact that the New Civil Code is creating two legal regimes in the situation of the credit institution insolvency, in relation with the clients funds: (i) funds property of the clients (the funds from the bank account, the funds constituted in bank deposits other than those regulated by article 2191 of the New Civil Code) and (ii) debts of the credit institutions in relation with their deponents (in the situation of the deposits regulated by article 2191 of the New Civil Code).

As a previous regulation of the bank account was inexistent in the Romanian legislation, the New Civil Code has adopted in its articles, the principles developed by the banking practice, the main provisions regarding the rights of the bank accounts holders, the particularities of commune bank accounts or the action in recovering the existing funds from a bank account.

Currently the bank account represents the support for most of the banking operations, the cashier operations being very rare (e.g. currency exchange operations involving cash). The amounts from the bank accounts are representing the result of the current operations of deposit, payment and withdrawal of the client, the credit institution not being entitled to use those funds<sup>7</sup>.

The legal doctrine<sup>8</sup> considers the bank account as being a dual purpose instrument because on one side it has the specific of a bank deposit without the possibility for the credit institution to use the existing amounts, and on the other side it represents an instrument used to perform certain operations such as payments or withdrawals.

The legal doctrine has also expressed the opinion according to which “the bank account is a remunerated funds deposit, without any term, over which a mandate granted by the account holder to the bank is overlapped in order for the bank to perform certain payments or account

<sup>4</sup> Karl Marx, *Das Kapital*, published by Regnery Publishing Inc., Washington DC, 2009;

<sup>5</sup> Civil Code of Romania, published in brochure no. 0 of 26/07/1993;

<sup>6</sup> Commercial Code of Romania, published in brochure no. 0 of 27/06/1997;

<sup>7</sup> Rada Postolache, Ilie Genoiu, Steluța Ionescu, Marinela Manea, Manuela Niță, *Contractul de depozit și varietățile acestuia*, published by C.H. Beck, Bucharest, 2010;

<sup>8</sup> Ion Turcu, *Drept Bancar vol. II*, published by Lumina Lex, Bucharest, 1999;

operations in the name and on behalf of the client./ The depository-bank becomes the owner of the deposited money (the money losing their individuality after the moment they are submitted in the bank account), the bank account holder having only a right to claim the money from the bank./ But the bank account holder has the right to dispose at any moment of the positive balance of the bank account...<sup>9</sup>.

We cannot agree with this second theory because it is not taking into consideration certain legal provisions and economic realities for which the preservation of the rights in relation with the monetary value constituted in bank deposits, is essential.

In this respect we would like to mention for example the European Directive 2004/39/EC on markets in financial instruments<sup>10</sup> which indicates under point 26 of the preamble that for the protection of the ownership rights and similar rights of an investor over its financial assets as well as its rights over the funds entrusted to an investment company, it is properly to segregate those rights from those of the company. Moreover according to article 4 of the above mentioned Directive, the ownership rights of third parties in relation with the funds entrusted to an investment company has to be protected especially against insolvency, seizer or any similar measures.

In fact, we have in mind the scenario in which a person intends to perform certain operations on the capital market. In this case that person will entrust an amount of money to a Financial Investment Services Company (Romanian language "*Societate de Servicii de Investitii Financiare*") (SSIF) which SSIF will deposit in a bank account operated in the name and on behalf of the client. All the payments and receivables corresponding to the activities performed on the capital market will be operated through this bank account.

As resulting from the provisions of the Directive 2004/39/EC one problem which may occur in the financial circuit is the insolvency of the SSIF or the insolvency of the credit institution.

The English jurisprudence<sup>11</sup> has solved the problem regarding the funds entrusted to a SSIF in the case when the credit institution where the client accounts are opened through the institution of *trust*<sup>12</sup>. In this respect the British courts have established that the funds recorded in the accounts of the credit institution affected for the performance of operations on the capital market do not become the property of such institution, the credit institution being in this situation only a *trustee*. Furthermore, the judges have mentioned that such funds have to be expressly segregated from those of the credit institution. Mixing the amounts placed in trust with the bank own funds leads to the ownership right itself over the resulted amount, from the bank to the client.

In Romania, Directive 2004/39/EC have been transposed through the Regulation of the Romanian National Securities Commission no. 32/2006<sup>13</sup> regarding financial investment services. According to article 90 of the above mentioned regulation, SSIF has the obligation to protect the funds of its clients and to return them upon their request. By taking into consideration the fact that the amounts entrusted to SSIF are deposited into a bank account opened with a credit institution (called *settlement bank*), according to the second theory mentioned above the

<sup>9</sup> Flavius-Antoniou Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *NOUL COD CIVIL. Comentariu pe articole*, published by C.H. Beck, Bucharest, 2012;

<sup>10</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC

<sup>11</sup> Reunited causes A2/2011/0070, A2/2011/0070(A), A3/2011/1107, A3/2011/2106 & A2/2011/1059, Royal Court of Justice, data 03/04/2012;

<sup>12</sup> "Trust", the regime of ownership and management of property of another, specific for Anglo-Saxon law;

<sup>13</sup> Regulation of National Securities Commission no. 32/2006, published in the Official Gazette, part I, no. 103bis of 12/02/2007

settlement bank acquires the ownership right over those amounts. In the case when the settlement bank goes insolvent, it appears the question if the SSIF is still capable to reimburse its clients upon their request. That is why we consider that in this situation may become incident the provisions of the Directive 2004/39/EC and consequently the SSIF clients, based on their ownership rights over the funds, expressly indicated by the directive, may claim those funds without being necessary to follow the procedure described by the insolvency legislation. Pursuant to those mentioned above it results that the purpose of the Directive 2004/39/EC is to preserve for the clients the ownership rights over their funds no matter the economic circuit of such funds.

In conclusion we consider the property right over the monetary value submitted in bank accounts stays with the bank account holder, the credit institution being merely the representative of its client when it performs in the name, on behalf and at the order of its client certain payment and collection operations.

**B.** The second section of Chapter XV (**The bank account and other banking contracts**) is regulating, also as novelty, the bank deposit. In this section the Romanian legislator, inspired by the Italian Civil Code, has regulated, in a synthetic manner, on one hand the deposit of funds with a credit institution and, on the other hand, the securities deposit with a credit institution.

1. Deposit of funds with a credit institution

The regulation manner of the deposit of funds is mostly reiterating the recent legal doctrinal concepts without taking into consideration the current banking realities.

The New Civil Code is taking from the legal doctrine those theories which have associated the deposit of funds with the irregular deposit. Therefore, in article 2191 (Deposit of funds) of the New Civil Code is indicated that “by constituting a deposit of funds with a credit institution, that institution acquires the ownership right over the submitted money amounts and it has the obligation to give in return the same monetary quantity, of the same kind, upon the established date, or as the case may be, any time at the client’s request, respecting the notification term established by the parties, or if such notification term was not indicated, in accordance with the market practice.”

Pursuant to the article above indicated when a person opens a deposit of funds with a credit institution, as a rule, that person loses the ownership right over those funds. Although the older legal doctrine<sup>14</sup> has expressed in very precise terms the fact that the property is sacred and can only be transmitted upon the express will of the owner, in the recent doctrine<sup>15</sup>, starting from the fungible character of the money, and applying the same concepts as for the property over fungible assets, have been argued that the property is also transferred in the case of the funds deposits with a credit institution.

The necessity of transferring the ownership right to the bank was explained mainly by: (i) the possibility for the bank to use the funds from the deposits for supporting the credit activity and (ii) the impossibility for the bank to return, once they are getting into the economic circuit, the same banknotes and coins received from the deposit owner (the fungible character of the banknotes and coins).

(i) In what concerns the explanation of the ownership transfer by the possibility of the bank to use the funds attracted through bank deposits for further granting credits, we ask each other if the total amount of credits granted at the national level by the credit institutions is equal with the value of the deposits opened with such institutions? In order to answer to this question we have conceived the following theoretical exercise through which we are trying to evidence the way in

<sup>14</sup> Dimitrie Alexandresco, *Explicațiunea teoretică și practică a dreptului civil român*, Tomul VI, Tipografia Națională, Iași, 1900;

<sup>15</sup> Flavius-Antoniua Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, *NOUL COD CIVIL. Comentariu pe articole*, published by C.H. Beck, Bucharest, 2012;

which the credit institutions are constituting the necessary funds for their credit activity (*the Leverage Effect*):

(T 0) We are starting from the following premises – at a certain moment a person (P) constitutes a deposit of funds with a credit institution in total amount of RON 3000. The term of the deposit is one year. Those RON 3000 represents the sole deposits attracted until that moment by the depository credit institution.

(T 1) Three days after the moment the deposit was opened P is asking the credit institution where the deposit is opened to grant a credit in total amount of RON 3000, the client not wanting to early close the deposit. P is receiving the credit in total amount of RON 3000 for a period of six months with a total interest of RON 1000. In this moment the credit institution has in relation with its client a deposit and a credit. In fact the credit institution holds in its records RON 3000 and an exposure of RON 4000.

(T 2) After he takes the credit P realises that he is left with RON 2000 of the credited amount and decides to add that money in the initially created deposit. In this moment the credit institution holds in its records RON 5000 but in fact it has only RON 2000 in cash, but actually the total amount which can be reoffered as credits is RON 5000. This is called the Leverage Effect of the deposits.

As follows from the above example, the credit institution is not necessarily lending their clients' money but the money created through the Leverage Effect. The existence of a significant disproportion between the deposits opened at the credit institutions and the credits granted by such institutions is also represented in the statistical reports published by the National Bank of Romania<sup>16</sup>.

Furthermore, by making a parallel analysis between the deposit of funds with a credit institution and unrepresented mandate agreement, in the situation when the representative receives from the principal an amount of money for the purpose of using it to fulfil the mandate (e.g. to buy for the principal a car), even if in such situation the moneys are regarded as fungible assets, the ownership right over the money is not transfer to the representative, this one having only a preservation obligation. However the representative will be able to use those amounts in his own name but on behalf of the principal without being able for us to affirm that the representative acquires the ownership over the money.

Nevertheless, during the existence of the deposit, in the credit institution evidences the positive balance of the account, as evidenced in the bank account excerpts, is unchanged, which can lead to the conclusion that such financial value was never placed. In the English doctrine the property is considered to be lost in the moment when the amount from the deposit account has disappeared<sup>17</sup>.

(ii) In what concerns the explanation of the ownership transfer by the impossibility of further returning the same banknotes and coins submitted by the depositor (the fungible character of banknotes and coins) we would like to underline the fact that a significant part of the deposits is constituted by transferring money between bank accounts. In this case the deposit will be established in a scriptural manner without having banknotes or coins. This type of opening a deposit of funds may lead to the idea that in the deposit account is submitted a *value* which might be represented through account units and not necessary in physical money. Having that in mind, we can say that physical money or the account units represent two formal ways of expressing the idea of monetary value.

<sup>16</sup> <http://www.bnro.ro/Statistica-monetara-si-financiara-6380.aspx>;

<sup>17</sup> Alastair Hudson, *The Law of Finance*, Thomson Reuters, London, 2009;

Furthermore, according to article 2191 paragraph 1 of the New Civil Code, the credit institution has the obligation to restore “the same monetary quantity, of the same kind”. Consequently to this definition of the code at the moment the deposit is due and payable or when the depositor is requesting so the credit institution should return the same monetary quantity of the same kind. In fact, when the depositor has submitted initially with the bank ten banknotes of RON 100, he can receive on the due date or upon request, one hundred banknotes of RON 10 or twenty banknotes of RON 50 or any other combination of banknotes and coins equal to the value initially submitted. However the payment obligation of the credit institution will be also considered to be executed if on the due date or upon request the initial amount is transferred in the depositor current bank account, in this case the monetary value being expressed in account units. An opposite interpretation of the above would be contrary to the banking practice and commercial facts.

Also the above example may be analyzed also vice versa, considering the constitution of the deposit through a bank account transfer. In this scenario the credit institution obligation will be also considered executed if on the due date or upon request, it returns to the depositor the equivalent of the deposited value in banknotes and coins.

In the case where the banknotes and coins, identified through specific signs or series constituted in a deposit are considered essential at the moment of the conclusion of the deposit convention, then we are no longer in the situation regulated by article 2191 of the New Civil Code, but in the case of a regular deposit.

We would also like to add that when we are referring to the price of an asset we have in mind a global value (e.g. RON 100 for a book) and not banknotes and coins (e.g. ten banknotes of RON 10 for a book). By extending this to the deposit of funds agreement then when the parties agree to open such deposit they have in mind the value of it and not the effective way in which this value is expressed.

As resulting from the above we can see that the accent in a deposit of funds is on the monetary value submitted and not on the physical elements which express it (e.g. banknotes and coins). Consequently our opinion is that the depositor may allow and the bank may use the entrusted value without being necessary a transfer of the ownership rights between the depositor and the credit institution.

*In our opinion the deposit of funds with a credit institution represents a contract by which a party, the depositor, may entrust to a credit institution for keeping, administrating or in full ownership, as agreed by the parties, a monetary value which may be expressed in banknotes and coins or in account unit, with the obligation for the credit institution to return upon request or at a date the parties have stipulated such amount.*

According to the above definition, the credit institution may have a triple role in the bank deposit agreement as follows:

- Depository, when the fund deposit is established in accordance with the provisions of regular deposit;
- Administrator, when the depositor taking into consideration the credit institution experience in the financial field is granting a mandate to it pursuing a better placement for its funds;
- Owner, when the parties agree to transfer the ownership right from the depositor to the credit institution over the monetary value, the depositor becoming this way the creditor of the bank.

In our opinion we believe that the legislator had in mind only the last scenario above indicated, without expressly prohibiting the other two. Therefore we consider that the rule of the ownership transfer over the monetary value is only of the nature and not of the essence of the

funds deposit agreement as regulated by article 2191 of the New Civil Code, the parties being allowed to derogate from such rule.

The problem regarding the ownership over the money and especially over the amounts existing in the bank deposit accounts has been raised also by the British legal system, the key issue being similar to the one existing in the Romanian legal system - intangibility of such values<sup>18</sup>. Most of the analysis made by the English specialists regarding money has started from the parallel with the property over tangible asset, even if in most cases the money is used in economy in a dematerialized form. Though, in the English doctrine has been raised the question if, following a transaction in which the payment is made through by bank account transfer, the ownership over such amounts passes from the debtor to its creditor. If in the first instance we are tempted to answer affirmative to the above question, in a case law<sup>19</sup> decision has been established that the electronic money transfer does not involve an ownership transfer but an adjustment of the value of the accounts between which the payment operation occurs, this decision underlining the concept of *monetary value*. In what concerns the decision of the English court, it is somehow applicable also in our legal system, considering also the complex payment systems existing between the credit institution operating in Romania. Such system involves a repetitive compensation process of the negative and positive balance existing between the participant credit institutions.

a) *Credit institution - depository*

It is important to mention that currently there is no definition of funds deposit agreement in either the New Civil Code or the banking legislation. The special law<sup>20</sup> applicable is using the expression *attracting of fund deposits and other repayable funds*, in the articles 5, 7 point 1, 18 paragraph 1 letter a, 22 paragraph 2 letter c, when is defining the banking activity or when it is establishing the activities which may be performed by a credit institution, and their limits. Formerly the legislator has used expressions as “accepting fund deposits for fructification for a certain period or upon depository request”<sup>21</sup>, “attracting funds from entities and individuals as funds deposits or negotiable instruments, repayable upon request or at a certain date”<sup>22</sup> or “accepting deposits”<sup>23</sup>. Furthermore the Law no. 58/1998 - the banking law, has defined the funds deposit with a credit institution as being “the amount of money entrusted under the following conditions: to be repaid in full, with or without an interest or any other facility, upon request or at a certain date agreed by the depository with the depository; should not refer to property transfer, providing services or granting any guarantees.”

With regards to the purpose of the credit institution as depository in the regular deposit, we consider that such a qualification can be made based on the intention of the parties at the moment when the deposit is opened. Article 2105 paragraph 2 of the New Civil Code expressly allows the parties to derogate from the rules applicable to the deposit of fungible assets and consequently from the rules regarding the ownership transfer over such assets, in the case of fund deposit. In this situation the credit institution will hold the entrusted amounts on behalf of the client. Also in a *per a contrario* interpretation of article 2108 of the New Civil Code, the credit institution will be allowed to use the entrusted amounts if there is an “express consent” from its client.

<sup>18</sup> Alastair Hudson, *The Law of Finance*, Thomson Reuters, London, 2009;

<sup>19</sup> *Cause Nimmo v. Westpac Banking Corporation* [1993] 3 N.Z.L.R. 218;

<sup>20</sup> Government Emergency Ordinance no. 99/2006 regarding credit institutions and capital adequacy, published in the Official Gazette, part I, no. 1027 of 27/12/2006;

<sup>21</sup> Law no. 70/1934 for the organization and regulation of banking commerce, published in the Official Gazette, part I, no. 230 of 09/10/1945;

<sup>22</sup> Law no. 33/1991 regarding the banking activity published in the Official Gazette, part I, no. 70 of 03/04/1991;

<sup>23</sup> Law no. 58/1998 - the banking law, published in the Official Gazette, part I, no. 121 of 23/03/1998;

By corroborating the above articles (2105 and 2108) we can conclude that a credit institution which has received in deposit an amount of money from a client may use that amount, without being necessary for the credit institution to previously acquire the ownership over such amounts, in accordance with the provisions of the ordinary deposit.

b) *Credit institution - administrator*

By taking into consideration the nature of the credit institutions as specialists of the financial and investment sector, the client, having in mind such quality, may open a deposit with the purpose of better placing and investing its money amounts. In supporting the above we would like to mention that certain fund deposits have their interest correlated with the performance of certain investment instruments. We consider that in order not to operate an ownership transfer over the funds to the credit institution it is necessary to expressly indicate in the deposit agreement the purpose and the limits within which the credit institution may act. In the scenario above the credit institution will act in its own name but on behalf of its client, this working as an unrepresented mandate.

The necessity of realizing a clear difference between the deposits which involves ownership transfer and the one without such transfer, is represented by the fact that in case the credit institution goes insolvent, the clients having deposit agreements as those indicated under letter a) and b) above will not have to recover their amounts from the Bank Deposits Guarantee Fund<sup>24</sup> or by registering their claim within the insolvency procedure, those not being creditors of the credit institution but owners over the funds entrusted to such institution. Consequently those clients will be entitled to recover their amounts prior to the creditors of the credit institution.

c) *Credit institution - owner over the funds placed in deposits*

Representing the rule in what concerns the deposit of fund with a credit institution, the funds deposit regulated by article 2191 of the New Civil Code will always transfer to the credit institution the ownership right over the deposited amounts. We consider that every time when between the client and the credit institution was not stipulated otherwise the provisions of article 2191 became incident.

According to an opinion expressed in the legal doctrine<sup>25</sup> the legal institution regulated by article 2191 of the New Civil Code was improperly qualified as deposit because the ownership right over the money passes to the credit institution, such institution using in its own name the amounts and taking the subsequent risks.

Furthermore it was considered that the funds deposit with a credit institution is not truly a deposit because the banker is not repaying what he receives but its equivalent. Very often, the credit institution is repaying the deposits by issuing a check or by bank account transfer. Also some times the amounts are placed in deposits by cash or bank account transfer or by discounting by the credit institution of a commercial title, or through other banking techniques<sup>26</sup>.

In conclusion we consider that *de lege ferenda* it is necessary a better regulation of the funds deposit agreement with a credit institution through the subsequent banking legislation as well as defining of certain concepts such as - funds deposit agreement, funds deposit operation and the concept of money. From our point of view we consider that the funds deposit should not be analyzed using the literal sense of the legal provision but by the purpose of such institution.

<sup>24</sup> Government Ordinance no. 39/1996 regarding the establishment and functioning of the Bank Deposit Guarantee Fund, published in the Official Gazette, part I, no. 587 of 19/08/2010;

<sup>25</sup> Rada Postolache, Iliora Genoiu, Steluța Ionescu, Marinela Manea, Manuela Niță, *Contractul de depozit și varietățile acestuia*, published by. C.H. Beck, Bucharest, 2010;

<sup>26</sup> Fr. Dekeuver-Defossez, *Droit bancaire*, 5e edition, Dalloz, Paris, 1995;

## 2. Titles deposit with a credit institution

The titles deposit represents a specie of the bank deposit which involves the transfer to a credit institution of the possession and administration rights over certain securities. Considering the fact that the New Civil Code is not defining the securities we consider that the analysis will have to regard the provisions of the applicable special law<sup>27</sup>. In this respect it can be deposited: shares, bonds, state bonds, promissory notes, checks or any other security which can be administrated by a credit institution - intangible movable assets having an economic value.

According to article 2192 paragraph 2 of the New Civil Code “the credit institution has the right of reimbursing the costs performed for the necessary operations, as well as remuneration, as established by the convention or banking practice”. The reason of the remuneration for the performed services is related to the fact that, by constituting the deposit the client pursues the use in its own interest of the credit institution experience and subsequently the profit.

We notice the fact that the legislator has used in article 2192 the expression “is empowered with the administration”, fact which may be associated with the performance of banking services as regulated by article 18 paragraph 1 letter j) (portfolio management and related legal consultancy) and k) (custody and administration of financial instruments) of Government Emergency Ordinance no. 99/2006 regarding credit institutions and capital adequacy. In our opinion the term “administration” from the above expression has a wider understanding, this including also letter g) of article 18 paragraph 1 of the above mentioned ordinance - transactions on behalf of the client.

From our point of view the preservation and conservation are not of the essence of the title deposit with a credit institution, a contrary interpretation leading to the provisions of the ordinary deposit. Administration is formed by specific operations meant to get profit for the client, the particularity of the title deposit being represented by the possibility of the client to limit the actions of the credit institution.

As we can see from the above we can ascertain that the title deposit does not represent a deposit in the sense of the banking activity, this being possible to qualify as related operation.

## III. Credit facility

As a novelty in the Romanian legislation, the New Civil Code is regulating the facility credit agreement in the third section of Chapter XV (**The bank account and other banking contracts**).

The credit facility is defined as being the contract by which a credit institution, a non-banking financial institution or any other entity authorized by the special law agrees to hold open for the client a certain amount of money for a determined or undetermined period of time.

As we can see from the above definition, the credit facility agreement presents two significant particularities: (i) the nature of the creditor and (ii) the obligation of the creditor.

In what concerns the nature of the creditor starting from the examples indicated in article 2193 (credit institution, non banking financial institution) and by corroborating with the fact that the credit facility is regulated by the chapter called “the bank account and other banking contracts” we conclude that “any other entity authorized by the special law” refers to those entities regulated by the National Bank of Romania.

Regarding the obligation of the creditor to “hold” for the client an amount of money, this might create confusion between the credit facility agreement and the credit agreement because in

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<sup>27</sup> Government Emergency Ordinance no. 64/2007 regarding the public debt, published in the Official Gazette, part I, no. 439 of 28/06/2007;

both cases the money offered to the client represents a credit. A possible explanation for such option of the legislator might be related with the intention to preclude the credit facility agreement from the category of *real contracts*. Accordingly, if the credit agreement is considered to be concluded at the moment when the credited amount is offered to the client, in the case of the facility agreement the contract is considered to be concluded at the moment when the parties have agreed its terms and conditions.

According to the legal doctrine, the credit facility is considered to be the common law in what concerns the banking credit agreements, being seen as a type of lending. That is why the provisions of the New Civil Code regarding the credit facility are complemented by the provisions regarding the civil credit<sup>28</sup>.

#### IV. Renting the safe deposit boxes

Renting the safe deposit boxes, in the New Civil Code, is a contract which combines elements of the lease agreement with those of the ordinary deposit. We consider that this type of contract has been regulated in the chapter for the banking contracts because the credit institutions also may manage in the interest of their clients such safe deposit boxes. However the renting of the safe deposit boxes is not performed exclusively by the credit institutions, by taking into consideration their main activity object, such an activity being merely complementary for it. This type of activity may be performed by any entity in accordance with the applicable law.

It is important to indicate that if in the rented safe deposit boxes are placed fungible assets, the ownership rights over such assets, are not transferred to the service provider, the latter remaining only the administrator of the safe deposit boxes during the renting period. Furthermore, by taking into consideration the remunerated character of such service, an aggravated liability of the service provider occurs, it can be held to conclude insurance for the entrusted assets.

#### Bibliography :

1. Flavius-Antoniou Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, NOUL COD CIVIL. Comentariu pe articole, published by C.H. Beck, Bucharest, 2012;
2. Rada Postolache, Ilioara Genoiu, Steluța Ionescu, Marinela Manea, Manuela Niță, Contractul de depozit și varietățile acestuia, published by C.H. Beck, Bucharest, 2010;
3. Alastair Hudson, The Law of Finance, published by Thomson Reuters, London, 2009;
4. Ion Turcu, Drept Bancar vol. II, published by Lumina Lex, Bucharest 1999;
5. Dimitrie Alexandresco, Explicațiunea teoretică și practică a dreptului civil român, Tomul VI, Tipografia Națională, Iași, 1900;
6. Aristotel, Politica, published by Antet, Bucharest, 2001;
7. Karl Marx, Das Kapital, published by Regnery Publishing Inc., Washington DC, 2009;
8. Dan Drosu Șaguna, Monica Amalia Rațiu, Drept Bancar, published by C.H. Beck, Bucharest, 2007
9. Fr. Dekeuver-Defossez, Droit bancaire, 5e edition, Dalloz, Paris, 1995;
10. Francisc Deak, Tratat de drept civil. Contracte speciale, Vol. III Comodatul, Împrumutul de consumație, Depozitul, Societatea civilă, Tranzacția, Donația, published by Universul Juridic, Bucharest, 2007.
11. Government Ordinance no. 39/1996 regarding the establishment and functioning of the Bank Deposit Guarantee Fund, published in the Official Gazette, part I, no. 587 of 19/08/2010;
12. Government Emergency Ordinance no. 64/2007 regarding the public debt, published in the Official Gazette, part I, no. 439 of 28/06/2007;

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<sup>28</sup> Flavius-Antoniou Baias, Eugen Chelaru, Rodica Constantinovici, Ioan Macovei, NOUL COD CIVIL. Comentariu pe articole, published by C.H. Beck, Bucharest, 2012;

13. Government Emergency Ordinance no. 99/2006 regarding credit institutions and capital adequacy, published in the Official Gazette, part I, no. 1027 of 27/12/2006;
14. Law no. 70/1934 for the organization and regulation of banking commerce, published in the Official Gazette, part I, no. 230 of 09/10/1945;
15. Law no. 33/1991 regarding the banking activity published in the Official Gazette, part I, no. 70 of 03/04/1991;
16. Law no. 58/1998 - the banking law, published in the Official Gazette, part I, no. 121 of 23/03/1998;
17. Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC;
18. Civil Code of Romania, published in brochure no. 0 of 26/07/1993;
19. Commercial Code of Romania, published in brochure no. 0 of 27/06/1997;
20. Law no. 287/2009 regarding the Civil Code, published in the Official Gazette, Part I, no. 505 of 15/07/2011.