

DISPOSSESSION OF ASSETS IN THE NEW ROMANIAN CIVIL CODE. COMPARATIVE LAW

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Abstract

This article deals with the legal status of pledge, in view of the new Romanian civil code. Besides regulation, definition and subject collateral (section 1,2 and 3), the focus of the analysis is on the institution dispossession of assets, which marks the time difference between pledge and mortgage (section 4). Original in the doctrinal approach is the analysis of pledge in different systems of law (French law and Canadian law, in section 5). If the purpose of the legislature was that the Roman civil pledge without dispossession come under the regulation of mortgage securities and dispossession remain at the borders of the Civil Code, we believe that achievement is threatened by the expansion of civilian collateral object of pledge to the marketable securities, especially over the nominative one (forms synthesized in the conclusions of the article).

Keywords: *pledge, dispossession, civil code, mortgage*

JEL Classification: *K11, K12*

1. History of regulations on the pledge

The provisions of art. 1685 – 1696 in the 1864 Civil Code regarding the pawning, abrogated by the new Civil Law, were applicable for the civil pledge in the civil law. Art. 478 – 489 in the Commercial Code regarding the commercial pledge, abrogated when the Law no 99/1999 regarding the juridical regime of movable securities² entered into force, were also general regulations. This law did not expressly abrogate art. 1685 - 1696 in the 1864 Civil Code, but, according to art. 1 in the Law 99/1999, these articles were applicable only to the extent to which they did not infringe the Law on securities (99/1999), regarding the civil pledge with dispossession³.

Prior to the new Romanian Civil Code, we had a regulation regarding the pledge with dispossession (included in the 1864 Civil Code) and a regulation regarding the pledge without dispossession, included in the Law 99/1999 regarding the juridical regime of movable securities; they were both abrogated on the 1st October 2011, under art. 230 letter a) and u) of the Law no. 71/2011⁴ for the enforcement of the Law no. 287/2009 regarding the Civil Code.

2. Definition of the pledge

The new Romanian Civil Code does not include a definition of the pledge but, according to art. 2481 para. 1, the pledge shall be constituted by remittance of the asset or of the instrument to the creditor or, as the case may be, by the creditor's keeping it, with the debtor's consent, in order to guarantee the debt.

As against the simplicity of the definition in the previous regulation⁵, we understand that the law-makers of the new Civil Code intended to summarize two cases: the case of the guarantee established on a tangible asset (when its remittance to the creditor is compulsory) and the case where the guarantee is established with a negotiable instrument (registered share, book-entry security or bearer share) where the creditor's keeping it is not a rule (except for the bearer share); in all other

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² Law no. 99/1999 on measures to speed up economic reform, published in the Romanian Official Gazette no. 236 of 27 May 1999, with further modifications.

³ See Mona – Lisa Belu Magdo "Garantiile comerciale" in "Contracte comerciale" – professional guide, Tribuna Economică Publishing House, Bucharest, 2004, pag. 369.

⁴ Published in the Romanian Official Gazette no 409 of 10 June 2011.

⁵ According to art. 1685 in the 1864 Civil Code "The pawning is a contract under which the debtor remits to the creditor a movable asset to ensure the debt".

cases the guarantee can be constituted by endorsement (in case of book-entry securities) or by the issuing company's act of registering it in the register (in case of registered shares). While these cases were expressly stipulated in the 1887 Commercial Code in 3 paragraphs in art. 479, the current Civil Code tried to include them in one paragraph only. For the sake of more accuracy, paragraph 2 of art. 2481 lists the three types of materialized negotiable instruments; we regret however the fact that, in the new regulation, the extension of remittance over registered shares does not comply with their juridical regime. We consider that their mere giving over is not efficient without registering the registered shares in the share register of the issuing company; the effect of constituting the guarantee by the transferee-creditor does not take place⁶.

The term pledge means the pledge contract, on the one hand, but also the pledge right arising from this contract, as well as the asset that makes the object of this right⁷.

3. Object of the contract

According to art. 2480 in the new Civil Code, the object of the pledge can be tangible assets or materialized negotiable instruments.

The list under art. 2480 leads us to the conclusion that the civil law-maker intended to regulate the pledge with dispossession in this section in order to distinguish it from the movable security (regulated by the Law 99/1999, abrogated), regulated in the section dedicated to movable mortgage (art. 2387 - 2464), whose object is the intangible assets, such as debt right, or dematerialized negotiable instruments, but also tangible assets on the condition that they are future assets (such as oil- gas and mineral resources that are to be exploited, crops to be harvested or forests to be cut), their basic characteristic being the debtor's dispossession of the asset that makes the object of the guarantee⁸.

The object of the pledge can be: cash⁹, materialized shares/bonds, materialized negotiable instruments: bill of exchange, promisory notes, cheques¹⁰; goods (on condition that they should not be tangible assets that make the object of a lease contract, or to be provided under a service providing contract, or material providing contract meant to be used or processed in operating an enterprise, or products under manufacturing and finite products - finite products are the exclusive object of the movable mortgage according to art. 2389 in the new Civil Code).

4. Possession of the asset constituted as a security

Judging by the specific nature of the assets that make the object of the pledge contract (and implicitly, its constituting with or without dispossession) we infer that in practice there are three possible situations about the possession of the asset:

- a) Possession of the asset by the pledge creditor, following its submittal by the guarantee constitutor (according to art. 2481 corroborated with art. 2483 in the new Civil Code);
- b) Possession of the asset by a third party (according to art. 2484 in the new Civil Code);

⁶ The juridical regime of the guarantee constituting is taken from the mechanism of the debt transfer between the transferor-debtor and the transferee-creditor.

⁷ See C. Stătescu and C. Bârsan "Tratat de drept civil – teoria generală a obligațiilor", Academiei Publishing House, 1981, page. 410; and the phrase "real movable security" was introduced and generalized by the Law no. 99/1999 on measures to speed up reform, which included it in Title VI "Juridical regime of real movable securities" ("Regimul juridic al garanțiilor reale mobiliare"), published in the Official Gazette no. 236 of 27 May 1999.

⁸ See Alexandru Mihnea Angheni *Unified regulations on the real securities in the new Civil Code (Unificarea reglementărilor privind garanțiile reale în cadrul Noului Cod civil)*, in the volume "Justiție, stat de drept și cultură juridică" edited by the Institute of Legal Research of the Romanian Academy – Andrei Rădulescu, Universul Juridic Publishing House, Bucharest, 2011, page. 714.

⁹ See M. Planiol "Traite elementaire de droit civil", tome II, n. 2391 quoted by Rosetti- Bălănescu and Al. Băicoianu, cited work, page. 419 and the French jurisprudence cited in it. Bank accounts are actually the object of the movable mortgage according to art. 2389 letter c in the new Civil Code.

¹⁰ For the presentation on how to constitute the pledge, be they registered shares, book-entry securities or bearer shares, according to the Commercial Code, currently abrogated, see St. Cărpenaru "Drept comercial român", vol. III, Atlas Lex Publishing House, Bucharest, 1994, page. 147.

- c) Keeping of the asset by its constitutor, and registering, with a special register, of the special situation of the asset, namely its constituting as a security for debt payment (in the Securities Archive, or, the case of registered shares whose pledge shall be registered in the register of the issuing company).

Regarding the case under letter “a”, the Romanian doctrine has stipulated that the purpose of the debtor’s dispossession is to fully guarantee the execution of the obligation, the protection of the creditor against the bad-willed debtor who might sell the pledged asset and the possession of the asset by creditors is a form of publicity towards third parties¹¹, on the condition worded in art. 2483 in the new Civil Code that it is a public and unequivocal possession¹². Although the doctrine interpreting the 1864 Civil Code expressed the effective and permanent character of the constitutor’s dispossession and of the creditor’s possession¹³, we consider that it is the same aspect, namely that an apparent and fictitious remittance does not comply with the law as long as an appearance of the constitutor’s possession is created for third parties; in this case, the pledge cannot be opposable to third parties. According to art. 2485 para. 2 letter a, the pledge does not terminate in this case, as long as the creditor no longer possesses the asset, despite his will, as a result of the act of another person. Such situation might arise in case of theft or loss of the asset; the law-maker, combining this case with the case of a third party’s taking over the asset (the party who owns the asset) formulates the solution in art. 2486 in the new Civil Code, stating that the creditor can ask for restitution of the asset he possesses under his right arising from the pledge that enables tracing and to preference, irrespective of where the asset is. There is however an exception!

The Romanian law-maker reformulates the situation of the preference ranks by recognizing priority of the mortgage creditors of higher ranks and of the situation of another creditor who has already obtained the enforcement of the pledger, and the pledged asset was already taken over by that creditor. The solutions expressly stipulated under art. 2486 are complemented, as an argument for justification, the provisions of art. 2494 stipulating that all rules formulated for publicity, priority, enforcement and termination of mortgages shall apply correspondingly¹⁴.

The issue of submittal to the pledge creditor raises the issue of the conservation of the asset.

According to art. 2491 in the new Civil Code, the expenses with the conservation of the asset made by the pledge creditor shall be returned by the debtor upon the termination of the pledge contract (following the termination of the main obligation guaranteed by the pledge, or other situation).

From the rule stating that the pledge exists as long as the creditor possesses the pledged asset (or in case of a book-entry security, as long as the endorsement is valid, according to art. 2485 para. 1), art. 2485 para. 2 list 3 cases in which the pledge does not terminate despite the loss of the creditor’s possession of the asset.

The first case is when the asset is stolen or lost (analyzed above); the second case is when the creditor gives the asset to another person to evaluate, repair, transform or improve it. It is a temporary situation and, as against the precarious third possessors, the pledge creditor shall invoke the right to follow it in any situation of opposability to restitution. The third case is when, in association with another creditor who obtained the enforcement of the constitutor, the pledge creditor must remit the asset, recognizing the rank of preference of the enforced debt.

One exception from the rule of pledge creditor’s possessing the asset is stipulated by the law-maker in art. 2484 in the Civil Code. With the consent of the debtor, the creditor can exercise possession through a third party, but in this case for opposability towards third parties, a written proof of the pledge is needed, which is given to the possessing third party.

¹¹ See Rosetti- Bălănescu and Al. Băicoianu, "Tratat de drept civil", vol. II, ed. Natională, Bucharest, 1943, pag. 421, with quotes from the French doctrine and jurisprudence.

¹² Among the terms defined by the new Civil Code in the chapter entitled “possession vices”, stating that possession is not useful is discontinuous, affected or clandestine. The term of interest in opposition with “useful” is “clandestine”, which considers that situation in which possession is exercised so that it cannot be known (according to art. 925). For further details see also art. 922 – 927 in the new Civil Code.

¹³Rosetti- Bălănescu and Al Băicoianu, cited work, pag. 421.

¹⁴ The presence of these stipulations is logical: the movable mortgage is regulated before the pledge in the new Civil Code (the mortgage in art.2343-2479, and the pledge in art.2480-2494), their juridical regime has confluences as well.

Possession by a third party had been formulated also in the 1864 Civil Code (art. 1688), as a translation, in the law, of major and fruitful outcome of the pledge regulated in commercial law (e.g. goods, cereal crops could be stored in docks or general stores, the pledge on them was constituted without dispossession, according to the Law of 28 June 1881; derogations from the principle of actual giving over of the pledged asset regulated: the Law of 2 June 1892 on the agricultural credit; the Law of 1 April 1894 for the setting up of the Agricultural bank; the Law of the people's bank of 29 March 1903; the Law of 8 June 1913 on oil consolidations and the Law of 16 April 1931 on the agricultural pledge)¹⁵.

We believe that the case listed under letter c in this section is the result of a version which was not intended by the law-maker of the new Civil Code. In its effort to allow application of the pledge only in the case of dispossession of the debtor (intention deducted from the interpretation of art. 2480 – 2493, except for art. 2484). In our opinion, the oscillation between giving over/possession by the pledge creditor has led to the criticisable wording of art. 2481 where, with all due respect, although paragraph 1 lists two cases: possession by a creditor and possession by a third party, with the consent of the debtor, only one version results from the explicit wording, the possession by the creditor¹⁶; the law-maker intended to differentiate the case where the asset was submitted to the creditor (thesis one) and the case where, the creditor, already having the asset, continues to keep it as a guarantee, with the consent of the debtor (thesis two).

In our opinion, what is relevant is not the fact that he was already in possession of the asset, or it was remitted to him as a result of the guarantee convention, but the nature of the pledged asset. That is, what juridical effects take place if the object is a tangible asset and what are the differences in case of a negotiable instrument, issued in materialized form.

In our opinion, the consequences that must be regulated in the future as they arise from the nature of the pledged assets are:

- For tangible assets: the rule of remittance of the asset to the creditor/third party;
- For bearer shares, and tangible assets, the mere remittance of the asset to the creditor/third party;
- For book-entry securities, in which case, according to the law of the bill of exchange, promissory note and cheque¹⁷, the remittance shall be done **at the same time** with the endorsement on the name of the pledge creditor¹⁸;
- For registered shares, in which case the giving over is optional, the law-maker, under art. 2481 para. 2 in the new Civil Code, through an unpleasant extension, introduces the remittance of registered shares as compulsory. We believe the transfer to be essential, according to art. 98 para. 1 in the Law no 31/1990¹⁹ on commercial companies, the transfer of the property shall be done under statement made in the shareholders' register and through the stipulation made on the instrument, signed by the transferee and by the transferor or their agents and according to art. 991 (introduced when Law 31/1990 was modified by Law 441/2006²⁰, art. I point 46) real movable securities on registered shares are constituted through a written document under private signature and by mentioning the guarantee on the instrument, signed by the creditor and the shareholder debtor or their agents.

¹⁵ For comments see Rosetti- Bălănescu and Al. Băicoianu, cited work, page. 422 – 423 including references of normative acts that regulate the pledge without dispossession.

¹⁶ According to art. 2481 para. 1 “The pledge is constituted by remittance of the asset or of the instrument to the creditor, or, as the case may be, by keeping it by the creditor, with the consent of the debtor, in order to guarantee the debt”.

¹⁷ Law no 59/1934 on the cheque, published in the Romanian Official Gazette no 100 of May 1934

¹⁸ See art. 14 – 15 in the Law 58/1934 and art. 15 in the Law 59/1934. For comments S. Cristea “Dreptul afacerilor”, Universitară Publishing House, Bucharest, 2012, pag. 365 – 370.

¹⁹ Law no 31/1990 on commercial companies, republished in the Official Gazette no 1066 of 17 November 2004.

²⁰ Law 441/2006 published in the Official Gazette no. 955 of 28 November 2006. According to Law no. 71/2011 for the enactment of the Law no 287/2009 on the civil code, the text of art. 991 is modified in the sense that the phrase “real movable securities” is replaced with “movable mortgage”; it is also regulated the obligation to register the mortgage in the register of the management/board (or the private independent register company).

This case does not modify the rule on the non-compulsory nature of the giving over.

Two aspects shall be mentioned to justify the need to modify the current regulation on the regime of the pledge in the new Civil Code:

- On the one hand, the current civil law-maker has not complied with the juridical regime set up by the general law on registered shares, that is Law 31/1990 on commercial companies that stipulates that registering the pledge on such registered shares is compulsory, and the remittance of these registered shares is not necessary but the guarantee must be written on them; we consider that, for the registered shares, the juridical regime is set up by Law 31/1990 on commercial companies, even if this law is a special regulation, as against the Civil Code, which is a general regulation of private law;
- On the other hand, the current manner to word art. 991 in the Law 31/1990 leads to the removal of the option for the debtor between constituting the pledge and constituting the movable mortgage, and proclaims the constituting of the movable mortgage as compulsory; the question is: **qui prodest?** We consider that such a solution will make more difficult the circulation of these instruments on the capital market due to the restrictive regime imposed on mortgages in the new Civil Code!

5. The pledge in the compared law

5.1. The pledge in the Quebec law

The Québec civil code includes provisions on the pledge, separated as follows²¹:

- a) Definition of the guarantee contract²² according to art. 1966;
- b) Guarantee with immovable assets²³, art. 1967;
- c) Pledge contract, art. 1968 – 1979;
- d) Guarantees valid for agricultural and forest exploitations: art. 1979 a – 1979 d;
- e) Commercial guarantees art. 1979 e – 1979 k.

The guarantee contract is defined as a contract under which an asset is remitted to the creditor, or which, being already in the hands of the creditor, can be kept with the consent of the owner, to guarantee a debt. The basic characteristic of this form of guarantee (called “nantissement”) is the dispossession of the debtor; moreover, the guarantee exists only during the time when the asset is possessed by the creditor or by a third party agreed upon by the parties (art. 1970).

This form of civil guarantee is different from the commercial one (called “nantissement commercial”); according to the Québec Civil Code, the commercial form covers exclusively movable assets and is characterized by the fact that it takes place without dispossession of the debtor. The Québec law-maker allows the trading entity to guarantee with the business assets and to keep possession of those needed to carry out the business²⁴.

To note that this form of commercial guarantee is an exception from the common law on the pledge (set up by art. 1968), since, while the pledge takes place with dispossession, the commercial guarantee takes place without dispossession²⁵.

²¹ According to the work of the Centre de recherché en droit privé et compare du Québec, authors P. A. Crépeau and Gisèle Laprise “Les Codes civils – éd. critique” – 1986, edited by the Chambre des notaires du Québec, McGill University, Montréal, 1986, pag. 382 – 387.

²² Defined in French as “nantissement”, distinct from the pledge contract, translated in French as “gage”.

²³ The Québec Civil Code includes also the provisions on the privileges on movable assets: art. 1993 – 2014 and provisions on mortgages in art. 2016 – 2052, also provisions on the effects of privileges and mortgages between debtor and creditor in art. 2053 – 2081, and, last but not least, provisions on the registering of real rights in art. 2082 – 2157.

²⁴ According to art. 1979 c in the Code “Celui qui a qualité de commerce aut peut nantir en garantie d’une ouverture de crédit qu’il contracte, pour un terme n’excédant pas dix ans, de l’attillage et du matériel d’équipement professionnel tout en conservant la garde. Il a alors envers le créancier, les obligation d’un emprunteur des effets nantis, sans avoir droit á des frais de garde ou de conservation”.

²⁵ See Albert Bohémier and Pierre – Paul Côté “Droit commercial général” – vol. I, 3rd edition, Thémis Publishing House, 1985, page. 89.

Regarding the applicability of the commercial pledge²⁶, we note that it has a rather limited area as it is subject to special requirements of form and contents. Only a trading entity, either a physical person or a legal person, in capacity of guarantor, can use this juridical tool²⁷ (according to art. 1979 letter c. in the Québec Code). The non-trading entity can use the commercial pledge only if it takes an obligation towards a trading entity. As the section covering the French law will show, the rule of the debt merchandability shall apply in this case too.

The creditor can have any capacity, the Québec doctrine lists the limits: professional or not, or even a commercial bank²⁸.

For the guaranteed bond, the Québec law-maker expanded the range from debts such as price to be paid by the guarantor to loans²⁹, whether personal debt (not related to trade) or trade-related debt.

In the interpretation of the Canadian Code, the commercial pledge cannot be used to guarantee an outstanding debt, a lease contract, an obligation to do or not to do³⁰.

The commercial pledge can be constituted only on equipment, installations or materials to be consumed or processed by the trade entity. To note the overlap with the object listed at the end of art. 2389 letter j in the new Civil Code, regulating the movable mortgage.

Unlike the movable mortgage in the Romanian law (according to art. 2389 corroborated with art. 2391 in the new Civil Code) the provisions of the Québec law exclude the application of the guarantee on the assets of a business, goods to be sold or tangible assets that make the object of the lease contract, rent or intangible assets, as well as to products under manufacturing and finite products (considered not to be in the possession of the debtor at the moment when the guarantee was constituted).

The duration of the contract is 10 years, with the possibility to extend it.

As against the civil pledge, the commercial pledge has a more limited range, because it cannot apply to future assets, but also a more extended range because it can apply to someone else's assets³¹.

Both the Québec law and the Romanian law impose requirements on form: the Canadian law allows an authenticated written document or written document concluded with two witnesses, while the Romanian law requires either the written document under private signature, or the authenticated form. Both regulations require an accurate description of the encumbered asset and a form of publicity, with the purpose to constitute a privilege for the mortgage creditor as against third parties: a real right that gives a right of preference and a right to follow the asset constituted as a guarantee³².

If the debtor does not execute his obligation willingly, the procedures of giving possession or execution of the mortgage are similar in the two legislations³³, and the Romanian regulations are more detailed.

5.2. Comparison with the French law

²⁶ Equivalent in English, in the Canadian law, of the pledge contract is "pawning", and for "nantissement", equivalent in English is "pledge". To note that this is another institution than the "security interest" in the American law. To see the connection with the Romanian law, see R. Rizoiu, "Încercare de re(definire) a garanției reale mobiliare", in review "Pandectele Române", nr. 4 din 31 august 2004.

²⁷ See R. Comtois "Une nouvelle législation: le nantissement commercial", (1963 - 1964), R. du N. 155, 158.

²⁸ See N. L'Heureux "Précis de droit commercial du Québec", Les Presses de L'Université Laval Publishing House, Québec, 1975, page. 269.

²⁹ As a result of the 1982 law modification, it can guarantee an opening of a credit line. See Albert Bohémier and P.P. Coté, cited work, page 100 and the footnote no 233.

³⁰ Ibid, page. 100, except for the novation technique which would allow application of the commercial pledge in case of sale or lease. See the cited doctrine in footnote no 236.

³¹ Only when the requirements of art. 1488 in the Québec regulation are complied with. See Albert Bohémier and P.P. Coté, cited work, page. 101, with the doctrine and jurisprudence in the footnotes no. 242 and 243.

³² According to art. 1979 g, 1979 k and 2094 in the Québec Civil Code and according to art. 2388, 2391, 2409 on the perfect mortgage and 2413 in the new Romanian Civil Code.

³³ For details, see Nicole L'Heureux, cited work, page. 271 – 272, the cited bibliography and jurisprudence.

The French law makes the difference between the civil pledge and the commercial pledge, constituted either by a trading entity, or by a non-trading entity, under a commercial act (according to art. 91 in the French commercial code³⁴); the merchandability of the debt entails the applicability of commercial rules, like in the Canadian and the Romanian law prior to the entering into force of the new Civil Code.

In the French law, the civil pledge is exclusively with dispossession of the guarantor debtor and commercial practice found the following disadvantages: on the one hand, the debtor trading entity cannot remit materials and goods that are indispensable for the operation of the business; on the other hand, the pledge creditor does not have the space needed for storing the pledged assets³⁵. This last disadvantage was removed by giving the assets not used for the business to a third party specialized in storing goods, for a limited duration.

Similarly to the Romanian commercial law (see the comment art. 478 in the Romanian commercial code in the previous sections³⁶), the French commercial law allows the proof of pledge by any means of evidence between the contracting parties and the proof shall be made in writing only to third parties³⁷, while the proof as a means of evidence shall apply in case of third parties at the moment when the pledge is constituted³⁸.

Regarding the transmission of possession, both the civil and the commercial French laws recognize the usefulness of the pledge only to the extent to which the right given to the pledge creditor is opposable to third parties. Art. 92 in the French commercial code sets up the privilege of the pledge creditor only if it is in possession of the creditor of a third party, agreed upon by the contracting parties. Unlike the Romanian law that imposes the rule of giving the written document acknowledging the pledge to third parties, as a requirement of opposability of the constituted pledge (according to art. 2484 in the new Civil Code), the French law accepts the dispossession of the debtor to be also apparent, that is based on the assumption that the third party cannot be considered to be owner of the asset on behalf of the debtor (according to art. 92 in the French commercial code³⁹).

Regarding the execution of the pledge, the French commercial code⁴⁰ opposes a simplified procedure to the excessive formalism imposed by the French civil regulation that is the existence of an enforcement for the pledge: notification of the debtor (or third party, owner of the asset) and then the right of the pledge creditor to sell the asset.

The French civil regulation (according to art. 2078 para. 1 in the French Civil Code) allows the creditor to go to court after the deadline of the main obligation to obtain permit to keep the asset in exchange of the debt, following an assessment by experts; a provision also applied by commercial courts⁴¹.

The danger of pressure by the pledge creditor on the debtor is removed by the French civil legislation (art. 2072 para. 2 in the civil code) in the regulation regarding the possibility to include a clause in the pledge contract according to which the creditor can keep the asset in exchange of the debt (commissary pact); the text forbids any clause by which the creditor may avoid legal forms of achieving the pledge. Although the French commercial regulation took over the contents of art. 2078 para. 2, in art. 93 para. 4 in the Commercial Code, the Cassation Court admitted the validity of the commissary pact clause, with the acceptance of the debtor only when the acceptance is after the moment when the pledge is constituted⁴².

³⁴ Published in the Law of 15 September 1807, that entered into force on 1 January 1808.

³⁵ See Georges Ripert "Traité de droit commercial", 112th edition, by René Roblot, L.G.D.J., Paris, 1990, page 622, no 2600.

³⁶ See no 9 above.

³⁷ Without imposing rules from the civil law (according to art. 2074 C. in the French civil code): formal requirement of two copies and stipulation, written by the debtor's hand, regarding the amount owed (in letters and figures).

³⁸ See G. Ripert, cited work, page. 623, no 2601 and the cited doctrine and jurisprudence.

³⁹ For re-interpretation of art. 92 of the French commercial code, see G. Ripert, cited work, page. 623, no 2602, with the analyzed jurisprudence and doctrine.

⁴⁰ Art. 91 – 93 in the French commercial code were modified by the La loi du 23 mai 1863.

⁴¹ See G. Ripert, cited work, page. 624, no 2603.

⁴² Ibid.

These provisions were included in the 1864 Romanian Civil Code, and reinforced by the Law 99/1999 on real movable securities.

To note the provisions of the French commercial code which, accepting any means of evidence to prove the existence of the pledge (according to art. 91 in the French commercial code), extends the validity of the rule regarding the negotiable instruments, by accepting their endorsement as a guarantee. The French doctrine, starting from the analyzed jurisprudence⁴³ formulated the remark that, for the registered shares, in order to validate the guarantee, an additional formal requirement is needed, apart from the transmission of the registered share to the creditor and the registering of the transmission, to ensure opposability of the constituted pledge towards third parties and towards the company that issued the registered shares; the author compares this provision with the provisions regarding transmission of property⁴⁴.

6. Conclusions

The implementation of rules that are typically of civil Anglo-saxon traditional law⁴⁵ can be beneficial. Law 99/1999 intended to do so but it was expressly abrogated by the new Romanian Civil Code. If the purpose of the law-maker was that the pledge without dispossession should be covered by the regulation of the movable mortgage, and the pledge with dispossession should be covered by the civil code, we believe that the purpose is jeopardized by the extended object of the civil pledge over negotiable instruments, especially registered shares.

Their special juridical regime does not harmonize with the regime of the bearer shares, or book-entry securities; and additional formal requirements are needed to constitute a valid guarantee for them⁴⁶. The French doctrine follows this idea⁴⁷.

The task of jurisprudence and doctrine is now to establish the usefulness of the juridical institutions promoted by the new Romanian Civil Code!

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12. C. Stătescu and C. Bârsan, *Tratat de drept civil – teoria generală a obligațiilor*, Academiei Publishing House, 1981.

⁴³ See G. Ripert, cited work, page. 625, no 2604 with the comment on the evolution of regulation, especially about the modifications made by the Decree of 26 October 1934, the Decree of 27 May 1940 and the Decree of 7 December 1955, and of the presented jurisprudence.

⁴⁴ Ibidem.

⁴⁵ Purpose intended and achieved by the Québec regulations, see section no. 11.1.

⁴⁶ See the comments above in section 8.

⁴⁷ See above 11.2; the French model is replaced by other models by the law-maker of the new Romanian civil code.