Advances in Business-Related Scientific Research Conference 2015 in Milan
(ABSRC 2015 Milan)
December 10-11, 2015, Milan, Italy

THE LEGAL NATURE OF BANKING CONTRACTS

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Abstract

Banking contracts have significant similarities with other contracts. A part of them have their origin from roman law contracts. For these reasons, the definiton of their legal nature has continuously been an object of doctrinal debate and judicial practice. This article analizes the legal nature of banking deposit, credit lines, overdrafts, bank rebates and safe-deposit box. However, the bank practicealso recognizes other contracts, this paper is confined only in banking contract that are prescribed in the Civil Code. In my view, even if debates over this topic continue, we have not to do with traditional contracts such as loan, lease or deposit ones, but with special contracts that present obvious distinctions from them.

1. GENERAL OVERVIEW

The determination of the legal nature of a contract is related to her qualification. To classify a contract in one of the certain categories constitutes an intellectual action named qualification[1]. The qualification itself is a difficult task and one of the biggest problems encountered in private law. First of all, qualification means to interpret the contract. For example, the question is: "Which Articles of the Civil Code would regulate the parking and garage contracts? How will they be considered? Will they be considered as leases, deposit contract or *sui generis*[2]? In the same way discussion follows banking law. Thus, it is discussed if the bank deposit is a loan contract or a deposit contract. A part of the doctrine adheres to the idea that bank deposits are a contract that leads to loans[3]. We have to do with the opening of a bank credit, when it is a loan or deposit contract, or a unilateral promise; for bank advancement if it is a short term loan type or a subtype of credit; with a bank rebate if it is a contract of sale, liquidity, ceding form, or sui generis, and with a safety box, if it is a form of

[1] Bénabent, A., (1993) *Droit civil, Les contrats spéciaux,* Montcherstien, Paris, pg. 4
[2] The Court of Cassation in France in a 1981 issue stated that parking garage is a deposit contract, because the owner is responsible for the loss of property. The opposite is for parking and in most cases is done in open spaces. It has the nature of the lease contract, since there is no obligation to maintain the property. But the Court of Cassation left the discussion opened, because the primary role of the terms is agreement between the parties: if the parties have predicted that the owner of the parking must maintain the object, then he will be responsible for its loss, so bringing it closer to the deposit contract. For more on this issue see Malaurie, P., Aynès, L., (1992), *Cours de droit civil: Les contrats speciaux (civils et commerciaux),* Cujas, Paris pg. 474-475
[3] Misha, E., (2009), *E drejta bankare*, Ekspres, Tiranë, pg. 67

deposit or a form of rent. In other words, not only the interpretation of certain clauses of the contract, but also its own qualification is not easy to deal with for lawyers.

The banking activity is very broad. Banking contracts are not only what is defined to be established in a bank. A banking contract is what technically is not conceivable unless it falls under the category of contracts collected functionally in the same genre, that which is realized only through the banking activity[4]. In this paper, we will focus only on the legal nature of the traditional bank contracts regulated under articles 1024-1049 of the Civil Code: bank deposits, credit opening, banking prepayment, bank rebate and safety boxes. For purposes of this paper, we will refer to the traditional classification of contracts through Albanian doctrine, dividing them into typical contracts and not typical contracts, where the first is expressly regulated by the civil legislation in force, while the latter is a contract that does not have a regulation expressed by law and that do not contradict with the main principles of contract law.

1.2 Banking Deposit

The banking deposit is a contract in which one of the parties, called the "depositors", transfers ownership to the other party called the "bank", such as ownership of the amount in cash and other securities, and where the other party has the obligation to return the equivalent of such items within the deadline specified in the contract or at the request of the depositor if there is no deadline. Among lawyers there is a debate about the nature of a bank deposits: What is its legal nature? Mainly, the discussion is focused on comparing the contracts of deposit, the lending and borrowing. We cannot say that we are dealing with a contract of deposit, because the object of a bank deposit is generally an amount of money that is considered as a movable asset, defined in genus and consumable, in contrast to the traditional deposit that has as an object items that are individually defined and non-consumable. Moreover, we notice that the obligation of the depositary (bank) to secure the object is absent, an obligation that is essential to the deposits, where the ownerships belongs to the bank. It is also harder and a more distant relationship that with the lending contract. They differ in terms of the object: the lending contract has individually specified objects, non-consumable ones, while bank deposits have defined objects and consequently consumable objects. The comparison with the loan contract is more acute. At first sight everything looks similar to the loan the two contracts have consumable assets as object; for both contracts, the deposit recipient and the borrower are obliged to return objects of the same quantity and quality but not the same asset. But what differentiates them is the purpose, their respective spirit: deposits are made in the interests of depositors, while the loan is in the interest of both parties or at least in the interests of the borrower[5]. For bank deposit it is characteristic the transfer of ownership of an amount of money from the depositor to the bank. The House of Lords in England has identified this feature of the bank deposit half a century ago, avoiding any suspicion.[6] In the case "*Foley v Hills and Others"*, the House of Lords held that the client is simply a creditor of the bank. Lord Cottenham said on this issue: "*When money get paid to the bank, they stop being the client's money, and they will become the property of the bank, which owes the equivalent, paying the same amount to those deposited whenever these are required by him ... the money*

[4] Ferri, G., (1994) *Manuale di diritto commerciale,* nona edizione, UTET, Torino, pg. 909
[5] Malaurie, P., Aynès, L., (1992), *Cours de droit civil: Les contrats speciaux (civils et commerciaux),* Cujas, Paris, pg. 483
[6] See the debate issues *Carr v. Carr (1811)* dhe *Devaynes v. Noble (1816)*

stored in a bank, in any case, are considered the money of the bank and it has the right to do whatever pleases its interest; the bank is not obligated to maintain them or to treat them as the client's property; but certainly it is responsible for the amount because there is a contract.t[7] In the same line is French law. While supporting this reasoning, the Court of Cassation in France, in the case of Caisse d`Epargne said: "*From the moment of their deposit (amount of money), being genus objects, they become the property of the bank, against which the client does not have a right but a loan*[8]". This approach is also supported by the American law. But as Rothbard notes, in this country there are abnormal concepts: *While the US courts insist that a bank deposit is a debit contract, they remain in a position of confusion over whether "the placement of money in a bank for storage" represents an investment ("the placement of money in some form of ownership to gain income). If money is set simply or storage, then will come a day when the courts will say that bank deposits is a lease contract. But, if they are set as an investment, then how can their preservation and remission be realized?"* [9]

The majority of researchers are of the view that bank deposits are irregular deposits, sui generis. Irregular deposits are those where the deposit recipient, because of the consumable nature of the assets as the object of a contract, need to return similar assets, in the same quantity and quality. In other words, the depositary should not return the same assets, but assets of the same value, the equivalent of the deposit object, a typical example of which is the deposit of funds and securities in the bank. Characteristic for an irregular deposit is that the depositary is not released from the obligation to return the item in case of force majeure action, a circumstance that is opposed in the usual deposit. Remember here the roman principle -*genera non pereunt* - objects specified in genus are not lost. In order to face the irregular deposit it is necessary to fulfill two conditions: the material condition and the psychological condition.[10] On the requirement of the material condition, items that will be deposited not only must be of such a nature that cannot resist after a certain time, but should also be helpful in the civil exchange. That means that the object must be consumable and defined in genus. So, the delivery of a jewelry cannot be considered as an irregular deposit because this item is non-consumable, although there may be many of those in the civil exchange. Regarding the psychological condition, the depositor and deposit recipient must have accepted that they will not return the same thing, but its equivalent.

Compared to the above, a bank deposit fulfills the requirements to be an irregular deposit: the deposit recipient (the bank) has the right to consume the deposited object; the deposit recipient is obligated to return the object equivalent to the deposited one and the deposit recipient is not liability-free if it is in terms of "vis majoris". Thus, in practice, bank deposits are almost always irregular deposits. According to other researchers it may be considered an *unlabeled contract*[11], this approach is similar to that of the Court of Cassation in France, in

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[7] *Foley v. Hill and Others* (1848), H.L.
[8] Civ. 1re 7 fevrier 1984, Bull. Civ., I, no 60, Cour de Cassation
[9] Rothbard, N., M., (2008) *The mistery of banking*, 2nd editon, Ludwig von Mises Institute, Auburn, Alabama, pg. 93
[10] Bénabent, A.,op.cit., pg. 403
[11] In French law, the basic division is made in denominated contract and unnamed contracts. Designated called contracts which are provided and regulated by law such as contracts of sale, gift, rent, transportation, entrepreneurship etc., And the contract unnamed refers to those which do not fall into any of the categories specified by law or practices.

which a case judged in 1984 (Caisse d`Epargne) simply stated that the bank account holder has the right to a bank loan without a qualified contract.[12] To be more realistic and consistent with the economic analysis, considering the use of bank checks and securities, the account holder is more entitled to a scriptural currency, rather than entitled to a loan.[13]

Turning to domestic law, the solution is easy. Despite the term "deposit" in the Civil Code of the Republic of Albania, bank deposits are not listed among the different forms of common deposit contract, but in a chapter devoted to bank contracts (Articles 1024 to 1050 KC). Therefore, there is no room for debate on the Albanian law, since it is a typical contract: the legislator has provided bank deposit as a particular contract. Discussions remain open on those countries where there is not yet a legal label for those contracts that have as their object the deposit of funds and securities in the bank. However, in order to study the effects, it should be accepted that a bank deposit is an irregular deposit.

1.3 Opening of the loan

The meaning of this contract is given in Article 1031: "The opening of the *bank credit is a contract by which the bank is obliged to keep at the disposal of the other party a sum of money for a certain or indefinite period of time*". That means that the opening of a bank credit is basically the bank's obligation to make available to the other party (credit recipient) a sum of money for a certain period of time or indefinitely, as provided in the agreement of the parties. Based on this formulation, some researchers argue that the opening of the bank credit is a unilateral contract, where the bank is the only party charged with obligations. Authors such as Gevalda and Stoufflet, go further by calling it a *preliminary agreement*, the framework agreement that does not always carry the commitments for both parties. According to them, it is a unilateral promise of the bank to set in favor of its clients the necessary payment tools for various forms, under certain conditions such as the deadline and interest rate[14]. The authors Aynès and Malaurie highlight the likeness of this contract with the promise to lend and borrow and with the promise for a loan in the form of signing shares, where the signer promises to pay the necessary amount to obtain the shares. However, according to them we do not have to do with a promise to lend money, because the credit can take a different form from the promise to lend, especially when it comes to checking the account: the banker may be released from the promise if the behavior of the credited party compromises the "dignity" of the loan, making it as a result a sui generis contract.[15]

While other authors submit the contrary, by excluding the option of preliminary contract when it is provided as a particular contract in the Civil Code.[16] In fact, if the provisions of the Civil Code will be carefully evaluated, the mutual character of opening of the loan is more than evident. The possibility of being a unilateral promise is automatically excluded, while the lawmakers have predicted that as a contract in the Civil Code. And it is a typical contract if we are going to refer to the traditional classification of the Albanian law, as foreseen and regulated by the Civil Code Sections 1031-1034. The parties of this agreement have both

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[12] Bénabent, A.,op.cit pg. 484
[13] Ibid.,
[14] Gevalda, Ch., Stoufflet, J., Gevalda, Ch., Stoufflet, J., (1992) *Droit bancaire: Institutions, comptes, operations, services*, Litec, Paris pg. 208
[15] Malaurie, Ph., Aynès, L., op.cit., pg. 466
[16] Ferri., G., op.cit., pg. 914, dhe Nuni, A., Mustafaj, I., Vokshi, A., (2008*) E drejta e detyrimeve II*, Tiranë, pg. 216

rights and obligations. The Bank has the obligation to make the amount available to the borrower. The borrower at the end of the period provided has the obligation to return the principal (amount received) as well as the bank interests. Thus, the rights and obligations of the parties are reciprocal, which is characteristic for bilateral contracts. We emphasize that the opening of a bank credit is always of interest.

Regarding the legal nature, except the form of the unilateral promise, in the legal doctrine it is thought to be a loan contract, but worst for the client because the interest here has a permanent character. But its specific characteristics such as the obligation of the bank to make available to the client a lot of money and the obligation of the latter to pay a commission on the amount made available, whether they used it or not, indicate a unique nature to this contract, opposed to the loan contract. According to Bénabent opening of a bank credit is not a loan agreement because the opened credit can be used for various loan operations that do not have the legal nature of the debit (bank rebate, etc.).[17]Although there are similar elements, the opening of a bank credit and loan should not be mistaken. They have specified and interchangeable items as their object, but they differ in two main aspects: Firstly, the loan is a real contract and will be considered bound at the time of delivery of the goods. Rather, the opening of a bank credit is a consensual contract. This contract will be bound at the moment of compliance of the will between the parties. The Bank makes available to the client the amount of money that is typically done by depositing in a check account and should not expect that these amounts be effectively used for the contract to be considered as established. Secondly, the loan contract may be with or without interest, on the contrary, the opening of a bank credit is a contract with burden, since its user always pays interest to the bank.[18]

Some authors support the idea that the opening of a bank credit is a deposit contract, while others say it is something intermediate between the loan and the deposit. It is unacceptable to believe that the opening of a bank credit is a complex contract (deposits and loans), while the legislator has foreseen it as a separate contract in the Civil Code. In fact, even if we refer to the terms of this contract, in reality there is no double operation loan and deposit because the amount available to the client never goes beyond the availability of the bank, otherwise if we would accept this, then we could justify the bank's resign from the contract for a right cause, before the deadline.[19] Other researchers argue that the opening of a bank credit is a supply contract whereby one party is obliged to carry out in favor of the other party constant and periodic supplies against the payment of the counter value. But, it is accepted that the obligation to periodic service of the bank is only possible and is lacking in cases when the customer does not use the amount which is credited.[20] In fact, even if this was accepted, it would apply only in the case of the bank credit in the current account, in which the credited party has the right to use more than once the amounts made available to him. However even here the obligation of the bank to deposit money is not recurring, making it different from a supply contract.

[17] Bénabent, A., op.cit., pg. 435
[18] Nuni, A., Mustafaj, I., Vokshi, A., op.cit., pg. 217
[19] Ferri, G., op.cit., pg. 919
[20] Misha, E., op.cit., pg. 50

1.4 Bank advanced payment

Emergency money needs may dictate immediate borrowing by the commercial companies, without waiting for the sale of their products. In many cases the businesses, in particular, agricultural enterprises, take credit from the bank, posing as security for repayment of the obligation the goods or their securities (shares, bonds, etc.) The contract in which the bank grants a loan to a subject, against its guarantee in the form of a mortgage over the securities and the goods will be called ***bank advance payment.*** Bank advanced payment basically involves two operations: the operation of the loan and the guarantee operation. The customer receives a credit against its guarantee through goods or securities.

In the legal doctrine prevails the view that the bank advanced payment is a characteristic element of credit operations.[21] Analyzing these two aspects of bank advanced payment in the legal literature there are ideas that a bank advanced payment is a form of short-term debt[22]. Some researchers prefer to make a different treatment depending on the form of the bank advanced payment, which has the legal nature of the loan in the case of a simple bank advanced payment and that of opening of a bank credit in the case of bank advance payment in a current account.[23] Other authors, whose perspective is right in our judgment, point out that the bank advance is a subtype of the opening bank credit. [24] However, this only applies to the bank advance payment in the current account. In fact, the bank advance is different from the opening of a loan as far as the elements “warranty”. The opening of the loan can be provided with real or personal guarantee is concerned, but can also be granted "in white", whereas the advance is always accomplished against a guarantee Furthermore, this guarantee must be in the form of a mortgage to goods or securities. These contracts differ in one other aspect. In this case, differently from the opening of a credit, the customer can achieve partial return of the mortgaged goods by the partial reimbursement of the advance paid amount[25].

The bank practice recognizes two main forms of bank advances: *simple bank advance payment* and *current account bank advance.* In simple bank advancement, the bank is obliged to provide effectively the entire amount at the time of establishment of the contract. The client has the right to fully or partially use the amount which he must return at the expiration of the term specified in the contract. Characteristic of this form is that the client has the right to return the amounts before the deadline. Usually this kind of advance is conducted by agricultural enterprises and private owners who let their goods or securities as mortgage in anticipation of the selling.[26]

A bank advance in a current account consists in putting the amounts available to the client, who has the right to do one or more withdrawal at his discretion, deposit into account, create the initial availability and consequently the performance of new attractions within the limits of availability. At the end of a contractual relationship, the client is obliged to send the bank the amounts received.

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[21] Bonneau, T., (2013) *Droit bancaire* 9e ed. Montchrestien, Paris, pg. 55
[22] Gevalda, Ch., Stoufflet, J., op.cit., pg. 205
[23] Ferri, G., op.cit., pg. 928
[24] Galgano, F., (1999) *E drejta private*, “Luarasi”, Tirane, pg. 590. For the same opinion, Nuni, A., Mustafaj, I., Vokshi, A., op.cit., pg. 232
[25] Galgano, F., op.cit., pg. 591
[26] Nuni, A., Mustafaj, I., Vokshi, A., op.cit., pg. 234

A bank advance is characterized by proportional permanent relation of the loan amount to the value of the mortgage. In each of the hypotheses mentioned above, the word "advance" is reserved to those operations which effectively give or make available the amounts in function of mortgage on securities or the goods, an actual or eventual bank loan guarantee, in which the effectively given amounts match at any point of the relationship with the rigorous criteria of proportionality and on the basis of a percentage reduction (known as *scarto* reduction) on the value of collateral.[27] In this way, the bank advancement has two important elements: the establishment of the mortgage right on securities or goods and the permanent proportional connection between the value of the mortgage and the amount of the advance.

The credit operation is constructed in such a way as to maintain a proportional relation between the amount of the advance and the value of the collateral. This means that the reduction of the guarantee, namely the reduction of the value of the collateral will be followed by the reduction of the loan amount. The Bank will deduct the advance payment in proportion to the new value that the mortgaged item carries. The proportional ratio will remain constant throughout the life of the contract.

It should be noted that the causal relation is applicable in both hypotheses, which means, in the case of effectively giving the money (simple banking prepayment), and in the case of making amounts available (advance prepayment in a current account). In this recent situation, where we are dealing with the opening of a bank loan, the availability of customer on the amounts made available is proportional, being determined on the basis of the percentage of the guarantee provided. Partial reduction of the mortgage on securities or goods entails limiting the availability of the client on these amounts.

The relationship created between the operation of the credit and the guarantee operation is based on a proportionality ratio. Both these operations are important and essential for the bank advance payment contracts. The guarantee given by the mortgage of securities or commodities is not simply an amplifier element of the contract, but its defining element. In other words, between the loan and the guarantee there is not an accessory relationship, but a relationship of interdependence based on proportionality.[28] The relationship between these operations is regulated by different principles from those applicable between the main and accessory contracts.

From the above analysis we conclude that the bank advance is a complex contract, which consists in two operations, the credit operation and the guarantee operation.

1.5 Bank Rebate

The Meaning of bank rebate is given in Section 1047 of the Civil Code: " rebate is a contract by which the bank, by applying the interest, gives the client the value of a loan toward the third parties, which is not finished yet, through a transfer". This formulation, that is almost identical to Article 1858 of the Italian Civil Code[29], is not entirely correct. The inaccuracies

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[27] Ferri, G., op.cit., pg. 928
[28] Ferri, G., op.cit., pg. 930
[29] For more information refer to the Italian Civil Code (Il Codice di Italia Civle) art.1858: *"Lo sconto è il contratto col quale la banca, previa deduzione dell'interesse, anticipa al cliente l'importo di un credito verso terzi non ancora scaduto, mediante la cessione, salvo buon fine, del credito stesso (1260 e seguenti)"*

are associated with the reference to "loan that is not over", while in the following section it is expressly prescribed the rebate of the current account, which is payable “a vista”. Also, it contains inaccuracies related to the "credit ceding" as a tool for the realization of the operation, because in normal conditions it can also be done through bills of exchange or other credit titles.

However, the definition provided in the Civil Code retains the substance, which is to allow the customer to take an immediate loan, which he wouldn’t have reached so quickly, against the transfer of the right of lending to the third parties according to such procedures prescribed by law.[30] The bank practice also recognizes the rebate of securities, also known as "rerebates". In this case the bank uses the credit rebated by rebating back at another bank. Generally, rebating is realized through the bill, the check and bills of exchange documented.[31]

The bank rebate is a rémunération contract. Against the benefit of the loan, the customer must pay interest for the amount of the loan taken from the bank. Regarding the credit titles, the law makes no differentiation between general loans and loans with an order on the admissibility of the rebate. However, in practice a rebate is mainly seen as a commercial loan being classified as a short-term loan.[32] We recall that another loan similar to the short-term one is the bank advance payment on securities. Despite the similarities, they are two different bank contracts.[33]

In the legal literature it is argued that the bank rebate is a contract for the sale of credit, where the buyer (client) pays the seller (rebating person) a price (amount received) against the transfer of the credit right with the “ex lege” guarantee of the solvency of the debtor. According to the authors Gevalda and Stoufflet "Sale" does not have the meaning given in the Civil Code of the sales contract. These authors point out that ownership passes to the customer according to the nature of things, through the bill of exchange titles or through the credit ceding (also known as Dailly ceding [34]). In fact, no provision of the Civil Code that regulates the bank rebates uses the term "sale". This term can be used for practical purposes, to understand easily this financial transaction, but not in the legal sense. Other authors argue that we are dealing with a loan contract. According to Galgano, these researchers are confused with the term "interest" and the general function of financing of this contract. The author notes that the discrepancy and the incompatibility of this reasoning is prominently seen if it is considered that the bank achieves free availability of credit or titles, which can be controlled or compared at another bank. He also notes the fact that credit ceding or the title is a part of the establishment of the contract. The concept of "interest" here is used in as a technical sense.[35]

Other researchers consider rebates as a "liquidity" contract. According to this thesis, we have a double transfer of the title of the amount defined by the bank to the client and of the title of credit from the client to the bank, where the latter, due to the effect of the contract becomes

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[30] Ferri, G., op.cit., pg. 935
[31] Martin, L., (1991) *Banque et Bourse*, 3e ed., Montchrestien, Paris pg.277
[32] Ferri, G., op.cit., pg. 935
[33] Nuni, A., Mustafaj, I., Voshi, A., op.cit., pg. 244
[34] Gevalda, Ch., Stoufflet, J., op.cit., pg. 195
[35] Galgano, F., op.cit., pg. 593

the title-holder of the only credit towards the new debtor, with the right to return to the client the ceding credit if the debtor (meaning: the new client) does not pay after the expiry.[36]

The Italian researcher Ferri does not support the above ideas. According to him we cannot speak either of a sale or liquidity contract in the case of the bank rebate. Ferri emphasizes that the sale does not answer the economic substance of this legal relationship, while the liquidity responds economically, but not in legal terms to the bank rebate. According to him, this contract is a complex operation, where there is a combined operation of guarantee with the credit operation (the transfer "pro solvendo[37]"of the credit right). Referring to the Italian Civil Code the bank "gives the customer an advance of the amounts", while the client is obliged "to return the amounts received in advance". There are mentioned the terms "advance payment" and "transfer", which are a typical expression of the credit operation. But it should be underlined that the "advance payment" and "transfer" are defined as "tools" to realize the rebate, precluding any genus relation.[38] In other words, the use of these terms means that we are dealing with a credit operation.

Generally, the rebate is performed on the current account in the form of credit opening. It is understandable that the operation of the loan is a loan contract, while the guarantee is a bit more difficult, to be perceived. Guarantee is accomplished indirectly, through the "pro solvendo" transfer of the credit. The debtor guarantees the return of the amounts received, together with the interests. We note here that the guarantee only operates between the bank and the client. The bank cannot require to the rebate person to recover the amounts, unless the debtor refuses to make the payment. If the debtor fulfills the obligation at the end of period, the relationship is extinguished, otherwise, if he does not pay, based on the relation of the rebate, the rebate person is obliged to return the amounts granted along with the related interests.[39]

1.6 Safe-deposit box

Safe-deposit box has to do with making available a fee to the clients, a metal box built in the internal space and armored bank, which is kept by the bank itself. These spaces are presented as places with high security, where things left by the client are protected from various dangers like stealing, damage and other adverse effects, with the exception of a force majeure. The client has the right to put in safe-deposit box the individually specified items, such as precious stones or jewelry, documents, amount of money, etc. In any case they cannot put such items which considering their nature, pose a threat to the security of the bank such as explosives, gasoline, gas, etc.

The determining of the legal nature or qualification of the safe-deposit box contract, has continuously been the object of many discussions. Discussions focus on the relationship between the safe-deposit box, lease and deposit. Thus, according to some researchers we are dealing with a lease, while according to others we have a deposit contract. Another part of researchers proposed an intermediate option, calling it a mixed contract, that is created as a result of the combination of the lease and deposit. It should be noted that the determination of

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[36] Ferri, G., op.cit., pg. 936
[37] Lat. *"pro solvendo"* meaning "capable to pay". The debtor should be capable to pay the credit
.[38] Ferri, G., op.cit., pg. 936
[39] Ferri, G., op.cit., pg. 237

the legal nature takes a significant amount for this contract, because depending on qualification, the responsibility of the bank is determined.

A safe-deposit box is traditionally conceptualized as a lease, although this qualification is contested because the client does not have free access on it.[40] The bank makes available to its customer a certain space for storing valuables and other belongings, in return of a fee. The client rents the object (the safe-deposit box), which should be used for the purposes specified in the contract. In France, the courts for a long time maintained an ambiguous position, pointing out that we are dealing with a lease, but that is subject of the regime of deposit: the bank is responsible for the loss of items placed in safe deposit, except force majeure.[41] Under widespread criticism of doctrine, the Court of Cassation has deserted this jurisprudence, by labeling it as an undesignated contract.[42]

In Italy, the majority of the researchers are of the opinion that we are dealing with a lease and not a deposit. The Bank is not bound against the client to maintain the objects that the customer puts in the of safe-deposit box and does not even know what the client put in it, but as every lessor it is obligated to allow the use of the item leased and the customer must maintain it according to the defined destination.[43] In essence, the bank gives the client the right to the enjoyment of a particular space, that offers a security guarantee.[44] According to Ferry the preservation activity is not a result of the relationship, but its condition: it is a safe-deposit box as long as it is found in storage places. In this author's view, the relationship is more that of a lease, but only in the enjoyment of the space put at his disposal, while the cooperation of the bank for opening and closing the box has not the legal nature of a lease. It should be noted that this definition of the safe-deposit box contract is also supported by the Albanian legal doctrine.[45]

But other authors emphasize that we are dealing with a deposit contract. The facts that the items deposited in the safe-deposit box are individually specified items, and the fact that the bank would be responsible if the items lost, except for the force majeure, are arguments that support this thesis. However, the differences that exist between them reject this variant. The bank is limited to the organization of the client’s access in the cassette without being familiar with the objects to be placed: different from the deposits, where the contract has no real character, but consensual character.[46] The Bank does not act as the depositary, as it does not possess the items placed in the box and does not necessarily know the nature or value of the items that will store.

In the same way, safe-deposit boxes differ from the bank deposits. First, bank deposits are real contracts, while safe-deposit boxes are a consensual contract. Second, the object of bank deposit is only money or titles in administration, whereas the safe-deposit box is wider, including each item individually defined, which is not dangerous for the security of the bank. Thirdly, in the safe-deposit boxes the object is owned by the client, and in the case of a bank

[40] Benabent, A., op.cit., pg. 382
[41] Malaurie, Ph., Aynes, L., op.cit., pg. 331
[42] Civ. Cass. III, 20 nov. 1991
[43] Galgano, F., op.cit., pg. 394-395
[44] Ferri, G., op.cit., pg. 946
[45] Misha, E., op.cit., pg. 105
[46] Malaurie, Ph., Aynes, L., op.cit., pg. 473

deposit cash amounts become the property of the bank, which is obligated to return items of equal value. Fourth, in the bank deposit contract, the object put on deposit is known by the bank, whereas in the safe-deposit box contract, the bank offers safety services and does not necessarily know what the customer deposits in.[47]

Some other authors prefer a third line. According to the authors, Gevalda and Stoufflet, we aren't dealing here with a deposit contract or a lease. The Bank does not act as depositary of objects located in the safe-deposit box, it does not possess them and does not necessarily know the nature or value of objects that it will store. In the same way, these authors "refute" the hypothesis of the lease. Differently from the rental relationship, in this case the client cannot use the box immediately and directly. He does not enjoy directly the box, but under the supervision of the bank. According to them, it is the case of an autonomic contract, *sui generis*: *contract of preservation (contract de garde),* which is more acceptable in civil law, because it justifies the appropriate law for the assessment of the professional responsibility of the bank.[48] The same authors point out that given that we are dealing with a preserving act, any person can enter into this contract, even persons with inability to act. In terms of the Albanian legislation, this seems unlikely because the Civil Code recognizes the right of persons aged 14-18 to deposit their savings, which does not mean their placement in the safe-deposit box, but in a bank deposit. Whereas, for persons under 14 years of age it is impossible to do so.[49]

CONCLUSIONS

Bank contracts are created as a result of banking activities. Some of them have as a starting point the classical contracts. So, for instance, it is indisputable the origin of opening a bank deposit and loan, from a general deposits and loan, which, with the continuous evolution of the bank law, were arranged with special norms different from the traditional contracts. While other contracts such as bank rebate and advanced payment are an "invention" of the banks themselves. Despite the similarities with the classical contracts, banking contracts have a different legal nature. Bank deposits are a typical contract, specifically adjusted to the Civil Code. However, it can be termed as an irregular deposit because it meets the requirements defined: the depositary (the bank) has the right to consume the thing deposited; the depositary is obligated to return the item equivalent to the deposit and the depositary is not excluded from the responsibility in the event of force majeure conditions. The bank credit is a particular contract distinguishable from the loan. Differently from the loan contracts, it is a consensual contract; It is always with interest rates and can be used for other transactions. It also cannot be considered as a unilateral promise or as supply contract as long as there is a special legal regulation in the Civil Code. An advance payment is a *complex contract*, which consists of two operations which are *condito sine qua non*: the operation of credit and the guarantee operation. We will not have advance payment if these actions do not accompany each other.

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[47] Nuni, A., Mustafaj, I., Vokshi, A., op.cit.,pg. 214
[48] Gevalda, Ch., Stoufflet, J., op.cit., pg. 394
[49] See article 7, 8 of the Civil Code. Article 7 KC: "*A child who has reached the age of 14 years may perform legal transactions only with the prior consent of his legal representatives. However, he can participate in social organizations, dispose the earnings from his work, deposit savings, and dispose these deposits himself.* "Article 8 Civil Code: "*A child who has not reached the age of 14, is unable to act. He can conduct legal transactions that adjust his age and which are fulfilled on the spot, as well as actions that bring benefits without compensation. The other legal actions are performed by his legal representative*. "

In the absence of the mortgage guarantee, depending on the case we have a loan contract or the opening of a credit, but not bank advances. As far as the legal nature is concerned, it is a kind of loan if it is realized in the simple form of an advance and a kind of credit opening if it is realized in the form of the advance payment on a current account. In the same logic, a bank rebate cannot be characterized as a sale, loan, ceding, or liquidation contract. Here we are dealing with a complex operation, where the operation of credit with the operation of guarantee are combined. Finally, as far as the safe-deposit box is concerned, it has the legal nature of a separate contract, *sui generis*. The bank is responsible for the loss of items inside the storage environment, therefore it cannot be categorized as a lease contract. Also it cannot be qualified either as a deposit contract, because we are not dealing with a real contract, also because the bank does not possess the items delivered for storage.

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