DEBT SECURITIES, SECURITIES IN THE NEW CODE OF CIVIL LAW – THE NEED OF JUDICIAL DISAMBIGUATION

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Abstract

A large part of the wealth is invested in securities, which circulate through documents or specific scriptural records that are located in the memory of the computer. These magnetic or paper-made „supports", received different names, in law and in doctrine: debt securities, securities, negotiable instruments or commercial securities, equity securities, bearer bonds, financial instruments, transferable securities, stocks, bonds, bill, promissory note, check, et al. These expressions used by the New Code of Civil Law were assumed tale quale from the specialized language of commercial law, without any concern for explaining the foundation and judicial meaning of these legal institutions, and eliminate the ambiguity in this matter. Under such conditions, the analysis is to identify the criteria under which the judicial genre will separate from the judicial species in relation to the law and jurisprudence of the European Union and/or to the regulations specially adopted at national level, over time.

Key words**:** *debt securities, securities representative of goods, transferable securities, financial market, money market, stock exchange market of transferable securities.*

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The ambiguities created by the tendency of the Romanian legislator, for a judicial language alien to the European tradition and the hesitation to direct the applicable rules in this specialized field of civil law, led to an elliptical and inadequate regulation, also assumed by the New Code of Civil Law, which refers with ease to debt securities, as if they were known by everybody.

As it is, an analysis referring to the nature and judicial consistency of some legal instruments created with the judicial name of *debt securities*, which underlines forms of payment and/or investments, is necessary.

Debt securities and public debt securities, will be examined, starting with the trade effects (bill, promissory note, check) and continuing with securities representative of goods, (waybill, bill of landing, warrant etc.) and with transferable securities (shares and bonds of the companies).

For each of these securities, the nature of the represented right is different, and their applicable judicial state is different.

In this respect, *the commercial papers, the securities representative of goods and the transferable securities* are the three categories of "species" of debt securities subject to special legal rules.

All the debt securities have as common element the *economic* function, which allows the law to move with maximum simplicity and safety, by document transfer or by account operation. The legislator anchored general principles to the economic function, which create the unity of the debt securities, configuring a judicial institution specific to the commercial law, currently to the specialized civil law.

The positive law recognizes by default, a double judicial nature of the debt securities, namely the one of *transferable securities* and of *negotiable instruments*, by which the private capitals flow from one investor to another.

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The commercial activity involves the supply and demand of goods, services, money, and even of the *instruments which represent these* goods, materialized in metal, paper or in electronic recordings, by the progress and the discoveries of humanity.

The transactions that have as object the instruments that incorporate values, have the effect of *releasing real capitals, which* are transmitted from one owner to another.

These kind of operations created the *financial market* or *the capital market*, in which the holders of the saved money, change or place the money for some medium or long-term claims. Purchase of commercial papers (bill, promissory note) or of some transferable securities (shares, bonds) represents a financial investment. The acquirers of these goods also hold a credit which they can mobilize or divest, obtaining the necessary cash quickly.

These investment and divestment mechanisms underline the independence of the transactions closed on specific markets and the connection among the money market, the credit market and the capital market. There is a close connection between the money market and the capital market, because the financial resources invested in transferable securities or in commercial papers, by means of stock exchange mechanisms or by discount and rediscount mechanisms, specific to the money market, are transformed in real capital and by divestment, they are transformed in money capital. In other words, on the capital market, the investment receives maximum liquidity regarding the parties affected by the transactions.

However, the operations that have as object debt securities and especially, transferable securities, facilitate the flow of private capitals beyond the borders of a state, in this way the capital market gains a transnational area. In these circumstances, one cannot ignore the European Union treaties referring to the capital market, the capital flow and also to the rights and obligations of natural persons and/or corporate bodies involved in transferable securities operations; to the activity of these individuals; to the operating conditions of the credit and insurance financial institutions and to the protection of the resident and non-resident of community states investors.

However, related to the internal situation, the multiple legislative acts including the analytical regulations of C.N.V.M, did not have the desired effect, the legal status of the debt securities remained little known, including the interested individuals (companies, shareholders, lawyers and so on.).

This state, created by the instability of the law, by the lack of cohesion between the provisions regarding the same matter included in different legislative instruments and the lack of an unitary legal concept dedicated to the debt securities, it reflected over the capital market and over the population reluctant to this form of investment.

The New Code of Civil Law adopted in the year 2011 included the provisions of commercial law specialized in the matter of commercial papers, transferable securities and securities representative of goods, emphasizing the vagueness of the rules in this matter and relaunching the need for some explanations of the matter.

As it is, an explanatory analysis is urged, in order to eliminate the confusions between the types of *debt securities* as a judicial genre and the delimitation of each legal type and sub-type, especially since, to date, specialized judicial literature has not shown concern in studying the debt securities, their examination being limited only to some instruments; an increased attention was paid only to commercial papers (bill, promissory note), although the other types of debt securities are unquestionably important, as we will show in what follows.

1. *The concept of "debt security" and the terminology used in law for the assigning the debt securities*

In the field of law, the various activities of production, exchange and movement of goods and services take the form of numerous legal operations.

The instruments and mechanisms used in common law are replaced by the technique specific to the commercial operations that cannot be included in the frame of the classical theory of civil obligations.

The transactions have a complex object that involves the concept of "security" and of "debt", and the closing procedure and their result reflect the commercialisms that give rise to increasingly complex legal operations.

In other words, the simple legal act known in common law, is replaced by the commercial transactions governed by specific rules that evolve permanently in order to fulfill the requests of the business life, and a specific judicial state becomes incidental to these operations that have as object, various kinds of debt securities.

Therefore, the debt securities were created in order to respond to different needs. Some fulfill the function of means of payment and debt, such as the *commercial papers* (bill, promissory note and check), others, such as securities representative of goods facilitate the commercial operations of goods held by a third party (bill of landing, warehouse receipt, warrant etc.) and others, such as *transferable securities* (shares, bonds, as well as the derivatives of these values) allow investments in productive capitals and / or provide a regular income.

Although they acquired familiarity and the provisions of some legislative acts refer to them, the debt securities or the negotiable instruments have never been the object of a unitary regulation, the rules of commercial law applicable to them, having their origin in judicial doctrine.

Under the influence of the Italian doctrine and starting from the two matrixes, *bill and investment securities,* the Romanian doctrine from the interwar period[2] examined the debt securities within the law of exchange and it separated them, adopting the distinction between the commercial papers, securities representative of goods and securities. However, the classification or the establishment of the terminology for the debt securities, although in the attention of the specialized literature, it did not solve the normative gap, and in its turn, the doctrine has oscillations and inaccuracies, opinions and terminologies that change from one author to another or from one type of "security" to another.

According to the dominant opinion, the bill is a debt security, but ambiguity arises when the shares and bonds of the trading companies or of other issuers are considered in relation to the bill

That being so, it is necessary to explain the types of debt securities, and the different names are to be re-attached to the typology used in the Romanian legislation and by referring to that of the states with market economy tradition.

2. *The terminology used for assigning debt securities*

In order to assign the means that serve to mobilize a right, the specialized literature used different names without making the net distinction between debt securities as a *judicial genre* and the categories of these securities as *species* of the same genre.

Thus, the Italian doctrine grouped into a single category under the name of "debt securities"[3], all the instruments by which the debt is mobilized by individual or mass operations.

The same concept was adopted by the American lawyers[4] who, starting from the economic function of the letters of credit in commercial transactions[5], they placed in the center of

[2] I.N.Finţescu, *Curs de Drept Comercial*, Vol.I, Bucharest, 1929, p. 6-9.
[3] F. Martorano, *Titoli di credito*, Milano 1994; A.Asquini, *Titoli di credito*, Padova 1966.
[4] Jhon F. Dolan, *The Law of letters of credit*, Boston 1991.

the study, the "*letters of credit*" among which the main role was granted to the "*bill of exchange*", considering the term synonymous with *draft*[6].

Some American authors analyzed the rules applying to the instruments "*securities*" which provide the investment, assigned separately from those dedicated to the investments in "*in other types of goods*", considering that the term "*securities*" represents a certain "type" of asset. Then, the authors defined "*security"* in terms of three types of instruments:

a) "*stock*" or "*notes*", to which they give the meaning and distinction from the other instruments, made in the American judicial practice

b) "*financial instruments*", in which it is included the valued policy and its annuities, the shares issued by the companies, the certificates of deposit in banks, the "*options*" and "*futures*" contracts,

c) *investment contracts in* "*stock*" or "*note*" or in other instruments that provide an interest or a profit participation

The French[7] and Belgian[8] lawyers use the expression "commercial negotiable instruments" or "negotiable instruments", by those names it is understood that the documents, that in themselves give to the legitimate holder the exercise of certain rights attached, subject to a particular judicial state. Other forms of collective investment were included in the same notion.

The German doctrine[9] uses the expression "*Wertpapiere*" (security), which is different from "*Papierwerte"* (the value of paper - banknotes).

The German authors have noted as characteristic of the securities, the item "Verköperung" or the embedding of a right, and under this item, they formed the category named "*Vollkommene Wertpapiere*" or "*Wertpapiere Offentliches Glaubens*", meaning complete or public debt securities. Then, they made the distinction between the public debt securities by the expression "*Inhaberpapiere*" and "*Orderpapiere*", which mean bearer bond and order paper, excluding from this category "*Nemen sau Rektpapiere"* – the nominative paper.

Following the EU Directive no. 298/1989, the German legislation adopted on December 13th 1990, the rules regarding the sale handbills of debt securities (Wertpapier – Verkaufsprospektgesetz) and on December 17th 1990, the regulation regarding the sale handbill of debt securities (Verordung über Wertpapier – Verkaufsprospekte).

In order to assign the securities that incorporate certain property values, the Romanian judicial doctrine, under the influence of the French or Italian ones, used the expressions "*debt securities*", "*securities"* or *"paper"*. Recently, it was argued that in comparison to the term "debt securities", it is more correct to use the term "commercial securities" as a concept, arguing that not all these securities involve a credit[10].

Some authors used the name of debt securities in order to examine the commercial papers, in the analysis there were described the debt securities and their general characteristics were listed, and in their classification were included also, the stocks of the companies[11].

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[5] Also in the American judicial literature, the origin of the bill is found in the Middle Ages, when it had the purpose of avoi ding the risks in transporting money.

[6] The American commercial legislation preferably uses the first term, with the meaning of negotiable instrument. For the explanation of these terms, supported by the legal texts mentioned, see: Steven H. Gifis, *Law Dictionary*, New York 1991

[7] R. Houin, R. Rodière,"*Droit commercial*", Paris, 1978; G. Hubrecht, A. Couret, Jean J. Barbiéri,"*Droit commercial*", Paris 1988.

[8] *La protection de l'epargne publique et la commission bancaire*, Editura "Bruylant", 1979. on the evolution of the concept of debt securities in relation to the financial market of Belgium, see: J. Bruynnel, Duquesne de la Vinelle, "Belgique*: Les recéntes mutation en matière financière et monètaire*", in the "Banque" magazine, 1991.

[9] Regarding the evolution of the German law in the matter, see: H.Assmann Schűtze, "*Kapitalmarkt und Kapitalmarktordnung*", "*Handbuch des Kapitalanlagerechts*", 1990.

[10] In this regard see: Stanciu D. Cărpenaru, *Drept comercial român,* IInd edition, revised, Bucharest, 1998.

[11] I. Turcu, *Teoria şi practica dreptului comercial român,*Vol. II p.82- 88 Bucharest, 1998.

On our part, we consider the correct term to be *debt securities*, because the name designates *diverse financial instruments,* which assure the investment and embody securities which incorporate values and even financial techniques.

It is not to be ignored that nowadays, the document or the material support of the security was replaced by a simple entry or classical or electronic recording *"in the account"*, an *issuing* method that raises novel legal problems with implications on the identification of securities.

One of these regards the legal consistency of the phrase *debt security,* which must be analyzed in relation to the two definitive elements: *security* and *debt.*

Therefore, according to civil law, the *security* represents a more accurate means of proof, a probatory document of the debt or of the right.[12].

In the concept of civil law, the transfer of the *security* from one person to another does not also imply the transfer of the right or of the debt found in the content of that document, and in order to transfer the debt, the formalities imposed by the law to the legal act of assignment of debt must be observed.

As it is known, the assignment governed by the rules applicable to the civil law relationship (as it is the case in which one of the parties is a consumer) is usually free of charge, thus, there is no protection for the acquirer – assignee who receives the debt as it is held by the assignor, respectively, with all the flaws and the nullity, resolution or payment exceptions, which the borrower of the assignor can also invoke to the assignee.

The concept of security, used in the matter of debt securities, has the meaning of "*support*" of the held right or debt. Actually, this paper or magnetic support *incorporates the right or the debt* representing "*the legal instrument"* through which, the right or the debt is transferred from one person to another, meaning that it is negotiated as the object of certain legal documents.

However, the right incorporated in the security is not just a simple debt, subject to the rules of civil law, but as we will show below, *the security is the essential element for the existence of the right itself.* This is the reason why the rules of the New Code of Civil Law are not incident to the assignment of debt, as it is expressly provided by the art. 1587, which when it refers to the *normative or order securities or bearer bonds* and to other "*securities"*, refers to the special law, without making the distinction between the types of debt securities, namely, the commercial papers (bill of exchange, promissory note and check) and the transferable securities (stocks / bonds), the securities of which, can be nominative or bearer, and only the commercial papers can be issued "to order"

Through the instruments, the transfer of debts with opposable effects to the third parties, takes place without the specific formalities of the debts rising from the civil law relations.

The special law demands to the *instrument* a simple formalism, in terms that it must contain certain mentions without which, the paper of magnetic support is not considered a "*debt security*"[13]. When the security under own signature has the content in accordance with the legal prescriptions and it is released into circulation, this instrument is reliable though its own value, independent of the will of the issuer. In other words, the third parties recognize the existence of the right, determined in the material or magnetic support, because, all the persons who signed the security, become responsible for the payment of the debt to the holder. In this regard, the debtor

[12] The distinction between "*debt securities"* and securities or the recordings that represent the means of proof, named by the author, *pre-established proofs,* see: I. N.Finţescu, cited work, p. 7.

[13] *Exempli gratia*: The lack of the essential mentions from the content of the absolute debt securities (bill, promissory note) does not lead to the total loss of their judicial value. They lose the quality of security but keep the judicial value of a bond or of acknowledgements of debt. An eloquent example is the form requirements of the *bill*, imposed by law. When the mention of „*bill"* is not recorded in the content of the support, it will have the judicial value of a *bond*, and in the case of the promissory note, it will have the value of an *acknowledgment of debt*. Only in these instances, the debt securities would fall under the common law.

cannot successfully oppose the bearer of the security, the nullity exceptions derived from the fundamental relation, pre-existing the issuance of the security and based on these, he cannot but to settle the obligation arising from the security.

The concept of debt supposes a remuneration, the amount of which is determined in relation to two main elements, *time and risk.* Specifically, for the payment of a service provided by the creditor, this one gives the debtor a time limit, and by giving *time*, the *risk* of insolvency of the debtor increases, which gives the creditor the right to claim an advance of the amount of the debt. *The debt* represents therefore, the trust placed in the debtor and the creditor appreciates it in relation to the debtor's assets, earnings and/or skill level, the state of administration and even the debtor's moral value.

The economic literature explains the term of "credit" as "*an act of trust entailing the exchange of two services provided dissociatively in time; the goods or mean of payment in exchange of a promise or prospect of payment or reimbursement*"[14] .

In the legal concept, "the credit" is an operation through which the current performance of a person is based on the counter-performance of another person. The judicial doctrine claimed that once born, the credit relation does not remain immutable between the persons who gave birth to it, the credit is meant to "*pass in what trade is concerned, from one property into another, from one market into another, from one country into another."* In other words, in order to engage in business and to finance the investments and the expenditures or to develop the exchanges, the traders rarely have the assets or the means of payment, ever so necessary, especially at the right time. Therefore, the credit and the credit operations are the main means of adjusting the resources in relation to the needs and the expectations or the decisions of those who resort to this form of financing.

As it was stated, commercial law felt the need for an institution that obtained the credit and in judicial field[15], the practical advantages. And even if there has not been adopted a special law, the existing legal rules, inevitably created the institution of *debt securities* in order to fulfill the function of facilitating the multiple transactions closed between the traders and non-traders. Based on this functional characteristic, it was argued that the debt securities objectify the credit as an economic entity, becoming "*free of any relation to the people that created it*[16]*."* and thus replacing currency.

So, from the business perspective, the *debt security* is the instrument through which the debt is placed into circulation, and from the judicial point of view, *the debt security reflects the obligation relation under which, the creditor gives a certain time limit to the debtor, for the latter to meet the creditor, the right and the debt entitled in the security.*

Based on these considerations, the definition of debt securities will be based on the concepts of "security" and "debt", but without disregarding the meaning given to these concepts by the economics.

3. The definition of debt securities

As it was stated, the Romanian law does not define debt securities, leaving this job to the interpret, and the doctrine proposed various definitions, out of which, some refer to the ownership or the property of an autonomous and literal right, and some refer to the "rightfulness", understood as the faculty of the rightful owner to exercise the right built in the security.

Under the influence of the Italian doctrine, the inter-war Romanian doctrine defines debt securities as "*necessary documents in order to exercise the autonomous and literal rights*

[14] I.N.Finţescu. cited work.
[15] I.N. Finţescu. cited work.
[16] I.N. Finţescu, cited work.

mentioned in them". This idea argued that "*the debt securities not only document a right, but also the paper, the security is the essential element for the existence of the right itself. The paper, the security materializes the right, which is meant to live a judicial life only because it is united with the security*[17].

According to this assertion, debt securities are "*documents which acknowledge commercial debts which postpone in time the payment of the debt and which can easily circulate as they are negotiable*"[18], and other authors consider that debt securities are "*negotiable documents that allow the holders to exercise the literal and autonomous rights mentioned in them, at a due date*"[19].

In another view[20], the debt securities are explained as "*debt securities themselves*" synonymous with *commercial papers* and separated form the so-called "*equity securities"*. The first ones were defined as a type of debt security, which *entitle the rightful holder to a performance consisting of a sum of money, a quantity of fungible things or goods determined by the type.*

In the light of this definition the authors included in the category of debt securities, the bill, the check, the public debt securities, the bonds issued by the companies, the valued policies, etc. Later, the authors identified the *equity securities*, which they considered *synonymous to the corporative rights securities, as a type of debt securities that give a complex of rights and property and non-property powers, arising from the shareholder quality in a company.*

It appears that the definition refers to shares and/or bonds issued by the company which *art. 2489 form the New Code of Civil Law* calls "*participatory equity securities,* and art. 2622 *from the same code,* calls them, "*securities"*.

The name corresponds to the more recent definition according to which, the debt security is a commercial valuable security considered "*a document also named security, under which the rightful owner is entitled to exercise, at a given time, the right shown above".*

Capitalizing the ideas presented, we appreciate that in order to define the debt securities, one cannot disregard their current form, influenced by the scientific progress and informatics, to which commercial law reacts inherently in order to coincide with the matter. In this respect, laws removed their paper support, and in the conception of the modern lawmaker, they have a *dematerialized form*[21].

Therefore, while the paper documents or recordings which materialized the commercial papers or the transferable securities[22] are about to disappear, the legal consequences resulting from their dematerialization or computerization, put in a new light the special relationship between ownership and possession, drawing a special meaning to the phrase *material ownership and possession*, which in the absence of the material support seems to have become inappropriate.

In reality, in the traditional form of the debt securities, the property right is incorporated in a recording or document, and the rightful owner enjoys the right resulting from the recording

17 Brânduşa Ştefănescu, I.Rucăreanu, *Dreptul comerţului internaţional*, Bucharest, 1983, p.329.
18 I.Macovei, *Dreptul comerţului internaţional*, Iaşi, 1980, p.313.
19 In this respect, see: M.Costin, M.Mureşan, P.Ursa, *Dicţionar de drept civil,* p.158-159 Bucharest, 1980.
20 In this respect, see: Stanciu D. Cărpenaru, cited work, p. 463.
21 According to the Law no. 31/1990, the company can issue nominative shares and bonds in a *dematerialized form*, of the entry in the account.
22 See: T.R. Popescu, cited work, p. 209.

and the right over the recording. In this perspective, the "*real"* relation with the recording or the document can be seen, the *material support* which represented and incorporated the right.

Nevertheless, any new "state" of the debt securities does not modify their purpose, as the connection between the right and the document is not the result of a legal regulation, as it is only the consequence of the use of traditional writing and preparation of documents submitted, in time, to a particular legal regime, as debt securities.

Therefore, the progress of the society exclusively explains the incorporation of a right in a piece of paper, and one of the immediate consequences of computerization, as a significant progress of the society, *consists in replacing the paper support with an entry or a recording of the right*.

Of course, the modern means of registration specific to the computer structure, is the alphanumeric language or the electronic impulses, means of clearly superior significance, both in rapid circulation of the right, in comparison to the one provided by the paper support, and in the conservation of the right, endangered by the loss, theft, alteration or destruction of the paper that incorporated it.

This explains why the provisions of the Law no. 31/1990 grants authority to the companies and suggests them to keep the register of shareholders and bondholders and to record all the operations regarding the shares and bonds issued in a dematerialized form, *in computer system.*

In the context of dematerialization, the definition of the debt securities exclusively as *records, papers or documents,* which are linked to the right, is overrated, as the exercise of the incorporated right or of its transfer to a third party is impossible, *without record or document.*

For the same reasons, the argument that states that "*the record which incorporates the right is of the same value as the security"* remains without legal foundation.

Besides, textually, the Romanian lawmaker characterized the transferable securities (a type of debt securities) as *negotiable instruments* or *financial instruments* that can take the dematerialized form, of the entry into the account.

According to the perspectives, the phrase *negotiable instruments* underline de impact and the effects of the computerization of debt securities and the will of the issuer to circulate them, thus mobilizing the credit. Due to their form, the debt securities are considered *instruments* that incorporate the right, *the instrument together with the right* form the object of certain *transactions,* which makes them *negotiable.*

As for the option of the legislator for the economic meaning of the term *negotiable instruments*, from a certain point of view it is justified, as, commercial law operates with economics, meaning that the legal concepts cannot be split from the economic ones. This means that *some pieces of paper* with an economic content can have their legal value recognized only by the legal rules. The same applies to the *records and account registrations,* able to create economic instruments whose legal value was recognized in positive law[23]. No doubt, that in turn, economics will recognize its legally consecrated value.

Regarding the presented reasons and considering the legal establishment of the dematerialized securities, it is necessary to redefine the debt securities, so as the concept of record (or document) as well as the function of the instrument of achieving the performance (as

[23] Since the years 1854 – 1930, there have been attempts to dematerialize the securities, by setting „running accounts of valuables". The genuine procedure of a collective security deposit in a bank account (*Sammeldepot*) was registered in Germany, where it did not have a mandatory character, but particularly developed in the year 1919. For additional information regarding the dematerialization of securities in France, see: G.Ripert, R.Roblot by Ph. Delbeque and M.Germain, *Droit commercial*, Paris, 1996; M.Vasseur, *La lettre de change- relevé; de l'influence de l'informatique sur le Droit*, Revue trimestrielle de droit commercial, 1975, p. 203 and 263, and regarding the dematerialization of *transferable securities*, see: Yves Guyon, *Les aspects juridiques de la dématerialisation des valeurs mobilières,* Revue de societes nr. 3, 1984.

final function) or the one of incorporating the right (as necessary function), in order not to acquire a different or prevalent focus, as compared to the role of circulating the right. Obviously, the essential elements kept by the debt securities, despite the changes sustained in the evolution process of the society, must be taken into consideration.

Therefore, *the debt security is a negotiable instrument that establishes an equity right, granted literally and autonomously to the holder as its rightful owner,* so that debt securities represent intangible property, as explained by the provision of the *art. 820 of the New Code of Civil Law*, which establishes the obligation to take inventory of the financial instruments.

The definition of the debt securities highlights the functions and essential characteristics of these securities and of the traits of the right incorporated in the security.

Regarded as negotiable instrument, the debt security has a double function, that of necessary and sufficient means to exercise the right mentioned in its content and that of a technical means, through which the entitled right itself, is released for circulation.

The double function of the debt security emphasizes their *essential characters*, first as *the representatives of an autonomous and literal right*, and second because *they are negotiable*, with the destination of being put into circulation as objects of legal instruments.

4. *Types of credit titles*

The complex juridical mechanism for the building of the credit titles, related to the legal norms that govern them and the essential features of these titles lead to the conclusion that *credit titles represent a "sui generis" institution of the law***.**

The rules that apply to the credit titles represent the guarantee for the efficiency of the assumed obligation and offers rigour to the title, without which the function of *"circulation value"* could not be fulfilled.

The underline that all credit titles are negotiable, some of them being ceased through transfer, endorsement, manual tradition or through another simplified similar form, but not identical with the cease of the civil right.

Practice distinguished between the category *of movable values that are negotiated in the stock* and *commerce effects that circulate in the relations between the banks and their customers*.

Theoretically and practically, the character of the *commerce effects* of representing an *investment on short term*, compared to the *investment on middle term and long term represented by the movable values,* imposes the juridical separation of these categories of credit titles.

On the other side, the commerce values and the movable values differ from the representative titles of the titles.

In other words, all credit titles deliver credit but each category of the titles circulates on a specific market and underlies a special juridical regime in relation with their type that determines the *circulation law.*

The variety of the adoption of credit titles underlines their species whose identification becomes easier through their classification. The juridical doctrine was focused on the separation of the categories of the credit titles and in this work various criteria were proposed, based on which these titles had been grouped and studied.

Taking into account the fact that the purpose of the classification is to de-ambuiguish the juridical acceptions caused by the inconsequent or redundant use of the names of the credit titles we will identify the juridical species of the type and sub-types of these titles.

In this profile, based on the grouping of the credit titles that function according to some relevant criteria the general features of the credit titles that are part of the sane category shall be identified.

Therefore:

4.1. Depending on the complexity of the right incorporated in the title we distinguish *simple and complex credit titles.*

The simple credit titles incorporate *one single right* for the exercise by the beneficiary. This category comprises the *bill, the bill to order, the check,* and these title assign the beneficiary the right to take in the money sum inscribed in the title of the content.

Complex credit titles assign *various rights*, some of them with main character and others with auxiliary character. This category comprises the *shares and bonds issued by the commercial capital companies.* The shares offer rights named for "*participation",* which are inherent to the special report and have a diverse nature: personal non-patrimonial (management, administration, control, information etc.) or patrimonial nature (right to dividends, to purchase some shares through the free increase of capital or of the shares or the right to the invested sum, in case of the retraction or in case of the company liquidation). The bonds are attached both with the right to the refund of capital and the intake of interest rates or afferent rates etc. and in case of the issuing if the bonds that can be converted into shares the right to their conversion into shares.

We underline that the credit titles that also contain other rights, which are accessories to the main ones generate special problems. We refer to the hypothesis in which a use right was constituted for the shares, the guarantee right or the distrain that attracts the specific norms determined by law no. 31/1990 regarding the commercial companies, by law no. 297/2004 regarding the capital market, through the issuing prospect that determined the specifi norms regarding the "circulation law" of this titles and to the specific formalities for the registration of the indicated rights.

4.2. Depending on the abstracting of the contained obligation report, the credit titles are classified in credit titles that are *causal;* and credit titles that are *abstract*.

Causal titles are the ones that, according to the designation, can be issued only *depending on a determining cause,* so they are not valid anymore in the absence of the fundamental juridical report that influences also the juridical regime that is applied for them. This character is present in the titles that have the quality to determine the *contract* or *the cause* that determined their issuing. Having as an object the obligation of the issuer to ensure the integrity and/or delivery of some goods, products etc. or to ensure the protection against some risks to which the same goods and/or products are exposed, the causal titles do not offer an autonomy of the incorporated right. The owner of these titles is liable for the fulfillment of the person who initially contracted participated to the formation of the fundamental juridical report, closing the contract (for selling, lease, renting etc.) with the issuer of the title. In this profile the causal titles evidence an attenuation of the autonomy of the incorporated right.

Causal credit titles are the *representative titles of the goods for deposit, warrants etc.*, which offer the owner the right to a certain quantity of goods in the deposits, magazine, docks or loaded on ships to be transported.

Also this category comprises *movable values, respectively shares of the commercial companies*, because these titles are in relation with the constitutive act of the company, which represents the *cause* of their issuing. The bonds are in connection also with a juridical act of the commercial company, materialized in the "loan contract" closed by the bondholder with the issuing company.

The causal credit titles fulfill the specific function for the extension of the causal report, that preexists between the parties. The consequence is that the one who gains a causal credit can not exclude the fundamental report that determined the issuing of the title.

But as well as the absolute credit titles (commerce effects), the transmission of the movable values (of the actions or obligations) follow the rules determine by the issuer, sense in

which only if these rules are followed the transfer produces juridical effects and becomes opposable also to the issuer.

The abstracting level of the obligation report contained in the credit title explains the opposability of the personal exceptions in the relations "*inter- partes*" or of the exceptions "*ex causa*", regarding the existence and validity of the juridical report, of the deficiencies of the cause or of its illicit character. From this point of view, the commerce effects are *abstract credit titles* but the same statement can not be made with reference to the movable values

Indeed, in case of the *causal credit titles*, the parties of the juridical relation are, depending on the case, the bailor and the depositor of the goods, the further owner of the representative title or the owner-shareholders of the shares or the bondsmen-owner of the bonds. They can invocate personal or real exceptions related to the fundamental juridical relation born of the juridical act of the deposit, from the company constitution act or from the issuing act of the bonds.

This way it is explained why in the case of a litigation having as an object the shares or bonds the check of the rights and bonds of the parties implied in the process is made through the clauses of the constitutive act of the issuing company, which means that these credit titles have not been abstracted absolutely from the cause of their issuing. In this profile the appreciation of the court is false, according to which the shares as value titles have an autonomic character and the rights and obligations born from these titles are independent from the juridical act from which they occurred.

Abstract credit titles do not contain the mentioning of the casual relation type (fundamental relation) that is the base of their issuing.

For such titles the "*causa debendi*" is irrelevant and the abstracting of the cause implies the exoneration of the bearer of the title (bill contract) from any exception with regard to the non-existence of the cause, from the illicit character or from other deficiencies of the bill pre-existent contract, this way assuring a perfect protection of the circulation of the incorporated rights and implicitly of the titles. The matrix of these titles are the *commerce effects*, respectively the, *bill, bill at order and the check,* which contain an engagement of payment based on a fundamental operation (purchase contract, load contract, transport contract etc.) from which abstraction is made on the date of the issuing.

At juridical level the bill is a juridical act which once issued benefits from a certain autonomy, the juridical relation of the bill born out of the act has an *independent existence compared to the fundamental relation,* and the parties of the purchase contract enter into bill juridical relations. Under this aspect the issuing of the bill can be similar to the novation contract, known in the civil right only as issued once, the bill becomes *abstract title* in the sense that no references to the juridical report that exists before the parties are admitted anymore. The issuer of the bill is liable to meet his obligation, since he adopted the form of the bill juridical act. Issuing the bill he is liable towards any third party. This obligation exists also in case at the date of the bill issuing the fundamental report is missing or is invalid.

The legislator instituted special juridical rules that underline the formalism of the bill obligation and of the principle of the autonomy of the incorporated debt right because they are not connected to the fundamental report. This explains why the bill is an abstract effect and the assumed obligation is as a principle distinct and independent from the juridical act or from the right title that base the base for its issuing.

The independence of the bill juridical report, the abstracting of the cause of the bill juridical act is manifested in a different manner as compared to the rules of the civil right according to which the obligation without cause is invalid.

According to *Art. 1235 -1239 of the new Civil Code*, the cause is a fond condition in any juridical act, any "*abstract*"contact being invalid which was closed to produce juridical effects through the simple will of the parts, independently on the existence of a cause.

The principle of the civil right *is not compatible with the abstract credit titles* because incorporating the debit right the credit titles become movable goods with the valence of an *object* of juridical acts.

In other words, once issued the absolute credit issues become juridical "instruments" for which the unconditioned obligation at the satisfaction of the incorporated right arises. We are talking about any right (for debit, use, distrain) that must be mentioned in the content of the instrument, respectively on the credit title, on the contrary, not being purchased. The right mentioned in the title can be negotiated and transferred from an owner to another, according to some simple rules, specific for the circulation of these special goods and through the *possession*, the *ownership over the credit title is gained.* As a consequence, thanks to the specific rules abstract credit titles have juridical value by themselves.

The credit titles can be classified and analyzed also according to other criteria like e.g. the way of transmitting the incorporated right, which determines the applicable "*circulation law*" of the titles. This supposes that at the moment of their creation the issuer focused on certain legal standards.

4.3 Depending on the way of transmitting the incorporated right we distinguish: credit titles *at the bearer*; credit titles *at order;* credit titles that are *nominative*.

The bearer credit titles offer the legitimate owner certain ceasible rights in relation to the third parties, as a simple tradition. What is specific for these titles is the stipulation in the text of the material or magnetic support of the clause "at the bearer", which is not compatible with the mentioning of the name of a subject determined as a beneficiary of the incorporated debt.

The form is preferred mostly for the *titles issued in series (shares, bonds etc.), since this form allows the rapid and simple circulation of rights.*

The issuing of the titles supposes that this goes out from under the disposal power of the issuer and enters under the disposition power of the owner, sub-scribing or gaining after the subscription. The moment of the issuing is important since to this the capacity of the sub-writer of assuming obligations relates as well as the existency, content and powers of the issuing representative when the title was issued by the representative. In this sense, the legal issuing of the title is verified through two elements: the pre-existence of the fundamental report or the closing of the credit "contract" connected to the fundamental report (like the clause of the bill stipulated in the purchase contract); the handing over of the title, done by meeting the circulation law and for the purpose of conferring the legitimate in the exercise of the incorporated exercise in the title. The elements described evidence "*justa causa traditionis*".

When the credit title was issued by a "*falsus procurator*", or without the validly expressed agreement of the issuer, the property shall not go to the hands of the owner until this will prove that is gained the possession in the forms provided by the law that applies to the title. This means that the owner of the title can request the execution of the service from the issuing debtor only if he legitimates as qualified towards him.

Some authors[24] considered the titles as cinrporated movable goods whose circulation and the right to assignment must undergo the civil juridical norms that are incident to the movable things. It was argued that the incorporation of the right in the title lasts as long as the title really exists and that the right is confused with the title in which it was materialized and the invocation of the right is indissolubly bonded to the possession of the title, sense in which it is easy to

[24] T.R. Popescu, cited work, p. 303.

explain how through the simple assignment of the title the cease of the rights resulted from this becomes opposable to third parties.

Regarding us we consider that the right incorporated in a title co-exists even when the support of the right has been lost, destroyed or stolen so that the supporting of the doctrine must be underlined. Indeed in the hypothesis in which the support is not in the hands of the owner anymore or do not exist anymore it can not be invocated the deletion of the right, the owner having the possibility to obtain a duplicate or an equivalent title and to demand the execution of the bonds in the lost, stolen or destroyed title ("*instrumentum*")[25]

In the hypothesis of the dematerialized titles, the transfer of the possession is equivalent with the message sent and executed, through the execution of the changes in the magnetic support, respectively through the deletion of the old owner and registration of the new one. As a consequence also in the case of the dematerialized titles, the *justa causa traditionis*" is present, and the transfer of the right and title is operated "in account" based on the agreement of the parties which are applied by the intermediates as well as issuer and/or the assignee who carries out electronically all operations and presents to the parties at request the account extract.

The manner in which the titles shall circulate at the bearer is the one adopted by the issuer, through the selection of the type of these titles. In case of these titles, the transfer of the possession qualified"*ad legitimationem*" consists in the *tradition* of the support. As a principle, the absence of the transfer right creates the doubt regarding the good-will of the owner. The bad will of the owner shall be confirmed by proving that this knew that the title was received "*a non domino*".

In a certain hypothesis, at the intervention of the issuer, the transfer method of the titles can be changed, the law based on which the transfer of these titles is valid being changed. This way, based on article 15 and 16 par.2 of the law no. 58/1934, the bill can be *guaranteed in blank as well*, which means that the content of the title does not comprise the name of the owner. In this hypothesis the bill represents the appearance of a title at the bearer, this way certificating any owner or bearer.

In reality the bill does not lose the quality of order bill and does not transform into title at the bearer since the owner can complete the guarantee at any time with his own name or with another name. When the owner has completed the bill with his name he is entitled to receive the sum inscribed in the bill as name bailor.

If the owner does not complete the bill with a name and does not guarantee it further in blank, but it sends it to another person, the transfer is equivalent, according to art. 16 point 1-3 of the indicated law, with the transfer of property over movable goods, through the tradition known by the civil law. But this transfer method has as effect the interruption of the guarantee.

The juridical effects of the presentation through tradition are appreciable. Indeed, the guarantor who just handed over the bill to another person doe not have his signature applied on the title. He is the one who interrupted the order of guarantee and he is excluded from this. This

[25] Regarding a category of the credit titles, resp. of the one of the movable values the constitutive act of the issuer or the prospect for the issuing can stipulate the procedure that is applied in case of loss, theft or destroying of the share titles of bonds, depending on the case. If the titles are issued in dematerialized form the risk of "loss" occurs rarely and thye hypothesis is regulated depending on the species or subspecies of the credit title (commerce effects-*bill, bill order*,-; movable values-*shares, bonds*, etc.; representative titles of the goods –*warehouse receipt, warrant*, etc.) . The interested person must meet the procedure provided in Art. 89 of the Law no. 59/1934 for bill and bill order; Art. 67 and the following articles of the law 59/1934 in case of loss, theft or destroying of the check. Regarding the subspecies of credit titles, law no. 52/1994 regulated a specific procedure applicable in case of theft or falsification of dematerialized shares, listed on an authorized market. Regarding a certain category of the credit titles, respectively the movable values, through the constitutive act or through the issuing prospect the applicable procedure can be stipulated in case of loss, theft or destroying of the shares or bonds titles.

way the juridical relation of the bill converted into a common law relation, as an effect of the change of the property transfer manner. As a consequence, against this transferor the bill shares are not to be accepted since he is not a guarantor anymore.

When also the further owners transfer the bill through tradition, all juridical relations born from the handing over of the bill (without this being endorsed on grey) shall be governed by the rules of the common law.

Title credits ***at order*** offer the legitimate owner certain achievable rights by any person through *guarantee.* The obligation of the debtor that was assumed through the title can have as an object a sum of money or goods. Such titles are usually created for isolated credit titles, which is why they have an individual character.

The model of the titles to order is the bill.

The juridical regime of the bill constitutes the "matrix" of the rules that apply to the other titles (check, loading police etc.).

Like the titles at order materialized in paper inscriptions also the electronic titles at order must contain in their magnetic support the mandatory mentions required by the incident norms. More exact, independently on the special rules imposed for the editing of certain credit titles, the titles at order must meet also the essential conditions based on which they can be identified at such. As a principle, titles at order must contain *the clause "to order*" inserted with the purpose of being put into circulation, through *guarantee or endorsement.*The title at order has a literal character, which constitutes rights. Any person who signed the title has the quality as debtor, and the obligation to pay arises according to the law in a solidary manner from the task of or signers of the title.

In case of dematerialized titles, the obligation arises through the assignment of the access code or of the password into the PC system.

In order to exercise the rights granted by a titles, the owner must meet two conditions required as in the case of credit titles at bearer: the legitimate possession of the title; the presentation of the title to the debtor.

Regarding the first condition, the possessor must justify his right *through the uninterrupted row of guarantees,* whose mechanism and effects legitimate the achievement "a domino" of the title. The connection between the guarantees exists when the first endorsement is subscribed by the first owner who is the first guarantor of the title and in any other further guarantee the name of the guarantor in the previous guarantee is written down. In this profile, the simple possession of the title to order, although necessary, is not enough to obtain the satisfaction of the rights that result from the title and in the series of the guarantee the possessor of the title must be nominated the last, on the support of the title. This mention, together with the other conditions, offer the owner legitimation in the exercising of the right.

In case of loss, theft, destruction or damage of the title to order, the rules indicated with regard to the title at bearer shall apply. The model of the credit titles "at order" is the bill, to which the oder bill is attached, the warrant and generally the titles issued in connection with the individual credit operations.

Like for the title at bearer, the issuing of the titles to order creates a "*vinculum juris"*of the issuer as compared to any legitimate owner of the title, starting with the date of this putting into circulation through *guarantee*.

The consequence is that if the title is lost or is stolen to the damage of the signer and then gets into the hands of a good will owner, this can exercise all the rights derived from the title, under the condition of justifying the legitimation through the uninterrupted series of guarantees. As a consequence, in the conception of the law *the bearer of the title* is not the one who has the instrument nor the owner of the property right, but the *person nominated* on the last place in the

support of the credit title. The rule applies also to the owner who achieved the possession in good will.

In conclusion when on the title it was stipulated *the clause "at order"*, the juridical act of the guarantee reflects *the transfer manner* of the bonds on short term, respectively the ones represented by the commerce effects. The model of the title at order is the "ticket at order" based on which the issuer does not appoint a third person with the payment but *promises that he will pay* himself to the beneficiary or to the further owners.

Born out of the isolated credit operations or with an individual character, credit titles at order are put into circulation through a mention, having the content of an *order* given by the issuer or another guarantor. For example: the issuer writes, "*I will pay based on this ticket at order to Mr. ....*" and the guarantor shall write, "*For me you pay to Mr.…*" or" *Instead or me you will pay to Mr.…*", followed by the signature. This is the guarantee that is written on the verso of the bill, where the designation of *endorsement* comes. The guarantee comprises: the nomination of the guarantor, the transfer statement and the signature of the guarantor.

When a simple signature is applied on the verso we have a guarantee in blank, expressly admitted by article 15 of Law no. 58/1934 and article 17 of law no. 59/1934 in the matter of commerce effects, Also the bill of lading can be guaranteed in blank as well as any other titles at order. We showed that the guarantee in blank apparently transform the title at order into a title at bearer.

The guarantee has a practical use for the procurement of money founds before the due date. The used mechanism is the one of the *discounting* of commerce effects, owned in the portfolio by the owner who needs liquidities. The discount supposes both the juridical purchase act of the effects before the due time and the commission and discount paid to the bank for this operation. Through *rediscount*, the bank mobilizes the commerce effects obtaining the needed liquidities. The discounting and rediscount operations of the commerce effects fulfill the function of lending, this way gaining the quality of credit instruments.

The commerce effects grant solid guarantees regarding the execution of the service since the signers of the effects are supposed to be sole bondsman for the payment. The foundation of this responsibility is, as in any other hypothesis, in the general interest of the commercial credit, and the legal passive solidarity presumption has the purpose to protect and secure the circulation of credit and payment instruments.

Nominal credit titles grant an own right, incorporated in a simple registration carried out in the registry kept by the issuer, on the name of the purchaser. In other word, the nominal credit titles physically determine, materially or magnetically, the right expressed through a scriptural value an *inscription* registered by the issuer in his evidences. The transfer of this right becomes opposable to third parties through a similar procedure but not identical to the debt assignment known in the general law. For this reason the transfer of property or of other real rights over the nominal credit title has the specific designation of *transfer*. In certain cases, starting from the acceptance of *debt* of the investment placed in the nominal credit titles the legislator uses the terms of *cession, assigner, assignee* to determine the translative effect of the property and the parts implied in the transfer of nominal titles.

Some instruments, although they contain the name of the owner, can not be considered nominal credit titles because in the opinion of the legislator they do not have the quality as credit titles.

It is the case of the *social shares and of the interest parts* (in which the capital of the commercial societies with limited liability and that of the person\s companies are divided), for which the legislator excluded the feature of the negotiability. Or the natural vocation of the nominal titles is the negotiability. Under this aspect negotiable titles, susceptible to take the form

of nominal titles are the shares and bonds issued by the capital companies, specific contracts (called movable *derived* values), other negotiable instruments, titles of the public debts etc.

Therefore the interest parts and the social parts are no negotiable titles, although the *New civil code* comprised them in *Art. 2628 Par.1 let.c next to the* shares and obligations, which being movable values, are negotiable by excellence.

As a principle, the nominal credit titles can be considered causal titles since the autonomy of the incorporated right operates in an attenuated formula.

The scriptural value incorporated on a paper or magnetic support on the name of a person has a juridical nature of *incorporated movable good*. The rights of the owner were born based on a fundamental relation. In order to be put in circulation, these rights (of complex nature in case of the actions issued by the commercial company) are materialized into titles with value *" instrumentum".* Independently whether the instrument is a piece of paper or a disk, the rights incorporated in these titles do not lose *the juridical nature of incorporal movable good*

The inscriptions carried out in the registry of the issuer needs and assumed obligation, unilaterally from the issuer towards the owner. The right represented through the nominal title is born as a rule *, from the moment of the execution of the registration* in the indicated registry. This right exists incorporated in the share or bond, *the right of the first buyer,* shareholder or bondholder *arising from the subscription act.*

The owner of the title is therefore the person registered, except for the case when through the registration the person does not gain another quality (use or guaranteeing creditor). The owner is exclusively granted the exercise of the rights attached to the title. We underline that in exceptional cases the registration into the evidence of the issuer is not an irrefutable probe of the property of the title.

In this sense the court practice decided that the registration of the assignment of shares in the evidence of the companies by the social manager that has an own interest in operation does not remove the nullity causes of the transfer, since the law does not allowed for the rights and interest of the real owner (association of the employee and of the members of the association of the acceptances of the shares) to be spoliated through the formality of the registration.

Under the presented aspects, the instance proved that the social administrator wanted to check whether the transfer of the ownership rights over the nominal shares comes from a person that is not familiar to the commercial company and in an affirmative case to reject the registration of the operation in the registry of shareholder, this way conforming to the provisions of Art. 3-5 of the govern order no. 885/1995. Since in the judged cause the procedure did not correspond to the described legal requirements, the court canceled the assignment of the shares and provided the restoration of the situation before the assignment in the registry of the shareholder kept by the issuing company. (*Appeal court of Alba Iulia, commercial department, decision no.708/21 September 2001, not published).*

Apparently the juridical regime applied to the transfer of the nominative titles is identical with the one for the assignment of the bond of the common law.

Indeed, while other types of credit titles circulate independently on the participation of the debtor, the perfection of the transfer act of the nominative titles demands also the participation of the debtor that issues the title.

In reality the transfer is not mistaken for the assignment of the civil right because as a principle, the consent of the issuing debtor is not imposed as a validity condition of the transfer, but only the purpose provided by the law that the juridical transfer act, respectively "*negotium-ul juris,* closed between the parties is admitted by the issuer and third parties. In this sense, if the issuer imposed certain conditions for the transfer, their non-meeting makes the transfer not recognized by the issuer.

The procedure for the transfer of nominative titles supposes both regarding the initial operation of the issuing and regarding each consecutive transfer act the fulfillment of a double formality:

- registration in the registry of the issuer of the person in favor of whom the titles was issued on transferred; the mentioning of the transfer on the title or on its verso or the execution of the words "inscriptions in account";

The transfer of nominative titles must not be mistaken for the juridical act that is the base of their issuing (constitutive act of the company, issuing prospect for the shares or bonds) which represents the source of the fundamental relation and neither must it be mistaken for the juridical contractual act (purchase, donation, report, loan etc.) that may constitute *the cause* for the transmission after the titles issuing.

Under these aspects the property over the nominative titles is gained through subscription, a specific operation through which the titles are transferred from the issuing company to the first achievers. After this operation, the transfer of the property takes place also through the juridical act of the transfer and not through selling, change etc., which are juridical acts that produce effects exclusively "interest-party" but not towards the issuer of the titles and towards third parties.

Regarding the transfer of property, after the subscription, we underline that *the transfer*, being an *abstract juridical act*, shall not be affected by the nullity of the juridical operation, respectively of the cause that determined it. Indeed, as long as those parts, the assigner, the assignee and the assigned debtor (issuer of the titles) have met the legal formalities regarding the transfer, invalidity of the juridical act (selling, change, report etc.) closed without the participation of the issuer, between the assigner and the assignee shall not influence the transfer validity.

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