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(excerpt)

CHAPTER I
I N T R O D U C T I O N

1. General considerations. In time developed payment and credit means specific to business world, means which played the role to satisfy its requirements, including ensuring the rapidity of commercial operations.

The present development of commerce would not have been possible without the existence of credit, the most frequently encountered instruments being the commercial securities with their double nature, payment and credit[1].

The payment and credit instruments belong to a vast category, that of written payment instruments.

A payment instrument represents the mechanism through which the performance of a payment obligation of an amount of money is ensured. A credit instrument represents the mechanism which postpones in time the payment of the debt, ensuring mobilization of credit and allowing the owner to obtain a title which ensures the accomplishment of debt at the due day[2].

Characteristic features[3]

From an economical poiint of view, the credit represents an operation characterized through a current performance of one person, which takes confidence in the future performance of the other member of the agreement. A credit characteristic is that it can circulate from a patrimony to another, from one market to another or even froma country to another.

The credit fulfills a function which makes easier the transactions concluded between traders and non-traders, this being an advantage offered by the credit titles[4].

The fact that the credit titles are characterized in comparison to other titles used in the legal relations especially through the incorporation of the debt in title, that is the incorporation of the debt right in the document, the doctrine specified that the credit titles have the following features: they are constitutive, formal, literal and autonomous.

The document which confers expression to the credit title has **constitutive character,** in the sense that the right expressed is incorporated into the title and does not exist without it. As a consequence, the right may be exercised only on the grounds of the written document[5], athis acquiring the value of value-document, of real estate rights, as well as of legal operations.

The credit titles are **formal,** in the sense that the appearence, existence, circulation, performance of valorization of partimonial rights depend on the existence of the document incorporating them. Thus, we have to know that the credit title represents a

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[1] This double nature belongs to most titles, but are, for example, titles which are lacking the function of credit, this is why we understand to use the denomination of commercial titles of value in relation to the credit titles

[2] D. Legeais, Droit commercial et des affaires, Editions Dalloz, Paris Armand Colin, 2003, pag. 317

[3] To this end please consult Vasile Luha, General features of the titles of credit, in R.D.C., no. 7-8/1998, pag. 160-171.

[4] I.N. Finţescu, Commercial Law Course, vol. II, Bucharest, 1929, pag. 6

[5] S.Cărpenaru, Romanian Commercial Law, ALL BECK Publishing House, Bucharest, 2002, pag.49

document, materialized in a writing, necessary for the performance of the rights contained by it[6].

The formal character imposed as an adaptation to the necessities of commercial life, which determined, on one side, the standardization and simplification of the forms required by law, and on the other side, stipulation of serious sanctions in case of existence of form faults.

The literal character of the credit title grants the certainty of the debt right. The right claimed to have been created exists only within the limits in which it was formally expressed (in a written manner) into a document, without being extented with the help of evidences.

The rights written into the document has an *autonomous cahracter*, in the sense that the issuer of the title is obliged, not based on the fundamental relation based on which it was issued, but based on the significance of signing the title, each owner of the document acquiring an autonomous debt right, and not derived from the one of its predecessor[7]. As a consequence, irrespective of the cause which determined the issuance of a credit title, the obligation resulting from the title is independent from it. Also, the necessity to ease the circulation and to protect the good will of succesive owners imposed the principle according to which each owner receives a personal and autonomous right, an original right based on teh legal relationship between him and the document.

For this reason, as we showed before at the exceptions from the civil law rules, the autonomous character of the credit title makes the one who purchases a credit title to also acquire a personal right, without the possibility to oppose exceptions which might have been opposed to the previous purchasers.

Purpose of commercial titles of value

From an economical point of view, the commercial titles of value fulfill an important role, as playment imstruments, as well as credit instruments[8].

As payment instrument, the title of credit may be handed to the creditor replacing the amount of money due, and as means of credit may be handed to another person, either as a title of property, or as a security title, in exchange of an amount of money mentioned in it, with the possibility for the one which offers the amount of money to retain a part of it.

The commercial titles of value do not have rules specific to the titles from the civil law titles: a) transmission of title does not lead to the transmission of the right of debt, unless they fulfill the formalities mentioned by art. 1393 C. civ. (notification made to the debtor or his acceptance, certified through authentic document –formalities necessary for the debt transfer); şi b) nemo plus juris ad alium transferre potest quam ipse habet (the purchaser of the title cannot receive more rights than the ones had by the previous holder).

The exception from these rules in the field of commercial titles of value has as consequence:

a) ensures the security of the title's carrier;

b) facilitates the circulation of titles easily negotiable, which, also, emphasizes the best their purpose.

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[6] See art. 2 from the Law no. 58/1934

[7] O Căpăţînă, B.Ştefănescu, op.cit., pag. 75

[8] Jacques Mestre, Marie-Eve Pancrazi, Droit commercial, L.G.D.J, 26-e édition, Paris, 2003, pag. 709.

CHAPTER II
BILL OF EXCHANGE

GENERAL CONSIDERATIONS

Notion. The bill of exchange may be regarded as „specie juris", one of the most refined species of the legal spirit.

Making reference to the titles of credit and taking into account their specificity, a personal system of legal norms and adequate to the titles of credit was developed, that is the **bill of exchange law.**

The bill of exchange law separated from private law, becoming an autonomous law which contains elements of material law and procedural law of commercial and civil nature, as well as references to public law[9].

In which concerns the sphere of application of the bill of exchange law, this is strictly determined by the validity if bill of exchange title and of the bill of exchange obligation.

The bill of exchage developed in several phases, that is several perios unfolded during which the bill of exchange improved continuously. Writers do not agree on the number and duration of these periods, but all of them recognized their existence.

Which was accepted by the majority is the division of [10], according to which: a first period was the Italian one, the second period is the French one, due to the fact that the French decree from 1762 influenced the development of bill of exchange principles, and the last period is the German one, this being imposed to all nations.

In which concerns the Romanian legislation, this is represented by the translation of articles from Italian commerce, which, in its turn, it is influenced by the German system.

Although the drafting of bill of exchange title is made as private document, it has a performance character, meaning that thus, it is given the possibility to directly valirize the bill of exchange debt through a performance procedure and without the need of legal procedure to establish a performance title obtained by judicial decision.

Functions[11]. The bill of exchange fulfills the following functions of economic nature[12]:

a. the bill of exchange is an *exchange technical – legal procedure* in monetary field;

b. the bill of exchange represents an *instrument of credit* due to the fact that the payment is made at a certain due date.

If the mutual performance would be performed in the same time, the traders would be disadvantaged, due to the fact that the buyer would have to raise an important amount of money which will not be used until the occurence of an opportunity at which he should conveniently buy, whereas the seller would acquire an amount of money which he cannot use instantly in all cases.

Frequently the bill of exchange replaces the cash, the receiver having the possibility to instantly encash the bill of exchange or he may credit it to the account for the due date.

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[9] Radu Economu, Practical guide of bill of exchange law, Lumina Lex Publishing House, Bucharest 1996, pag. 8

[10] See Wechselrecht, in Endemann's, Handbuch, vol. IV, part 2, 1884

[11] D. Gălăşescu-Pyk, Bill of exchange and promissory note, vol. I, University Press, Bucharest, 1939, pag. 41 and the following.

[12] Petru V. Pătrăşcanu, op. cit., pag. 20 and 21.

The title of credit is incorporated into the title (bill of exchange) which contains un autonomous right, strictly linked to the document, taking into account the fact that the purpose of the bill of exchange is that the payment should be made at the due date or to cover or guarantee for the case when the party doues not fulfill its obligation.

Also, the bill of exchange represents an instrument of credit and because it involves granting a term in favor of the debtor being regarded as an effect of commerce (a negotiable effect)[13];

c. the bill of exchange represents a *payment instrument.* The person which agrees to make credit to the party of the agreement does not need to compulsory request the help of a bank in order to discount a bill of exchange or a promissory note issued by his debtor in order to acquire the funds with which it has to make a payment, he may draw a bill of exchange on his debtor and which he delivers to his own creditor.[14]

The bill of exchange being a payment instrument, it presents the following advantages: transmission is simple and rapid due to the fact that it is transmitted through guarantee; acceptance of the bill of exchange by the drawer offers the certainty of the accomplishment of interest of beneficiary; the drawer cannot oppose any exception to the successive carriers of the title; it offers the guarantee of solidarity of warrants;

Even if the bill of exchange has some advantages, this cannot effectively replace the currency. The payment through transmission of bills of exchange also presents a disadvantage, that it appears a certain difficulty regarding the quantum of various debts which do not always coincide, nor their due dates, the owner being forced, in order to obtain the payment, to wait for the due date.

ESSENCE AND FORM CONDITIONS OF THE BILL OF EXCHANGE

A. Essence conditions

General characteristics. The Law no. 58/1934 does not contain dispositions regarding the essence conditions, that is the rules of common law will apply in which concerns the legal documents mentioned by art. 948 C. civ., but with some distinctions.

According to art. 7 from the Law no. 58/1934, if a bill of exchange bears signatures of persons incapable to pledge through a bill of exchage, false signatures or signatures of imaginary persons or signatures which, for any reason whatsoever, do not oblige the persons who signed the bill of exchange or in whose name the bill of exchange was signed, the obligations of the other signatory parties still remain valid. Thus, from this law we may draw the following conclusions:

- that the commerce deeds, as disposition deeds, cannot be made by under age personsor by the persons prohibited by law;
- that the breach of this rule is sanctioned with relative nullity which may be invoked by the inheritors and creditors of the incapable person or by his legal representative; and
- that the other obligations are still considered valid, taking into account the fact that the rule of autonomy of obligations functions.

B. Form conditions

General knowledge. In order to exist and to be effective, the bill of exchange must fulfill

[13] Ion Dogaru, Lucian Săuleanu, Armand Calotă Ponea, op.cit., pag. 21
[14] Petru V. Pătrăşcanu, op. cit., pag.21

the form requested by law, and the will of the parties must be expressed in a clear and unequivocal manner. These form conditions represent guarantees in commercial relations, ensuring the commercial creditor, whose good faith is presumed, of the possibility which he has to accomplish his bill of exchange debt in a simple and effective manner[15].

The solemn and formal character of the bill of exchange results from the need in circulation of the title from one carrier to another, most frequently these not having the possibility to know the fundamental legal relation, that is the original one[16].

The bill of exchange obligation cannot vary the nature of the bill of exchange title in relation to the circumstances in which it was issued, taking into account the fact that this is formal, abstract and independent of any legal relation between parties, even of the cause which produced it. Thus, if a bill of exchange is issued in oder to cover a debt from another legal relation, it is understood that the debtor wished to create a new bill of exchange relation.

The form conditions are expressed in the necessity of a document and of obligatory mentions[17], the bill of exchange's formal character does not automatically involve a cause, being sufficient the promise for payment of the amount.

The bill of exchange contains either the obligation to pay, or the obligation to make another to pay at the due date the amount agreed on. The bill of exchange which contains the obligation to make another to pay at the due date the amount agreed on is called *draft*.

If we are in the presence of a bill of exchange with the mention *promissory*, due to its formal effect, the signatory pledges not only to the beneficiary from the moment of emission but, in the same time, directly and beforehand, he pledges to any person which, at the due date, represents the owner of the title. From here we draw the conclusion that the third owner is *ayant-cause* of the endorser, as well as the *owner of a personal title*, which cannot be affected by the endorser's deeds[18].

TRANSMISSION OF THE BILL OF EXCHAGE

ENDORSEMENT[19]

General aspects. The bill of exchange's property, will all guarantees and rights coming from it are transmitted through endorsement, the endorsers being responsible in solidum of the acceptance of the bill of exchange and of the payment at the due date of it.

The endorsement is that legal document through which the owner of the bill of exchange, called endorser, transfers to another person, called endorsee, all rights coming from the title, sense in which a written statement signed on the title must be made and the title must be transfered to the endorsee[20].

Thus, the endorsement is, after all, the modality of transmission of the bill of exchange through the remission of the title with a certain written mention, formally, to this end on the back of the title. This is why the name of „*endorsement*" is also used.

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[15] Radu Economu, op.cit., pag. 19

[16] N. Jac Constantinescu, op. cit., pag. 11.

[17] To this end also see Clara Ştefan, Emanuela Casandra, Bill of exchange law. Theoretical and practical aspects. Form conditions of the bill of exchange, in R.D.C. no. 3/1999, pag. 103-109.

[18] Ion Dogaru, Lucian Săuleanu, Armand Calotă Ponea, op.cit., pag. 23

[19] Radu Economu, Bill of exchange circulation through endorsement, R.D.C. no. 2/1995, pag. 95 and the following.

[20] Stanciu D. Cărpenaru, op. cit. pag. 484.

In compliance to the Hague regulation Haga, the endorsement represents the order which the receiver of the bill of exchange gives to the issuer or drawer in order to pay to another person the amount at the due date and at the place shown in the bill of exchange, this being a scriptural accessory document. The endorsement may be written on the original bill of exchange, on a copy or on the extension of a bill of exchange.

The one who transfers the bill of exchange through endorsement is called endorser, meanwhile the one who receives the bill of exchange through endorsement is called an endorsee.

The owner, the formal endorser, acquires the bill of exchange in virtue of the endorsement, not beng obliged to return the bill of exchange to its original oner, except for the cases of ill-faith or of serious mistake which was made in acquiring it[21].

When the property of the bill of exchange is transmitted, all the rights derived from the bill of exchange are also transmitted, but we have to learn that the endorsement does not transfer the rights which the endorser might have, only those rights resulted from the bill of exchange.

Being a title at order, the bill of exchange circulates from hand to hand with the help of written order on the back of the document called *order-endorsement* or, as retained, endorsement. The purpose of the endorsement is to transfer the bill of exchange's property.

Thus, the bill of exchange represents a specific means of transmission of the bill of exchange through which the endorsee acquires a personal and independent right, without being necessary to notify the bill of exchange debtor[22].

GUARANTEE

Notion. The payment of a bill of exchange may be guaranteed through a guarantee, the guarantee being written on the bill of exchange and signed by the one giving it.

The guarantee is expressed through the words “for guarantee” or any other equivalent expressions. In compliance to art. 34 para. 3 from the Law no. 58/1934, the guarantee may be made also through the simple signature by the referee in case of need on the face of the guarantee, with the exception of the case in which the signature belongs to the drawee or of the drawer.

Through guarantee the payment of the entire amount may be guaranteed or only a part from the amount of money mentioned in the guarantee[23].

The guarantee cannot be made after the the elaboration of the protest for non-payment or after the term mentioned for the protest.

Thus, the guarantee represents the legal document through which a person, called a referee in case of need, is obliged to guarantee the obligation assumed by the bill of exchange debtor, called guaranteed[24] or, in another words, the guarantee represents the

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[21] Vivante, op.cit., 1123

[22] And the beneficiary of a bill of exchange transmitted through succession acquires all bill of exchange rights (Cas. II, dec. from 2nd of April 1927, Weekly pandects, pag. 615).

[23] Silvia Condor –Cristea, Considerations concerning the guarantee of the bill of exchange, R.D.C. no. 3/1995, pag. 45 and the following.

[24] Stanciu D. Cărpenaru, op. cit. pag. 494.

document through which a person „guarantees the payment if a bill of exchange".[19]

The person which gives the guarantee is called a referee in case of need, and the person guaranteed is called guaranteed.

The referee in case of need does not take part to the acts of transmission of the title, this appearing in order to increase the confidence given to the title. The referee in case of need in obliged in solidum at payment, through guaranteeing one of the obligations which form the bill of exchange chain.

Conditions of validity

In order to be valid, the guarantee must be written on the face of the check, through registering on of the formulas „guarantee", "for guarantee", "for guarantee" or any other equivalent expression, followed by the signature of the referee in case of need or of its agent[25]."

The guarantee may be given by the third person, as well as by one of the signatories of the bill of exchange, that is the drawee, being a third party as long as he did not accept the bill of exchange, he can guarantee any of the bill of exchange debtors.

The drawer or any of the endorsers assume a direct obligation through the guarantee given in favor of the drawee acceptant, whereas the bearer of the bill of exchange may exercise against him direct bill of exchange action, without being obliged to fulfill formalities which are necessary to maintain the action in recession.

The validity of the guarantee is conditioned by the formal validity of the obligation guaranteed, thus, in the case in which the obligation guaranteed is void because any of the formal essential conditions are missing, then the guarantee is considered without value. In case the main obligation is not valid due to other circumstances which regard the conditions of form, then the guarantee is considered valid, producing bill of exchange effects.

The guarantee is given on the bill of exchange or on its allonge, on a duplicate or on a copy from the title and may be drafted by had with the pen, ink, even by the referee in case of need or by another person, typed or printed with a seal. But, in any situation it is obligatory that the guarantee formulas is followed by the written signature of the referee in case of need[26].

In case the guarantee is expressed separately, on another writing, this may be interpreted as a transfer in compliance to the common law rules[27].

The guarantee results from the introduction of the formula "*for guarantee*" or "*for transfer*".

Concerning these formulas, the court has the right to deduce the guarantee from the terms used by the one obliged to this end: the obligation to guarantee the payment of a bill of exchange not being subject by law to a sacred formula, this may be deducted by the law court from the formula "for guarantee" or from other terms which should contain, implicitly, the idea of payment guarantee. That is, the law court had the right to certify, through the word "accepted" followed by the signature, the bank understood to oblige to

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[19] Tudor R. Popescu, op.cit., 1975 pag.268

[25]Framework norms of the National Bank of Romania no. 6/08.03.1994 regarding the commerce done by the banking companies and the other companies of credit with bills of exchange and promissory notes, based on the Law no. 58/1934 on the bill of exchange and promissory note, modified through the Law no. 83/1994

[26] See Internet resource: www.spi-romania.eu

[27] Radu Economu, op. cit., pag. 93.

guarantee the payment of the bill of exchange, but as a promissory note, and not to receive the more difficult situation, that of co-debtor or of drawee which accepts the obligation to pay a policy or draft[28].

Also, the guarantee may be given for a part from the amount mentioned in the bill of exchange, but this cannot be given under condition and cannot be stipulated the lack of solidarity.

Regarding the fundamental elements of the debt guaranteed, these cannot be modified through guarantee.

A guarantee must show in favor of whom it was given, if the person in favor of whom it was given is not mentioned, the absolute legal presumption that it was given in favor of the drawer works.

Regarding this situation, the case of guarantee without specifying the nebeficiary, there is the following decision of the French Court of Causation[29] :"the guarantee given on a bill of exchange without specifying the beneficiary is presumed as being given in favor of the drawer".

The guarantee must be given through a simple signature of the referee in case of need deposited on the face of the title, with the condition that the respective signature does not belong to the drawer, drawee or acceptant. When the guarantee is given on the back of the title, in order not to mix it up with the endorsement, it is necessary, together with the ignature of the referee in case of need also the addition of a formula with the type: "for guarantee" or "for warranty". The simple signature given on the back of the bill of exchange does not value guarantee if it is accompanied by one of the forms shown.

„According to the bill of exchange law, the simple signature on a bill of exchange, without any other specification, may represent a guarantee, but only if it is accompanied by the expression "for guarantee" or any other equivalent form, a certain signature represents a guarantee anywhere it is deposited, either on the front, or on the back of the bill of exchange. If the signature from the bill of exchange is found on the back and is not accompanied by the words "for guarantee" or any other equivalent form, it cannot be taken as guarantee, because it does not fulfill the conditions required by the law"[30].

In case the referee in case of need pays the bill of exchange, he takes over all the rights of the owner through a legal subrogation.

Regarding the guarantee, taking into account the fact that the one giving the guarantee is a bill of exchange transferor, the rules from transfer apply, if these are not contrary to the commercial rules of the guarantee. This is how the referee in case of need's right to bail is explained from the debtor guaranteed; his right to free himself from his guarantee, if he cannot take over the rights, mortgages and priviledges of the creditor, due to him etc.

Regarding the capacity to give a guarantee, this is the attribute of any person which may pledge for a bill of exchange in a valid manner.

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[28] Court of Causation, dec. nr. 1557/1923, in "Legal jurisprudence in comemrcial matter", pag. 89

[29] French Court of Causation, decision from 29th of October 1979, in the Economic Tribune, pag. 294

[30] Court of Causation, dec. nr. 813/1940, in "Legal jurisprudence in commercial matter", pag. 89

CHAPTER IV
THE PROMISSORY NOTE

Notion[31]. The promissory note has a very similar structure to the one of the bill of exchange and fulfills the same economic functions.

The promissory note represents a title of credit, unde rprivate signature, which involves two persons in the process of its creation: subscriber or issuer and beneficiary. The title is created by the subscriber or issuer as debtor, this pledging to pay a fixed amount of money, at a certain term or at the presentation of another person, named beneficiary, which has the quality of creditor. In a promissory note payable at sight or within a certain time from the sight, it may be stipulated that this amount will produce interest. In any other promissory note, this stipulation is considered not written. The interest must be shown in the promissory note. If another date is not shown, the interest elapses from the date of emission of the promissory note.

The promissory note is payable at presentation, this having to be presented for payment within a year from its date.

The promissory note represents a commercial title of value which is represented by a document through which a person (issuer) is obliged to pay to another person (beneficiary) or at its order, an amount of money at the due date established. Thus, it represents the document through which the subscriber is obliged to pay directly a certain amount to the creditor or at its order.

The due date of the promissory note[32]

The due date represents the term at which the promissory note is exigible and must be paid.

The due date must be certain, that is it has to indicate precisely the day or the maximum term within which the creditor must present himself for payment, in order not to oblige the debtor to maintain the amount for payment without limit in time.

The due date at sight is represented at the corresponding time from the month in which the payment must be made.

If this is not a corresponding date, the due date will be in the last day of this month.

If the due date is at a certain time from the date of emission, it may be expressed in days, weeks, months and years from the emission date. If the due date is fixed at the beginning, middle or end of the month, through these terms will be understood the first, the fifteen or the last day of the month.

In the case the due date is fixed on months, through expressions as “three months from the date...”, the due date will be calculated without taking into account the variation of the number of calendar days of each month. The due date will take place in the calendar days corresponding to the month established.

When a promissory note is due in a certain year or over a year or over a number of years, then the due date will be in the day and month of the year indicated, which will correspond to the number of day and month of emission.

When a promissory note is payable at a fixed day in a place where the calendar is different from the one of the place of emission, the due date is considered made after the calendar of the place of payment.

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[31] www.info-legal.ro

[32] www. contabilitate.ablog.ro

The owner of the promissory note payable at a fixed date or within a certain term from the date of emission or from sight must request to the debtor the payment either in the day in which the promissory note is pais, or in one of the two working days following the date of payment.

If within the two working days allowed for the postponement of payment over the due date a legal holiday of a day or several days occurs, the number of days representing the legal holiday is added to the tolerance of two working days mentioned.

The promissory notes with other due dates or with succesive due dates are void.

The owner of the promissory note must present the title at the due date, at the place and due date indicated for the payment. The payment will be requested at the main registered office of the debtor legal entity.

A presentation which is made on the street cannot be considered valid, such presentation not being able to authorize the elaboration of the protest for non-payment.

In case the domicile or the registered office of the debtor cannot be found, then the owner must request the payment at the last domicile known or registered office of the debtor. In case the debtor is not found even through this means, than a "protest in wind" will be elaborated.

In case the promissory note is not presented for payment within the fixed term, any debtor has the right to deposit the amount at the House of Economies and Deposits (CEC) or at any other institution authorized to make these operations, on the expense and risk of the owner of the promissory note. The receipt will be deposited at the law court of the place of payment, through it, the debtor being free from the obligation of payment which he had towards the beneficiary of the promissory note.

Similarities with the bill of exchange. Between the bill of exchange and the promissory note there are similarities, reason for which both are regulated through the same law, respectively the Law no. 58/1934, but the promissory note is different from the bill of exchange through the fact that, meanwhile at the bill of exchange three persons appear (drawer, drawee and beneficiary), in case of the promissory note two persons appear (issuer and beneficiary). The bill of exchange represent the genre, whereas the promissory note – the species.

The bill of exchange in which the issuer and the drawee are the same person is considered a draft (promissory note). This only in the case that the place of emission is different from the of the payment[33].

„A bill of exchange drawn for the benefit of the drawer, which contains the simple obligation to pay, is, in reality, a promissory note, bearing, thus, the signature of the one which has to pay (debtor) not of the signature of the drawer which, in such bill of exchange, has two qualities: that of drawer, as well as that of receiver (beneficiary). The signature of the drawer would be necessary only when this, instead of requesting the payment of the bill of exchange, would negotiate it"[34].

As in the case of the bill of exchange, the promissory note supposes the existence of a fundamental legal relation (for example, a merchandise sale-purchase agreement was concluded, and for the payment of the price at a certain due date, the buyer issues a promissory note).

The promissory note involves a recognition of the debt, that is the issuer has the

[33] Court of Causation, dec. no. 1159/1926, in "Leagl practice in commercial matter", pag. 83
[34] Court of Causation, dec. no. 288/1928, in "Legal jurisprudence in commercial matter", pag. 83

quality of debtor and through the emission of the title he pledges to pay an amount of money, and the beneficiary has the quality of creditor.

Conditions of form

The obligatory mentions which the promissory note has to fulfill are:

a. denomination of promissory note; this denomination must be expressly mentioned in the contents of the title

b. the unconditioned promise to pay a determined amount of money; the promise must be firm and unconditioned and expressed with the words "I will pay" or other similar expressions.

c. indication of the due date; if a due date is not indicated, the payment will be made at sight;

d. indication of the place of payment; if the place of payment is not indicated, this may be considered the place where the promissory note was issued;

When in the promissory note the place of payment is not indicated, as means of payment and as domicile of the issuer. As a consequence, the protest made at this place is valid[35].

„The non-payment protest must be made at the place indicated in the bill of exchange for payment or, if this is missing, at the domicile of the debtor supposed as place of payment agreed between the parties. The non-fulfillment of the formality draws the nullity of the protest, virtual nullity which results from the non-observane of the dispositions of the law"[36].

e. the name of the person to whom or at the order of which the payment must be made

f. Date and place of emission; if the place of emission is not mentioned, it will be considered that this is the place showed near the issuer's name;

If there is no date, than the promissory note is void. It may have the value of a promise of payment accompanied by the clause "promissory"[37].

g. The issuer's signature; the title must bear the personal signature of the issuer.

Taking int account the fact that „the endorsement represents the order given to the issuer by the beneficiary of the promissory note' beneficiary, for the payment of the debt in the hands of the person senting the title, the first endorsement must belong to the person mentioned in the promissory note as beneficiary. In case the first beneficiary remains the owner of the promissory note, the signature on the back of the ticket of a person foreign of the bill of exchange relation does not represent an endorsement. It cannot be considered neither as a guarantee, because, in this case, the signature must be accompanied by the mentioned "for guarantee" or by an equivalent formula, or it has to be written on the front of the bill of exchange"[38].

In case one of the mentions described before is missing, the title will not have the value of a bill of exchange, with the exception of the cases strictly mentioned by the law[39]:

- it will be considered that the bill of exchange whose due date is not shown is payable "at sight";

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[35] Court of Causation, dec. no. 387/1919, in "Legal jurisprudence in commercial matter", pag. 91

[36] Court of Causation, dec. no. 1006/1926, in "Legal jurisprudence in commercial matter", pag. 91

[37] French Court of Causation, decision from 7th of November 1979, in Economic Tribune, "Market economy, institutions and mechanisms", vol. V-VI, Bucharest, 1992, pag. 282

[38] Court of Causation, dec. no. 220/1941, in "Legal jurisprudence in commercial matter", pag. 88

[39] Ion Turcu, Dorina Paşca, Use of the the bill of exchange in blank in the banking practice, R.D.C. no. 10/1998, pag. 20 and the following.

- if the place of payment is missing, the payment will be made at the place of emission of the title. The dispositions regulating the bill of exchange in which concerns the endorsement, due date, payment, protest also applies to the bill of exchange.

According to art. 106 from the Law no. 58/1934 are appied to the promissory note, if these are not compatible with the nature of this title, the dispositions relative to the bill of exchange, regarding: the endorsement (art. 13 - 23), due date (art. 36 - 40), payment (art. 41 - 46), bill of exchange action or performance (art. 47), as well as the recession in case of non-payment (art. 48 - 55 şi 57 - 65), protest (art. 66 - 73), payment through intervention (art. 74 şi 78 - 82), copies (art. 83 şi 86), modifications (art. 88), prescription (art. 94), days of legal holiday, calendar of terms and inadmissibility of the term of grace (art. 95 - 98), subscription through positioning of the finger (art. 99), the action coming from enrichment without a just cause (art. 65), annulment and replacement of title (art. 89 - 93).

Also the dispositions regarding the bill of echange paid by a third party or in another locality than the one of the drawee's domicile are applicable to the promissory note (art. 4 şi 30), the clause through which the interest is established (art. 5), the differences in indicating the amount of payment (art. 6), effects of a signature deposited in the conditions mentioned at art. 7, the effects of signature of a person which signs without having a mandate in this sense or exceeding the mandate received (art. 10) and the bill of exchange in blank (art. 12).

Also the dispositions regarding the guarantee apply to the promissory note, in the case of the last paragraph of art. 34, if the guarantee does not show for whom it was given , it is considered given for the issuer.

CHAPTER V
THE CHECK

GENERAL CONSIDERATIONS

Legal nature. Next to the bill of exchange and promissory note, the check is considered as a title of credit or as a payment instrument (according to the legal literature in this matter). There were several opinions regarding the legal nature of the check, in order to eliminate interpretations regarding this aspect, as well as to allow its correct use, the National Bank of Romania specified at point 2 from Framework norms no. 7/1994 the fact that the "check represents an payment instrument….". But the inclusion of the check in the category of titles of credit is due to operations and principles similar to those which govern the bill of exchange, as well as the promissory note[40]. The differences between the check and the bill of exchange were identified even from the first moments of the legislation on this payment instrument[41].

The check, as payment instrument, represents the possibility of the holder to make payments, without cash, based on an available amount of money which is pre-established at a banking institution which, previously, made available the material support issued in compliance to the Framework norms no. 9/1994[42].

Each person who knows her rights and obligations from the beginning may make all the operations linked to this instrument, in her own name.

Which is different between a check and a bill of exchange are the aspects related to thefact taht the emission of a check is made only if the drawer has an available amount of money at the bank and if there is a convention concluded between the drawer and the drawee.

The check is different from the bill of exchange because:

- is does not represent an objective commerce deed;
- it is used as a payment instrument
- in quality of drawee, it may only be indicated by a bank
- the payment will be done at the presentation.

In the payment circuit through the check three subjects are involved, denominated as such: drawer, drawee and beneficiary[43].

From a commercial point of view, the drawer represents the buyer or the beneficiary of a service (debtor), the drawer represents the bank which will pay the amount registered on the check, the beneficiary having the role of seller.

Special conditions of emission of teh check

The conditions which have to be fulfilled in the same time, in the sense to make the operation, in order to achieve the payment through the check represents, on one side, the

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[40] St. D. Cărpenaru, op. cit., pag. 557

[41] J.D. Casasus, Les Institution de Credit. Etude sur leur functions et leur organisation, Societe Belge de Librairie, Oscar Schepens & C, Bruxelles, 1900, pag. 39, E. Thaller, Traite elementaire de Droit Commercial a l'exclusion du droit maritime, Cinquieme edition, Librairie Arthur Rousseau, Paris, 1916, pag. 821

[42] Ion Dogaru, Lucian Săuleanu, Armand Calotă Ponea, op.cit., pag. 163

[43] The framework norms of the National Bank of Romania no. 7/1994 mention in point 4 : the check represents a payment instrument which connects the process of its creation three persons: drawer, drawee and beneficiary.

pre-establishment of an available amount of maney in administering the drawer, and on the other hand the convention between the drawer and the drawee regarding the emission of checks[44].

The available amount of money represents the cert amount of money in the administartion of the drawee, which the drawer makes available to the beneficiary by using the payment instrument, The payment instrument in order to be considered as a check, must fulfill the conditions mentioned by the law.

The essential aspect which makes different the check from the bill of exchange or promissory note and the one generating the specific effects on this commercial title of value represents the necessity to pre-establish the available amount of money[45].

Without a doubt, the check represents an instrument of payment and not an instrument of credit, as the bill of exchange. Given the cause of the nature and function in commercial relations, that to ease the urgent liquidations and to satisfy the general needs of circulation, releasing the drawer and the endorsers from their responsibility and without giving the possibility to the drawer to dispose of its provision at the drawing, the legislator stipulated that the owner of the check must present it to the drawee in 8 days from the emission date, in case the check is issued instead of the payment and within the 15 days is payable in a place different from the one where it was issued.

Part of the French, German and Italian doctrine opinate that the transmission of the check involves the transmission of provision and, thus, the beneficiary is anytime in time to request the payment of the check. The doctrine from England and from the United States of America refuses to the owner of the check any personal right of debt and any direct action towards the drawer, considering the drawer as being in direct relation only with the drawer.

In our case, the checks were drawn in Romania and payable in Zürich in August 1918. They were presented to the drawer in May 1919. The drawer refused the payment following the order received to this end from the drawer, on the reason that the legal term had expired without being presented at the drawee.

Thus, the presentation of checks being made much later that the terms established by the law, it cannot be claimed that the property of the provision would have been acquired, thus we cannot allow that there is a bill of exchange action against the drawer in recession for the non-payment of the check[46].

The check acquires an autonomy from the date of its emission through value incorporation of the amount registered on the reason of presumed existence of the available amount.

In a different manner from the other instruments of payment, the check is preferred in the commercial relations by its beneficiaries, due to the existence of the presumtion of pre-establishment of an amount of which they can benefit in compliance to the legal dispositions.

In which concerns the convention between the bank, drawee and drawer, this represents the previous authorization of the drawer in order to use his available amount

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[44] Ion Dogaru, Lucian Săuleanu, Armand Calotă Ponea, op.cit., pag. 170

[45] E. Thaller, Traite Elementaire de Droit Commercial, Librairie Artur Rousseau, Paris, 1916, pag. 823

[46] Ilfov Tribunal, s. II com., decision 521 from 16th of June 1922, J.G. 1923, 1586, P.R. 1924, II, p. 62, quoted from I. Turcu, page 184

through the check, the drawee making available to the drawer the necessary forms which may be transformed into checks.

The bank has the obligation to verify if the checks delivered will be used by the persons with which it has a convention to that end.

If a client is in prohibition to issue checks, the banking company cannot give him for use the check forms, and if a drawer is under prohibition, it is obliged to request the return of the forms made available.

In case of delivery and payment of checks requested and used by the falsifier through means of false signatures, the person responsible is the banker, if he is not careful enough with the ccasion of delivery and payment.

When an employee of a trader, which has an account at the banker, imitates the signature of his employer, in order to request the delivery of important checks, the banker is at fault because he is being delivered on a simple presentation of a signature deposited on a printed paper, without any explanatory letter from the client and, enspecially, when this remission is made to an employee which does not have the power, not the special capacity to hold it.

Also, if the banker, after paying the checks did not immediately notify the client, as in current practice, this negligence is assimilated to the serous fault[47].

In case the banking company neglects to take these measures, the drawee will be obliged at the payment of all checks issued without being covered through the use of forms used by the drawer in banking incidence[48].

CONDITIONS OF VALIDITY OF THE CHECK

Obligatory mentions[49].

Taking into account the specific formalism, the check must contain the mentions expressly stipulated in the Law no. 59/1934[50], thus:

a. The check denomination written in the text of the title and expressed in the language used for the elaboration of the title. The lack of denomination traws the nullity of the title. The denomination of check in the text of the title will be an obligatory part of the formula: "paid in echange of this *check* ...". This aspect only certifies the fact that the drawer, as well as the beneficiary are familiar with the nature of the instrument used in the performance of the payment operation.

b. The unconditioned order of payment of a determined amount of money, written on the check. The amount of payment will be written in numbers and letters, also specifying the currency in which the payment will be made. If between the amount registered in numbers and the one written in letters there is a difference, the amount in letters will be

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[47] Montpellier 4 janvier 1909, quoted from I. Turcu, op. cit., pag. 189

[48] I. Turcu, Banking operations and contracts. Banking law treaty, 5th edition, vol. II, Lumina Lex Publishing House, Bucharest 2004, pag. 109.

[49] Technical norms no. 9/1994 regarding the check modified through the Circular no. 33/1995

[50] The framework norms of the National Bank of Romania no. 7/1994 stipulate at point 9 "On the check other mentions may be made than the compulsory ones which through the respective instrument stipulates optional clauses, responding to necessities specific to the relation between the three persons: drawer, drawee and beneficiary. The optional stipulations make the object of an understanding between these persons"

paid; if on the check the amount of payment is written several times, either in numbers, or in letters, the smallest amount will be paid.

Any limitations or counter-performances which are added to the order of payment lead to the nullity of the writing.

c. The name of the draww, respectively of the bank which has to make the payment.

The indication of the name of the bank which has to make the payment operation of the check is obligatory, its absence drawing its nullity[51].

d. The place of payment, respectively the bank, locality where the payment was supposed to be made: if on the check there is no mention regarding the place of payment, this is considered the place appointed near the name of the drawee. The absence of the mention regarding the place of payment, does not attract the nullity of the check. If near the name of the drawee (bank) are indicated several localities, the check is payable at the first place indicated after the name of the drawee. There are several big banks which have subsidiaries, agencies etc. in various localities from the country and from abroad. These print on the check, besides the denomination of the bank and locality where it is payable. If this instruction is missing, the check is considered payable at the central registered office of the bank drawn.

„A bill of exchange action cannot be allowed when based on a check on which the proof was not made, by the plaintiff, that it was presented at payment within legal time and that it was protested for non-payment. In these cases, though, although the check was removed within the bill of exchange action, the plaintiff may carry the action coming from the basic obligational legal relation, using the check as a document with which the obligational relation must be established. In pur case, the Court of Appeals, judging in the light of this principle, did not breach the dispositions of art. 1201 C. civ., when, in the common law action considered the check as a writing from which it could deduce that the convention between the parties was that the payment of the debt should be made in French franks”[52].

According to art. 366 from the Commercial Code, all stipulations related to bills of exchange are also applicable to the check. From here it results that in this matter, the drawee, not taking part to the formation of the agreement and not taking, until the acceptance for payment, no direct obligation towards the beneficiary, cannot be forced to request it, by claim in front of a court, to pay checks whose payment was refused. The only action which the beneficiary of a check may exercise, in this case, is the action in recess against the endorsers or the drawer, in compliance to art. 399 C. com., applicable also to the check[53].

e. Place and date of emission of the check. The place of emission must be near the emission date. If the place of emission is not shown in a special manner, it is considered that the check was issued in the locality indicated near the name of the drawer. In which concerns the date of emission of the check, the day, month and year will be specified (the date must be unique, certain and possible) in order to allow the calculation by the bank

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[51] Framework norms of the National Bank of Romania no. 7/1994 stipulate at the point 19 " The name of the drawee, respectively the denomination of the banking society, cannot be drafted on the instrument on diagonal, onyl in the cases mentioned at the framework norms."

[52] Court of Causation, dec. no. 1465/1932, in ”Legal jurisprudence in commercial matter”, pag. 124

[53] Court of Causation, dec. no. 293/1923, in ”Legal jurisprudence in commercial matter”, pag. 123

(drawee) of the presentation term for payment of the check, the cjeck without a date is considered issued prior to the term of presentation for payment.

If a check is lost, according to the disposition from the Commercial Code, the place of payment establishes the competence of tribunal which will fulfill the formalities of cancellation of the lost check. The Commercial Code only refers to the cases when it is stipulated as place of payment the locality from the country where this law applies, not in all the cases when the place of payment was established abroad where the Romanian Commercial Code does not apply, not being able to atribute the competence of forein law courts. This is why, in these special cases, to know which court is competent to fulfill the formalities for the cancellation of bills of exchange or lost checks is solved according to common law rules, according to which the competence in the field of commercial actions or requests is determined, at the request of the plaintiff, in compliance to art.987 C.com.

In this case[54], the completion of the respective formalities was requested at the registered office tribunal of the Romanian Bank, which was also obliged to issue nea checks instead of the ones lost. The Court of Appeals correctly statued that the tribunal mentioned before was authorized to fulfill these formalities, taking into account that the annulment of the lost check was in discussion, as well as the emission of a duplicate, but the requester itself resides in the country. The competence was not established, in this case, by the payment of the value of the check by the one who lives abroad. The risk of the owner or issuer of the check may be avoided by the notification of the payer abroad not to pay.

f. The personal signature of the drawer, that is of the check's issuer. The banks will accept for payment only checks in which the name of the drawer (natural or legal entity) is clearly elaborated.

Analyzing on one side the text of the Framework norms related to the signatures done on the material support of the check and on the other part the text of the banking norms and the jurisprudence in this field, we consider that in the case of commercial companies, in order to establish the opposability of the title towards the drawer it is necessary to apply the seal, whose specimen is requested by the banking institutions next to the signature specimen[55].

The absence of the issuer's seal will not affect the validity of the check.

The High Court[56] states that in a correct manner the court of appeals stated that in this case the compensation does not operate, the check invoked by the respondent, not bearing the seal of the company plantiff, in order to prove that it was issued by the latter. The compensation is the modality to extinguish the obligations which represents the extinction of two mutual obligations, until reaching the smallest of them.

Optional mentions. Besides the compulsory mentions which have to be present i the text of the check, on the writing may be present also a series of optional mentions[57] (clauses) that is:

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[54] Court of Causation, dec. no. 97/1927, in ”Legal jurisprudence in commercial matter”, pag. 123

[55] The framework norms of the National Bank of Romania no. 7/1994 stipulate at the point 58 " In order to draw checks, any drawer must deposit to the banking society at which it has available money the specimen of its signature."

[56] The High Court of Causation and Justice, commercial section, dec. no. 1707/2005

[57] Technical norms no. 9/1994 concerning the check modified through the Circular no. 33/1995

- the interest clause, in case of the check the inscription of the interest is considered not written, not leading to its nullity;

- the non-transmission clause written on the check either by the drawer at the request of the beneficiary, or by an endorser means that the check is payable only to this last owner (beneficiary), having the possibility to endorse it to a commercial bank for encashment (“endorsement for encashment”);

- clause of payment through deposit, the drawer or one of the succesive beneficiaries of the check (following the endorsement) may mention the clause “payable to the accout” or “only through deposit” or any other equivalent expression, this meaning that the check cannot be encashed in cash, the amount for payment being deposited into the bank account of the beneficiary;

- the clause of certification, through the mention “certified check” written on the title: the certification will be requested from the bank (drawee) by the drawer or by one of the subsequent beneficiaries;

- the clause “payable through notification” is inserted on the check by the drawer following a previous understanding with the drawer that he will pay only after the notification of the drawer. This clause does not represent a condition for the coomplishment of the payment, but it is an additional measure to verify the authenticity of the check in order to prevent payments based on false checks in checks in the hands of ill-faith owners;

- the clause “no expenses” or “no protest” stipulated on the check by the drawer, referee in case of need or endorser absolves the beneficiary of the title from the elaboration of te non-payment protect in order to exercise the recession action.

CHAPTER VI
PAYMENT INCIDENTS

The authority of payment incidents

In compliance to art. 1 from the Regulation no. 1/2001[58], the Authority of payment incidents, hereinafter referred to as CIP, is a centre of agency which administers the data specific to payment incidents, for public interest.

The non-performance in due time and adequate of the payment obligations assumed, which appears before or during the process of clearing of the instrument (check, bill of exchange, promissory note), obligations mentioned in the law and /or an agreement and whose non-performance is notified to CIP by the declaring persons (banks) for the defense of public interest, is called payment incident[59].

The major payment incidents are: 1. *in case of the check*:

a. the check was issued without the authorization of the drawee;

b. the check was refused from a total lack of available money, in the case of presentation for payment before the expiration of the presentation term;

c. the check was refused for payment from a partial lack of available money, in the case of presentation for payment before the expiration of the presentation term;

d. the check was issued with a false date or it is missing an obligatory mention;

e. the circular check or the travel check was issued "at the bearer";

f. the check was issued by a drawer in banking prohibition

2. in case of the bill of exchange and of the promissory note:

a. the bill of exchange was discounted without the total existence or partial existence of the debt transfered at the moment of its transfer;

b. the promissory note or the bill of exchange with due date at sight was refused from a lack of available money in case of presentation for payment in term;

c. the promissory note or the bill of exchange with due date at sight was refused from a total lack of available money in case of presentation for payment in term

d. the promissory note or the bill of exchange with due time at a certain time from the sight, at a certain time from the emission date or at a fixed date it was refused from a partial lack of available money in case of presentation for payment in term.

e.the promissory note or the bill of exchange with due date at a certain time from the sight, at a certain time from the emission date or at a fixed date it was refused from a total lack of available money in case of presentation for payment in term;

The structure of the data basis is composed from two basic files: the national file of payment incidents (FNIP) and the national file of the persons with risk (FNPR).

The national file of payment incidents (FNIP) is structured on three components in connection to the payment banking instruments whose incidents are administered:

The national file of checks (FNC); The national file of bills of exchange (FNCb); The national file of promissory notes (FNBO).

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[58] The regulation no. 1/2001 concerns the organization and functioning at the National Bank of Romania of the Authority for payment incidents and published in the Official Journal of Romania no. 120 from 9th of March 2001.

[59] http://www.bnr.ro/Ro/Legi/CIP/

The national file of persons with risk (FNPR) represents a file automatically fed by FNIP with the major payment incidents registered on the name of a natural or legal entity, inclusing of a bank[60].

The two files mentioned, respectively the National file of payment incidents (FNIP) and the National file of persons with risk (FNPR) administers the Data from the data basis of the Authority of payment incidents.

The valorization of incidents registered in FNIP and in FNPR is made:

- by the banks and by the National Bank of Romania;
- by the CIP through the transmission of data to the General Prosecutor's Office from the High Court of Causation and Justice and the Ministry of Interior;
- by the natural and legal entities through the banks;
- by the institutions from abroad similar to CIP
- by the judicial courts;

Organization and administration of the two data files is made as to allow the operative emphasizing and valorization of the data regarding: refusal for payment of the checks, bills of exchange and promissory notes; declaration of checks, bills of exchange and promissory notes, as lost, stolen, destroyed or cancelled; the natural or legal persons in banking prohibition to issue checks.

The declaring persons have the obligation to appoint the qualified staff for accessing the CIP data basis, authorized by the National Bank of Romania through an authorization chart.

Accesing the data system of CIP is made by the persons authorized for CIP from the access node based on the unique access password and name, given by the National Bank of Romania. The declaring persons (banks) which are also access node to CIP have the obligation to ensure at their registered office the technical conditions which allow the operative transmission, without modifications, on electronic support of data concerning the payment incidents.

CIP administers the personal data basis in order to search in it by using the search keys based mainly on the series, number of the check and fiscal code of the legal entity or, after the case, the personal number of the natural person.

Based on the data received from the declaring persons, the Authority of payment incidents has the obligation to transfer to the authorities of the commercial bank the *Declaration concerning the banking prohibition* established on the account's owner to issue checks. In their turn, the bank authorities has the obligation to disseminate this data in their own banking system.

The transmission of requests, statements and cancellations of payment incidents from the CIP access node is done electronically, with the exception of certain requests or statements[61].

The data basis linked to CIP are established from the data related to the payment incidents. These data have the obligation to transmit to the authorities of commercial banks, including to the subsidiaries of foreign banks. These are responsible for the

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[60] CIP may, from its own initiative or at the request of any bank, to also organize other files related to the payment incidents.

[61] For example, the summons, declarations of lossed, theft, detruction or cancellation of checks, declarations of lossed, theft, detruction or cancellation of bills of exchange and promissory notes are archived, etc. (art. 49 from the Regulation no. 1/2001)

accuracy and integrity of all data directly addressing to CIP, gathered from their account owners or from those belonging to the personal banking units, as well as from other natural and legal persons.

CHAPTER VII
SHARES

GENERAL CHARACTERISTICS

Notion. Several definitions were given to shares, reminding some of them.

In the opinion of some authors, the share represents a title of value established on a fraction from the social capital on a company on shares (commercial companies on shares and joint stock companies with limited liability), capable to proove the participation of its owner at the capital of the company issuer.

The share represents the title of property on a part from the social capital issuing it.

The most representative from the definitions given to shares and stated in the legal literature is the following: the shares represent equal fractions from the social capital which grants to the owner in his quality of shareholder, patrimonial and non-patrimonial rights.

In compliance to Swiss law, „the share represents a document of value certifying the participation of its owner at the social capital and which grants his money and society rights. It has obligatory a nominal value, and this cannot be inferior to the amount of 20 franks”[62].

In Italian law, the shares represent participation quotas of associates to the establishemtn of companies on shares, the social capital being distributed in ideal quotas with equal value denominated shares[63].

The nominal value modifies only through the decision of the general meeting of shareholders[64].

In the case of retirement of a shareholder from the company, he does not have the right to obtain from the company the countervalue of the shares.

Categories of shares

In compliance to art. 91 from the Law no. 31/1990, *1. after the presentation modality the shares are nominative and at bearer*:

The nominal shares (nominative) contain: name of the owner, surname and domicile of the shareholder natural person or denomination, registered office and registration number of the shareholder natural person. The nominative shares are transmissible only through transfer (notified transcription of the transaction in the issuer's documents);

The nominative shares may be issued in material form, on paper support, or in dematerialized form, case in which it is registered in the registry of shareholders. The shares in dematerialized form are found, especially, as transacted movable assets on the stock exchange market. If these were issued through public offer of movable assets or if they

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[62] See P. Montavon, A. Wermelinger, C. Favre, „Droit et pratique de la société anonyme”, Editions juridique AMC Aplha, Lausanne, 1994, pag. 34

[63] Italian Civil Code, art.3248

[64] Gh. Pipera, Obligations and responsibility of administrators of the commercial company, All Beck Publishing House, 1998, pag. 101 and the following

represent the object of transactions on an organized stock exchange market, they are subject to special regulations[65].

In which concerns the right of property on the nominative shares, this is transmitted through a statement made in the registry of shareholders, signed by the endorser and with the mention on the identity of the new shareholder, made on the title[66].

The nominative shares may be converted into shares at bearer and the reverse, through the decision of the general meeting of shareholders.

The shares at bearer do not contain on them the name of the owner, making easier their transmissibility (because the formalities are not used); from this angle, these present more advantages than the previous ones, due to the fact that the identification "code" is given only by the title's series.

In compliance to the dispositions of the Law no. 31/1990, the shares at bearer may be issued only in material form, the company obligatory issuing titles of value for these types of shares[67].

In case the company did not issue and did not release shares at bearer, shareholder certificates will be issued at the request of the shareholders or ex officio.

The company does not have the obligation to keep records regarding the identification dates of the shareholders owing the shares, having the obligation to keep the reconrds of the number of shares at bearer issued and released.

Regarding the transfer of the property right on the shares at bearer, this is done through the simple material transmission of the title. This transmission is exempted from fulfilling the formalism of registering the operation on title and in the registry of shareholders.

2. after the character granted by the rights mentioned, the shares are classified in ordinary and preferential shares:

The ordinary shares (customary or common): give the possibility to obtain the dividend (percentage quota from the company' profit, distributed to the owners);

Priviledged shares (preferential)[68]: grant certain rights to owners, in addition to owing ordinary titles.

In compliance to art. 95 from the Law no. 31/1990, the company may issue preferential shares with priority dividend without the right to vote[69]. The owners of such shares have the right at a priority divident taken on the distribution benefit, before any prelevation. The shares with priorty dividend cannotexceed a fourth from the social capital and have the same nominal value as the ordinary shares.

The representatives, administrators and censors of the company cannot be owners of shares with priority dividend without the right to vote.

The preferential shares and the ordinary shares will be converted from a category into another into another one through the decision of the general meeting of the shareholders.

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[65] Law no. 294/2004 regarding the capital market

[66] Law no. 31/1990, art. 98

[67] Marian Britiş, op.cit., pag. 410

[68] Ph. Merle, Droit commercial, Sociétés commerciales, Paris, 1990, pag. 239 and the following, M. Jeantin, Observations sur la notion de catégorie d'actions, Ed. Dalloz, 1995, pg.88

[69] Ph. Merle, op.cit., pag. 239 and the following

The owners of each category of shares are reunited in special meetings, in the conditions established by the constitutive document of the company. Any owner of such shares may take part to these meetings.

Through express provisions in the constitutive document, the shareholders are those which establish the type of shares, nominative or at bearer.

In order to protect the company and the third parties, the law maker mentioned certain absolute presumptions that is, if through the constitutive document the type of shares is not mentioned, it is presumed that these are nominative, whereas the shares not completely paid are always nominative.

After the criteria of materialization of shares, these may be shares titles of value and shares-movable assets.

a. The shares-titles of value are materialized in documents which certify at least relevant data on the issuer and their value.

In compliance to art. 93 from the Law no. 31/1990, these shares may be nominative, case in which they contain mentiones regarding the commercial company issuer, their owner and the characters of the share, or at the bearer when they will indicate the same data, minus the identity of the acquirer.

b. In compliance to the regulations issued by the National Council of Movable Assets (C.N.V.M.), the shares – movable assets are shares issued by the commercial companies, negotiated on a capital market[70].

Obligatory, the shares-movable assets are deposited at the central authorized depositary, in order to make the operations with movable values and to ensure a centralized record of these. The central depositary makes operations of clearing-reimbursement of movable assets transactions and of raw reimbursement for the transactions with financial instruments, which may take place within the system of clearing-reimbursement[71].

The shares – movable assets may be issued only after the end of the subscription period, and may represent the object of admission for transaction on a regulated market (art. 215 and art. 216 from the Law no. 29712004)

The shares-movable assets have a special legal regime of issue and operation on the capital market; their record is done by a central depositary and the intermediaries which operate such movable assets on the market organized by the capital, through opening and maintaining accounts, and, in the same manner, of the individual sub-accounts on criteria which appoint the intermediary, issuer, investor and the class of movable assets[72].

In compliance to art. 2 point 33 para. 1 from the Law no. 297/2004, the nominative shares, as well as the shares at bearer, may be qualified as movable assets, due to the fact that the legislator of the capital market does not make any distinction to this end. The Romanian legislator appropriated the directives of the Council of the European Union referring to the stock exchange markets and was inspited from the legislations of the European states which have a tradition in the filed of regulation of capital market, especially from the French legislation[73].

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[70] Law no. 297/2004, regaridng the capital market, art. 2 pct. 2, art.33 alin. 1 and 2

[71] Law no. 297/2004, art. 141 combined with art. 143

[72] Gheorghe Pipera, Commercial companies, capital market, acquis communautaire, pag. 239

[73] Le droit des societes, in the Magazine of the Magistrates National Institute, Paris, May 2005. In France, the Ordinance from the 24th of June 2004 is in force, regaridng the regime of the movable assets issued by the commercial companies and the extension of the dispositions of modification of commercial legislation.

CHAPTER VIII
BONDS

Notion. In case the social capital is not sufficient, and the necessity of liquidities becomes vital for the strengthening or development of activity, the bonds represent another modality to acquire new credits by the commercial companies.

There are numerous other modalities through which a commercial company may acquire amounts of money, through bank loans guaranteed with the goods of the company, bills of exchange, etc., which might excessively charge or indebt and compromise the activity of the company. On the other hand, the option of increase of social capital might be in conflict with the interests of shareholders, allowing access of another persons, other shareholders to the share of benefits[74].

The bonds were defined in the doctrine as titles of credit, uniform titles which represent equal and independent fractions of a sole loan contracted by the issuing company which, once issued, will follow separately their own legal faith[75].

Thus, the bonds are commercial titles of value[76] through which the issuing compan acquires long term credits, that is an additional capital, it may administer it in order to cover immediate needs or for the development of the activity[77].

In the Romanian legislation several definitions were given to bonds, remembering some of them.

The bonds represent instruments of credit, on long and medium term, issued by the commercial companies or by organs of central and local state administration. They give the right to encash an interest and to recover the amount invested from a due date or in phases on the duration of life.

In which concerns the investors in bonds, these may be legal and natural persons from the country or from abroad, which own money capitals.

When a bond is bought from an issuing institution, the right of use is transfered to this institution of the respective amount of money for an established period. In echange, the issuer will give a certificate through which it engages to return the borrowed value plus an interest.

Another definition, given through other words, is that the bonds are commercial titles of value which incorporate the right to the amount of money registered on the title, granting the quality of creditor of the issuer for the respective amount subscribed irrespective if it contains profit or not, these being practically equal fractions, with a determined nominal value, of a credit requested by the company through this modality of accumulation of capital[78].

The commercial titles of value, equal and indivisible, with a determined and registered interest, issued by the commercial companies through which the issuer pledges

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[74] I. N. Finţescu, Commercial Law Course, vol. I, published by Al. Th. Doicescu, Bucharest, 1929, p.275.
[75] Adrian Tuţuianu, op.cit., pag. 163
[76] S. Anghelini, M. Volonciu, C. Stoica, Commercial law for economic teaching, University Press, Bucharest, 2005, p. 182
[77] St. D. Cărpenaru, Romanian commercial law, 5th edition, All Beck Publishing House, Bucharest 2004, p. 329
[78] I. L. Georgescu, Romanian commercial law vol. II, All Beck Publishing House, Bucharest 2002, p. 519, St. D. Cărpenaru, op. cit. p. 329

to reimburse the amounts received as loan together with the related interests, are called bonds[79].

Those owing such bonds bear the name of bearers which pledge, which, although owners of titles of value with societary behavior close to the regime of shares, do not contain their pregogatives of the latter.

The bonds grant the quality of the bearer which pledges only by the creditor of the company having the right to reimburse the amount registered in the title, as well as of the related amounts. On the other part not being a shareholder, the beared which pledges does not have the rights granted by having shares, as such does not have the right to dividends[80], but do not support the company's losses[81].

In compliance to French law, the bonds issued by the companies are defined as "negotiable titles which in the same emission grant the same debt rights for the same nominal values"[82].

In the Anglo-Saxon law, the bond is defined as being a financial title, instrument of debt which represents a debt of the title's debtor on the issuer which gives the right to encash an interest, being redeemed at the due date by the issuer or as financial title of loan on long term[83].

Types of bonds. The Law 31/1990 makes reference to various categories of bonds, in connection to several criteria[84]. In a first and most important classification, after the transmission modality, the bonds are nominative and at bearer.

The nominative bonds contain in case of natural persons, the name and domicile or the denomination in case of legal persons, the rights granted by them having an "intuitu personae" character, and may be exercised only by the owner; the transmission modality being through transfer.

The nominative bonds[85] may be classified after the form were issued in:

a. Bonds in material form, those issued on paper support

b. Dematerialized bonds, through the registration into the account.[86]

The bonds at bearer are those not containing the identification data of the person pledging, and the rights contained by it belong to the owner of the title, their transmission being made through the simple material tradition of the title.

Types of bonds on the international market of bonds

On the international market of bonds, besides the classical bonds new ones appeared[87]:

a. subscription coupons bonds (warant). These represent classical bonds with a subscription right, negotiable, which allows to purchase subsequently, at a price established before, bonds of issuing company;

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[79] I. Băcanu, Contributions in debts, in R.D.C. no. 2/1999

[80] E. Cârcei, Commercial companies on shares, All Beck Publishing House, Bucharest 1999, pag. 312

[81] St. D. Cărpenaru, op. cit. p. 330

[82] P. Dalion, J.P. Pamoukdjian, Law of the companies, Economic Publishing House, Bucharest, 2002, pag. 250

[83] Bonds market, Hrema Publishing House, pag.3

[84] M. Şcheaua, op. cit, pag. 369

[85] St. D. Cărpenaru, op. cit. p. 330

[86] Art. 167, pct. (3) from the Law 31/1990

[87] Source: Internet, address: www.sova.ro

b. zero coupon bonds – these do not suppose interest payments to the investors, the gain being given in this case by the difference between the emission price (smaller) and the nominal value at which the issuer subsequently redeems the bonds from the issuer or from the redeem bonus given by the issuer;

c. participation bonds, in which the interest rate and the remeed prince are established at a minimum level at the moment of the emission, but these may be increased in compliance to the financial results obtained by the debtor;

d. bonds convertible into shares which give the right to the owner, as in the term fixed through the emission agreement, to express the conversion option on shares titles. The creditor becomes a shareholder at the financed company;

e. indexed bonds. The issuer assumes the obligation to update the value of these titles in relation to an index, in agreement with the investor. The indexation also applies to the interest, to the reimbursement price or to other elements;

f. variable interest bonds. The issuer pledges to modify the interest rate oon the duration of the bond, in order to ensure a gain in compliance to the market conditions.

g. special bonds with coupon which may be reinvested - OSCAR. These allow to the owner to choose between receiving the interest coupon in cash or to receive idetical bonds to the initial ones.

Emission of bonds. The Law 31/1990, on commercial companies, section V is the doucment which regulates the modalities of emission of bonds.

The emission of bonds represents a beneficial credit modality for the issuer, as well as for the one purchasing these titles, becoming thus creditor of the commercial company[88].

In order to issue the bonds the following basic conditions must be accomplished:

a. emission of bonds may be made only after the decision of the extraordinary meeting of shareholders of the issuing company[89]. Also, the extraordinary general meeting is the one which may order the conversion of a category of bonds into another category or in shares[90].

b. Bonds which are a part of the same emission must have an equal nominal value.

c.The nominal value of a bond cannot be smaller than 2,5 lei[91], and in the case of convertible bonds, their nominal value must be equal to the nominal value of the company's shares[92].

d. the obligations my be issued in material form, on paper or in de-materialized form, through registration into account.

With regard to art. 177 from the Law 31/1990, the emissions of bonds may be administered by the company or through the public subscription of bonds.

The bonds issued through public offer are issued and transacted (transmitted) in compliance to the rules regarding public offers[93] which form the object of the

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[88] M. Şcheaua, Law of commercial companies no. 31/1990, Commented and noted, All Beck Publishing House, Bucharest, 2000, p. 368.

[89] Art. 113, letter l from the Law 31/1990

[90] Art. 113, letter k from the Law 31/1990

[91] Art. 167, point (1) from the Law 31/1990

[92] Art. 170, point (5) from the Law 31/1990

[93] Art. 2, point 18 from the Law 297/2004 stipulates:

" the public offer of movable values – means the communication to persons made in any form and through any means, presenting enough data on the terms of the offer and on the movable assets offered, as to allow

dispositions of the Law 297/2004, regarding the capital market. In this case, the bonds are a part from the movable assets[94] which are made available to the investors through public offer.

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to the investor to adopt a decision regarding the sale, purchase or subscription of the repsective movable assets. "

[94] Art. 2, point 33 from the Law 297/2004 stipulates:

The following represent movable assets:

a) shares issued by commercial companies and other movable assets of these, negotiated on the capital market;

b) obligations and other titles of debt, including state titles with due date higher than 12 months, negotiable on the capital market;

c) any other titles usually negotiated, which give the right to purchase the respective movable assets through subscription or exchange, giving place to a money settlement, with the exception of the payment instruments".