BRIEF CONSIDERATIONS ON THE WARANT, AS REPRESENTATIVE TITLE OF GOODS IN WAREHOUSES, ANALYZED FROM THE PERSPECTIVE OF ITS FUNCTION OF PAYMENT INSTRUMENT, IN THE LIGHT OF SPECIAL REGULATIONS AND PROVISIONS OF THE NEW CIVIL CODE

Assistant professor **Alexandru BULEARCĂ[1],** PhD. student

Abstract

In terms of terminology, both the doctrine and national regulation or community law are making confusion between the terms „payment instruments" and „means of payment" when they need to designate the document through which is made the payment to a pecuniary obligation by the debtor. In order to highlight the legal status of warant as payment tool of international trade law has been used both the method of comparative law and rules of interpretation specific to the international trade law science, and rules of interpretation common to all branches of law, including commercial and banking law. Thus, in a first perspective was considered the concept of "instrumentum" according to which as long as the document by which is made the payment of a pecuniary obligation relating to a legal relationship with a foreign element is a document, either on a material support or dematerialized, we hold that the appropriate term to describe this is payment instrument and not means of payment, because the latter means, on the one hand, how the payment is made, and on the other hand, international liquidity - in currency - used in economic exchanges. From another perspective, have been considered the proposals to update national legislation both in terms of financial and banking practice set globally and the progress made in information technology, widely used to achieve cross-border payments.

Keywords: *payment instruments; payment services; deposit contract; the warrant*

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I. The contract of deposit in the common law

In the common law, the deposit is governed by articles 2103-2123 of the new Civil Code.

Generally, the deposit governed by the common law is a contract free of charge. However, considering the monistic character of the current national legislation, the legislator stated that the deposit is basically free[2] unless the parties agreed otherwise, or from usages or circumstances such as the profession of depositary, it results that the deposit is paid.

However, even if the current legislation provides for the possibility of the depositary in a situation in which the parties agreed in this way, or from usages or profession of the depositary shall be deducted such a possibility, the common law rules are not applicable in a situation where we refer to the temporary storage of quantities of goods until the delivery to foreign markets, or the contract of deposit is international[3].

By virtue of the common law, the deposit represents a convention by which the depositary receives from the depositor a movable, with the obligation to keep it for a period of time, and to repay it in kind.

Therefore, the deposit is voluntary, in the sense that the deponent has the freedom to choose the depositary and real, which means that the valid conclusion of such contract is made through the effective delivery of the asset that is the subject of storage.

Regarding the sample of the contract of deposit, the common law held that it is recorded by a document assumed by parties, namely the *contract of deposit*[4], without having to prove the ownership of the deponent on the goods stored.

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[1] Alexandru Bulearcă - Athenaeum University, Bucharest, Romania, office@officeatlaw.ro

[2] Article 2106 of the new Civil Code;

[3] In this case are the provisions of Law no. 153/1937 for general stores and warranting goods and cereals and is the object of analysis in the Section III of this article;

[4] Article 2104 of the new Civil Code;

With regard to the obligations of the depositary, according to the new Civil Code, it can use the good received in deposit under the condition that this feature to be conferred on him expressly or tacitly by the depositor[5], situation in which the depositor is required to keep the assets with prudence and diligence. Otherwise, it is incumbent upon the depository only the obligation to keep the property with the same diligence that keeps its own property.

According to the new Civil Code, the return of the good deposited shall be made to the depositor, to his heirs or the person expressly designated in the contract[6]. As for us we appreciate that in a situation in which the deposit was made by the owner of the good, which proceeded at its disposal during the period of the deposit agreement, through the sales procedure governed by the common law the property right was transferred and hence the quality of depositor arising from the ongoing deposit agreement, which is why the good must be returned to the new owner.

It is true that provisions of Article 2120 of the new Civil Code authorize the depositary to not repay the depositor's property if it has been requested by the owner. However, in our opinion, the formulation of article 2120 is poor as it is likely to generate confusions in relation to the person entitled to the refund of the stored goods, the depositor or the owner respectively.

Under the provisions of the new Civil Code, the depositary is entitled to change the storage location of the goods received in the warehouse[7], if the operation is performed in order to avoid asset destruction, theft or damage, or to delegate it to another person, with the prior consent of the depositor.

However, changing the storage location or entrusting goods to another person, may be also made without the consent of the depositor in case of emergency, with the condition to announce and communicate him the new place where the good was stored. In this case, the initial depositary shall be liable only for the choice of the person or the indications transmitted in relation to keeping the good.

In such a situation, if the property can no longer be recovered in kind by the depositor, the depositary is obliged to submit to the depositor the replacement value of the property and not the one had at the time of filing[8].

Regarding the abolition of the contract of deposit, we note that it may be terminated at any time by the depositor, in which case it has the obligation to reimburse expenses incurred by the depositary to the good, for the period during which it was stored.

The right to terminate at any time the contract of deposit is recognized by law also to the depositary, with the condition to exist good reasons. In such a case, the depositary may be required to pay compensation if the termination of the contract was made untimely[9] or inopportune.

With regard to the return of the good, according to the legal provisions, it must be made, unless otherwise agreed, at the place where it should have been kept, and the costs of this operation are borne by the depositor.

In the situation where the depositary has changed the place of storage of the good without being done for the purpose of avoiding property from destruction, loss or damage, the depositor may ask either to bring the asset to the original storage location to be returned to him, either being taken over by the depositary of the difference between the expenses incurred by the depositor for taking the asset from the new storage location and those which would be made from the original storage location.

Regarding the payment of the deposit contract, under the provisions of Article 2123 in the new Civil Code, *"unless agreed otherwise, the payment of remuneration to depositary is made at the time of asset restitution"*.

Considering that by virtue of the provisions of the new Civil Code the depositor is obligated to pay the depositary even if the contract has been concluded for free[10], we consider that it is

[5] Article 2108 of the new Civil Code;
[6] Article 2117 of the new Civil Code;
[7] Article 2111-2113 of the new Civil Code;
[8] Article 2116 par. 3 of the new Civil Code;
[9] Article 2115 of the new Civil Code;

excluded any other compensation at the request of the depositary, because otherwise we would be in a situation of depositary's unjust enrichment.

However, the depositary has the right to compensation when it suffered losses due to the dangerous nature of the goods, except where he was aware of the hazardous nature of the asset and accepted its preservation into the warehouse[11].

In the absence of provision to the contrary, we appreciate that also in the case of the deposit contract, the depositary may condition the return of the asset of payment of remuneration by the depositor, case in which it may invoke a retention right over the goods in storage until the payment of liabilities by the depositor.

The new Civil Code provides for the possibility of multiple depositors or depositaries. In the event of multiple depositors, when their obligation is indivisible or joint, the depositary releases the obligation by returning the goods to any of them, unless agreed otherwise by contract[12].

In the event of the existence of multiple depositaries, the obligation to return the goods reverts to the one or the ones the good is keeping by, with the condition of notifying the others about the return of the good[13].

Also, according to provisions of the new Civil Code, the depositary is entitled not to return the good in storage if it was seized or sequestered by the public authorities[14].

The new Civil Code has also regulated the situation in which the depositary's heir alienated the good in storage, in good faith and without having known it was stored, case in which it is required to submit the price for sale to the depositor, or to transfer the rights of claims against the purchaser, when it would not have paid the price yet[15].

II. International contract of deposit. The warranty

The commercial contract of deposit is a contract under which a party called depositor entrusts for safekeeping to another party called depositary, a quantity of goods for a determined price, with the latter's obligation to preserve, keep and return them to the first request of the depositor.

The normative act regulating the commercial deposit is Law no. 153/1937 for general stores and warranting goods and cereals, as amended[16] by Law no. 71/2011 for the implementation of Law no. 287/2009 on the new Civil Code.

Commercial contract of deposit, as we will show below, differs from the deposit contract in the common law both by its commercial nature with foreign element and the regime and its legal effects.

Thus, according to the special regulation of article 2 paragraph 10 of Law no. 153/1937, the storage activity is conducted exclusively by a professional, in specially designed and equipped locations to preserve intact the characteristics and quality of the goods stored, thus being excluded the gratuity of such benefit.

Commercial contract of deposit in docks and silos is a real contract for pecuniary interest, which means that its valid conclusion is conditioned by the actual delivery of the goods for storage, and the depositary shall be paid for this work performed for the depositor through the deposit fee, calculated in relation to the affected storage facility and the duration of this task.

Deposit governed by Law no. 153/1937 is always voluntary, the depositor having the freedom to choose the depositary. Also, under this special regulation, the depositor is required to

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[10] Article 2120 par. 3, final part of the new Civil Code;
[11] Article 2122 of the new Civil Code;
[12] Article 2119 par. 1 of the new Civil Code;
[13] Idem par. 2;
[14] Article 2120 of the new Civil Code;
[15] Article 2121 of the new Civil Code;
[16] Through Article 230 par. f) of Law no. 71/2011 for the implementation of the Law no. 287/2009 on the new Civil Code, were repealed only articles17 and 19-28 of Law no. 153/1937concerning the procedural aspects on the enforcement in the event of non-payment of the deposit;

give to the depository the goods packed and labeled according to their nature and to the present to the depository their insurance policy concluded with an insurance and reinsurance company.

According to the same normative act, the depositary is obliged to carry out this activity as a good professional, being prohibited to him the use of the goods during the period in which they have been entrusted for storage. At the same time, the depositary is obliged to preserve the confidentiality of the contract in its whole and to return the goods received in the storage facility at the simple request of the depositor[17].

The depositor is entitled to terminate the contract of deposit before the deadline for which was concluded, noting that it is liable to pay the deposit fee, otherwise, the depositary shall have the right to retain the goods in storage.

Under the provisions of Law no. 153/1937 the commercial contract of deposit of goods in general warehouses are concluded in written, the depositary preparing *three documents with identical content*, of which two are issued for the depositor, namely the *deposit receipt* which is evidence of the contract, the *warranty* representing a pledge[18], both documents may be nominative, at order or to bearer with the quality of securities representing the goods stored and assuming the ownership of the depositor on the goods stored in the warehouse. The third document is called *coupon* and remains in the storage administration registry, thus being the proof of concluding the deposit agreement, which is why the doctrine and practice have given it the probative value[19].

Because of the three documents prepared at the conclusion of the deposit agreement, to the depositor shall be submitted regularly two of them, for their appointment it is used the phrase of warranty-receipt. Thus, the phrase actually refers to two documents, namely the deposit receipt and warranty that fulfill distinct functions, although have identical content and are emitted simultaneously from the same book[20].

Therefore, under the Law no. 153/1937 the documents confirming the storage of goods, namely the receipt of deposit and the warranty, are negotiable, together or separately - being *transmissible through endorsement* - which is why the return of the goods is made to the holder of the receipt and pledge[21], if it proofs the legitimate possession by an unbroken string of endorsements, or only to that of the receipt if it proofs the legitimate possession and also the proof of depositing the amount warranted at the administration of the storage[22].

In relation to the provisions of articles 2 and 3 of Law no. 153/1937 - although the normative act does not contain an express provision to that effect – we state that the written form of this commercial deposit contract makes it occupy a place on the edge of consensual and solemn acts, circumstance for which we support that the written form of this contract is legally required *ad validitatem* and not ad probationem.

Regarding the law applicable to an international contract of deposit, in the absence of uniform regulations, it is subject to the law chosen by the parties by virtue of the principle of *lex voluntatis*.

In the event that the parties have omitted the choice of the applicable law in international contract deposit fund, both the arbitral and judicial practice have voted consistently for the purpose of subjecting the contract to the law in force at the headquarters of the depositary, as an application of the principle of *lex loci executionis*.

In exceptional circumstances, such as those in which the parties have not specified in the contract, the place of storage of the goods, and it cannot be identified in any way, the doctrine has decided for the purposes of implementing the international contract of deposit fund or the law of the

[17] B. Ştefănescu, I. Rucăreanu, *Intgernational trade law*, Didactică şi Pedagogică Pub., Bucharest 1983, pag. 161;
[18] Article 2 and 3 of Law no. 153/1937;
[19] B. Ştefănescu, I. Rucăreanu, *op. cit.*, pag. 161;
[20] O. Căpăţână, B. Ştefănescu, op.cit., pag. 98;
[21] Article 10 of Law no. 153/1937;
[22] Article 13 of Law no. 153/1937;

location where the goods were handed over or either the place of conclusion of the contract of deposit[23].

According to the rules of Law no. 153/1937 changing the location of storage or the custody of goods stored to another person to protect the goods from loss, damage or doom are excluded because when storing the depositor is required to show the insurance policy of the goods left in storage, document to be mentioned in the coupon, the receipt of deposit and pledge bulletin[24], case in which the responsibility for the failure to recover in kind the goods stored returns to the insurer who is bound to reimburse the depositor only with the value at which the goods were insured.

At the same time, in accordance with the provisions of article 9 of Law no. 153/1937 the goods in storage, for which receipts and security bulletins have been issued may not be subject to execution or seizure proceedings. However, if there is such a procedure in process, the rules of paragraph 2 of article 9 in Law no. 153/1937 applies, under which the execution can be done only on the titles of the goods, *respectively the deposit receipt and pledge bulletin*, and only if it is in the possession of the debtor.

As I stated, the commercial contract of deposit is covered by Law no. 153/1937 for general stores and warranting goods and cereals, whose provisions on the warranty-receipt are supplemented by Law no. 58/1934 on the bills of exchange and promissory notes, with subsequent amendments, to the extent to which they are compatible[25].

The warranty, as stated above, also called pledge bulletin is both a representative title of the goods in storage and also credit title running by endorsements and represents for the endorsees a warranty right on the goods in storage.

In other words, the warranty is a real agreement, under which it is the issuer who represents a guarantee for a payment of a debt in favor of the creditor, who thus becomes the owner of the goods stored and that the loan was guaranteed with.

The procedure by which the pledgee creditor receives from depositor the warranty is that of endorsement, situation in which on the reverse of the credit title (warranty) should be mentioned the guaranteed amount with the goods in the storage. The same statements are to be made also in the receipt of deposit and the coupon found at the storage administration.

In relation to the mentions to be made on all three documents – issued at the conclusion of the commercial contract of deposit – once with the endorsement of the warranty, we can say that such a pledge contract belongs to the category of securities with tackle, even if the goods remain in storage[26], because the warranty is the merchandise stored.

After the adoption of GEO no. 99/2006 relating to the establishment and operation of credit institutions and capital adequacy, the National Bank of Romania, in its capacity as regulator in the field of credit institutions and capital adequacy, adopted the Regulation no. 22/27 of December 28, 2006 by which the *warranty was redefined*.

According to the Regulation[27] the warranty is a title with a limited duration in time, which gives the holder the right to purchase an underlying asset at a fixed price, up to the expiry date and whose settlement can be made in cash or by delivery of the underlying asset.

In our opinion the definition given to the warranty by the regulation is poor, because, besides the fact that it does not define the underlying asset that can be acquired, does not specify what kind of title this is. At the same time, from the regulatory text, it appears that the warranty refers to goods in the general usage of the term, and not to the legal regime of temporary storage.

Also, the definition is confusing and from the perspective of legal effects of the warranty, as defined by the regulation, in contrast with those of the deposit pledge corresponding to the temporary storage regulated by Law no. 153/1937. Last but not least we appreciate that from the

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[23] H. Batiffol, *Traité de droit international privé*, Ivth edition of no. 586; *Les conflits de lois en matière de contracts*, no. 241-243;
[24] Article 2 par. 6 of Law no. 153/1937;
[25] Ibidem;
[26] B. Stefănescu, I. Rucăreanu, *op. cit.*, pag. 163;
[27] Article 2 par. 2 pt. e) of Regulation no. 22/27/2006 of the National Bank of Romania and the National Securities Commission;

definition given to warranty by the regulation were taken into account the provisions of the law system in common-law countries and not those of the continental European system of law.

We support this because in the Anglo-American law, common-law-type, the number of documents that reveal the existence of the contract of temporary deposit are in number of two, coupon and warranty respectively, which includes also the receipt of deposit.

However, in the system of common-law the holder of the warranty acquired only a right of pledge on the goods under the temporary storage and not a straight purchase right. Changing the owner of goods in temporary storage, in accordance with the warranty, is a judicial consequence either of the transfer of the representative title to the new holder, either of the non refunding in time the loan obtained from by the depositor from the warranty's holder, to whom he guaranteed the reimbursement of the amount borrowed by the endorsement of the warranty.

In the continental European legal system, as we have shown, for the acquisition of ownership of the goods placed in storage temporarily by the owner of the warranty, if the term of reimbursement of the amount borrowed by the endorsement of the credit title by the depositor is delayed, it is necessary also the endorsement of the deposit receipt.

III. The legal movement of the warranty-receipt

As I said, the phrase warranty-receipt designates two documents, namely the *receipt of deposit* and *pledge bulletin*, which are representative documents of the goods held in a general storage location and make the owner the owner thereof, and for this reason are likely to be *transmissible though endorsement*, together or separately.

If the *two documents* were *acquired* together, *by endorsement*, from the depositor, their transmission amounts to a sale of goods in storage and their new legitimate owner can pick up their goods in the warehouse at any time upon the presentation of the receipt of deposit and pledge bulletin with the condition to pay the related storage fees[28].

By endorsing only the *deposit receipt* has as effect the transfer of the ownership of goods being in temporary storage of the acquirer-endorsee, provided this right only after prior return and until maturity, to the holder of the warranty of the loan obtained by the depositor-endorser from it by endorsing the pledge bulletin.

The separate *endorsement* of the *warranty* is transmitting to the new owner (endorsee) a right of pledge on the goods in temporary storage in exchange for the loan granted to the depositor (endorser), and thus worth as *pignorative endorsement*.

As shown previously, the warranty has dual nature because, on the one hand it is analyzed in terms of a *promissory note* under which the endorser was required to pay at maturity an amount determined by the endorsees equivalent borrowing and on the other hand, transmitting by endorsement the warranty is equivalent to a guarantee - with dispossession – on the goods in temporary storage in favor of the endorsee.

In these circumstances, the endorsee shall present the warranty to the depositary in order to submit in the registry the mentions included in the endorsement and the deposit administration must certify on the warranty the registration[29].

Consequently, the depositor of the goods as borrowed-endorser and the subsequent acquirers of the receipt of deposit are held liable to the owner-endorsee of the warranty[30].

In case of non-reimbursement of the loan at maturity, the holder of the warranty is entitled to compensate the value of the goods stored, being authorized to request the initiation of enforcement proceedings within 30 days of the due date of the pledge bulletin[31].

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[28] Article 10 of Law no. 153/1937;
[29] Article 7 of Law no. 153/1937;
[30] Idem Article 30;
[31] Regarding the auction sale procedure with the entry into force of the new Civil Code were repealed provisions of Article 17 and 19 to 27 of Law no. 153/1937 for general stores and warrantying goods, being governed the provisions of Article 1516 and following of the new Civil Code;

So, in the event of non-reimbursement of the loan at maturity, in order to recover his claim, the holder of the warranty is entitled and obliged to request the initiation of enforcement proceedings over the movable pledged assets in storage and only secondarily, can straighten action of recourse against the depositor-borrowed and other guarantors for the difference in of the claim not reimbursed.

However, in order to exercise the recourse action the holder of the warranty is bound to draw first the protest of non-payment and to advise the other guarantors for non-payment at maturity in the terms and procedure covered by Law no. 58/1934 on bills of exchange and promissory notes as amended, and to be asked first to trigger the movable enforcement procedure for the goods related to the loan guarantee[32].

The warranty, due to its legal double nature, while being pledge bulletin and also *promissory note* is useful in the practice of international trade because it gives the depositor the opportunity to ensure payment of a debt at a certain date, with the merchandise located in a warehouse and also gives the endorsee the certainty that could be satisfied for its claim, from the goods pledged to issue the warranty.

In conclusion, the commercial contract of pledge provides the advantage that the depositor can dispose of the goods in the storage although it was established as loan guarantee. The transfer of ownership of the goods stored in the warehouse operates only after the depositor endorse the deposit receipt to the new owner, and the latter may dispose of the goods in storage only after will pay to the holder of the *warranty* holder the amount for which the pledge was constituted.

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[32] Idem Article 30-31;