

The Rheology and Domestic Choice of the Concept of Negotiable Securities

LIU Linlin^{[a].*} ; FEI Yanying^[b]

^[a]Ph.D., Master Supervisor, Lecturer, Department of Public Administration and Law, Dalian University of Technology, Dalian, China.

^[b]Ph.D., PhD Supervisor, Professor, in Department of Public Administration and Law, Dalian University of Technology, Dalian, China.

*Corresponding author.

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Abstract

The concept of negotiable securities is an important part of the basic theory of negotiable securities, and also the logical starting point of securities study. Negotiable securities have experienced many times of baptism from the concept doctrines whose purpose is to realize the legal and economic functions since it has been created in 19th century as an unique legal name of the continental legal system. However, the theories of commercial law of China do not do well in the study of the concept of negotiable securities, not to mention the basic study of unfixed security theory, so it isn't conducive to developing the effectiveness of securities. By means of study on the rheology of negotiable securities concept, this paper analyzes the advantages and disadvantages of different concept doctrines and points out train of thought of the concept study of negotiable securities and its essential interpretation for theories of commercial law of China, which helps lay the foundation for theoretical study on negotiable securities.

Key words: Negotiable securities; Private rights; Possession; Circulation; Enforcement

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INTRODUCTION

Concepts have huge effects in theoretical constructions. Viewing the human history, scientific researches especially theoretical researches in some senses are the processes to propose, analyze, argue and accumulate concepts (Zhang, 2001). There are diverse written documents which are can be called as negotiable securities in life, but most countries of the continental legal system does not give a unified definition to negotiable securities in their substantive laws, so as the laws of China and Taiwan. If we establish its legal concept according to the common nature of negotiable securities in several laws, the essence of arguing negotiable securities will easily cause confusion, so we cannot understand the meaning of negotiable securities only by means of articles of law. In negotiable securities, rights combine with securities, and disposing of securities is disposing of the rights, which are the unique characteristic of the rights of negotiable securities. The scholars of the continental legal system explore the purpose of legal norms by the substantive law hermeneutics and explain the meaning of negotiable securities by legal hermeneutics to avoid conflicts and inconsistency between legal systems and legal applications, and make use of the concept of negotiable securities explained by legal hermeneutics to fully meet the legal and economic functions of negotiable securities. Exploring the nature of negotiable securities from feature of the combination of rights and securities, the scholars of the continental legal system have proposed a variety of conceptual theories. This paper analyzes the development of concepts of negotiable securities and makes definition of negotiable securities in line with Chinese legal philosophy and economic practices, trying to consult with the general concept and to give a good introduction to the basic theoretical research on negotiable securities.

1. THE CONCEPT OF NEGOTIABLE SECURITIES WHOSE CORE IS THE USE OF PRIVATE RIGHT

1.1 The Establishment of Theory of Private Law Relationship

German scholar Thöl believes that negotiable securities are the securities to recognize private property rights, which have been called as the theory of marketable products by the scholars of the continental legal system. However, the theory of marketable products cannot distinguish itself from the evidence securities

which recognize property rights, so it has been criticized by scholars in later. Scholar Savigny further studies the relationship of rights and securities and suggests that bearer securities are the transubstantiation (Verkörpern) of creditors' rights, and so gets similar conclusion that securities are the transubstantiation of rights, which is the famous theory of transubstantiation. A lot of schools have emerged hereafter such as the theory of transubstantiation of debt binding, the theory of transubstantiation of debtor's intention, and the theory of transubstantiation of rights.

German scholar Heinrich Brunner clarifies the nature of combination of negotiable securities and rights in private law relationship, which is called the theory of private law relationship. Brunner believes, Thöl's theory of marketable products is to understand negotiable securities by the general concept of property rights, and does not comply with the name of negotiable securities. Savigny's theory of transubstantiation does not clarify the legal character association between rights and securities, as it does not clearly recount the combination of rights and securities, and also does not clearly explain the relationship between creditor's rights and securities, hence it would easily cause the misunderstanding that loss or elimination of securities will simultaneously result in the loss or elimination of the rights recognized by the securities, and the theory cannot explain the invalidating judgment system of securities, so it still fails to explain the nature of negotiable securities.

Brunner believes that the key to understand the concept of negotiable securities lies with the fundament issue of "the value of securities arises based on the value of rights". From the perspective of association between securities and rights, negotiable securities do not contain material properties. Right of securities belongs to private right, therefore stamps and stamp duties are not negotiable securities. Securities makes the occurrence, transfer, and performance of rights paper-based. If the concept of securities to be restricted as the embodiment of rights, negotiable securities can only realize the function of evidence laws, and therefore the securities with only the necessity of occurrence of rights should not belong to negotiable securities. To achieve the function in private laws, the concept of negotiable securities should include the three aspects of the occurrence, transfer, and enforcement of documented rights. The documented occurrence of rights has significance in private laws. It not only proves the establishment of legal acts, but also plays a role in complement of legal acts. Therefore, legal acts are completed upon securities completion acts, and securities completion is the formal condition for occurrence of rights. As securities to be disposed, occurrence of rights of negotiable securities has no significance in evidence laws, and it's only means to prove, which is different from a simple proof securities. The securities which recognizes occurrence of rights have different functions in private laws to those which recognizes transfer and enforcement of rights. For transfer and enforcement

of rights, securities not only have significance in evidence laws, but also have value in private laws. The value endowed with negotiable securities does not refer to the value of the securities itself, but the economic value of the recognized rights under it. Rights of securities are private rights of economic value, and the private rights with economic value are realized by the transfer or performance of rights, namely, turning securities into cash. Therefore, negotiable securities link the function of value realization of documented rights with the function of private laws, so transfer and enforcement of securities rights not only meet securities functions, but also realizes value of the rights (Teruhisa, 1952). Therefore, Brunner points out that negotiable securities are the securities which recognize private rights, and the realization of value of private rights takes the possession of securities as the condition, and the use of private rights mainly refers to transfer and enforcement of rights; in other words, negotiable securities are the securities which recognizes private rights, and transfer or enforcement of securities rights can realize the function of private laws, and transfer or enforcement of rights takes the possession of securities as the condition.

1.2 Evaluation of the Theory of Private Law Relationship

The theory of Brunner has an important theoretical significance. It explores the essence of negotiable securities through the realization of right value (namely the function of securities in private laws), studies the significance of securities during the transfer and enforcement of rights, associates target value of negotiable securities with its right value, and defines the function of securities during the transfer and enforcement of rights. What is the significance of securities during the transfer and enforcement of rights? Whether the two are completely independent or parallel to each other? He points out that securities are the essential and formal conditions to enforce rights, even rights are to be fully transferred, it takes possession as the condition, and delivery of securities is the essential requirement of transfer of rights. Brunner theory has an impact over several countries of the continental legal system. The Japanese academics followed his theory and went through two times of definitions of negotiable securities. The earlier theory held that negotiable securities were the securities which recognized private rights. The whole or a part of the occurrence, enforcement, and transfer of rights took securities as the necessary condition (Kotaro, 1960); Current theory holds that negotiable securities is the securities which recognizes property rights or property interests in private laws, and the use or disposition of rights takes possession of securities as the necessary condition (Kawamura, 2007).

However, Brunner theory does not explain why the occurrence, transfer, and enforcement of rights take the possession of securities as the necessary condition. Such a concept does not clarify the essential attributes of negotiable securities, and setting concept only based on the external function of securities makes

people doubt. According to the theory, from the perspective of the basic structure of negotiable securities, we can know the state of combination of rights and securities, and the definition can be feasible according to the theory of private laws, but the concept which he constructs is only ideological product without the technical basis which can converse the phenomena into laws. It does not clearly point out that the use of rights under securities takes the possession of securities as the necessary condition (Kimura, 1992). At the same time, from the view of private law relations, there are only bills which are in line with the concept of negotiable securities. As its transfer and perform rights is on the premise of possession of securities, Bills of lading and warehouse receipts don't belong to negotiable securities; transfer of rights of registered shares takes the possession of securities as the premise, the rights of registered shares can be enforced according to the shareholders name list, they are also not negotiable securities. It would appear that the concept of negotiable securities by private law relations is too narrow.

2. THE CONCEPT OF NEGOTIABLE SECURITIES WHOSE CORE IS POSSESSION OF SECURITIES

2.1 The Establishment of the Theory of Apparent Rights

German scholar Ernst Jacobi published *Negotiable Securities in German Civil Laws* in 1901, which has clearly explained the reason that securities was the reflection of rights, studied negotiable securities in legal provisions, explored the commonness, basis and purpose of securities, and made a general description of the definition of negotiable securities. Article 1 of German Commercial Law lists the “negotiable securities for fundamental commercial transactions” which are called commercial securities, including bearer securities, orders of payment, and a large number of issued registered securities which record the same content. The first two are certainly negotiable securities. The third does not retain the notice clauses for transfer of general creditor's rights, and requires creditors to present transfer certificates and securities, which are the reflection that rights performance takes securities possession as the premise; In *German Civil Procedure Law*, seizure of rights of negotiable securities refers to the seizure of securities, which means rights cannot be enforced, and it needs disposing securities for exchange for value; Article 369 of German Commercial Law provides that merchants can set aside negotiable securities to realize the lien, which also reflects that rights performance takes securities possession as the premise; negotiable securities in securities trade market also means that rights enforcement takes securities as the premise. Therefore Jacobi concludes that negotiable securities are the securities which recognize rights, and enforcement of the rights takes securities possession as the premise. Jacobi's theory has obtained supports by substantive laws.

To explain that possession of securities is the prerequisite for performance of rights, Jacobi has set three theoretical fulcrums. Firstly, when rights to be enforced the possession of negotiable securities is meaningful in substantive laws to both obligee and obligator, which are different from other securities. Secondly, the nature of the documented rights is not a part of the concept of negotiable securities, and the nature of securities rights is determined by the authority of the indication. Thirdly, according to the types of obligee specified on the securities, negotiable securities fall into registered securities, orders of payment and bearer securities. The obligee trusts the content recorded on the securities, hence negotiable securities are called credible securities (literal notes). Jacobi has studied the influence of securities possession between the present or future obligee and obligator, respectively analyzed bearer securities, orders of payment, simple orders of payment, registered securities and registered member securities, and concluded that possession of securities is the qualification requirement for obligee and is the reflection for possession of rights. Jacobi's explains in securities possession accord with German civil law theories. Possession of negotiable securities is the qualification requirement for the obligee, and the way that the obligee declares their qualification is to render the securities, and the obligator does not need to examine whether the right itself is flawed, so possession of securities endows trust to the obligator, which is the commonness of all negotiable securities. Therefore, Jacobi believes that the essence of concept of negotiable securities should include the following points: firstly, transactions between obligators and all obligees are determined by possession of securities, and possession of securities has the effect to decide the real obligee. Secondly, if the obligee does not enforce rights in accordance with the qualification of securities, he cannot claim the payments specified on the securities. Thirdly, when rights of securities have been transferred and securities have been delivered, the obligator cannot oppose the legal transfer of securities even he does not know the rights have been transferred.

2.2 The Evaluation of the Theory of Apparent Rights

The greatest contribution of Jacobi theory lies in the study of securities possession on the relationship between the parties involved, especially in the discussions of bearer securities that have solved two problems, the first is who is the obligee of bearer securities; the second is that possession of bearer securities produces apparent rights effectiveness. For the former, Term 1, Provision 793 of German Civil Law stipulates that the holder of bearer debt certificate can request the issuer to perform the payment as per the promise (except that the holder do not have right to dispose of the certificate), and the issuer is exempted for fulfilling the payment to the holder who does not have the right of disposition. The disposal right of certificate is generated from certificate ownership and limited property right (such as pledge). The ownership right of certificate corresponds to the creditor's right on securities,

and the limited property right corresponds to the limited right on securities, which is called the parallel phenomenon between the ownership right of securities (Recht am Papier) and the rights on securities (Recht aus DEM Papier). The stipulations for holders of bearer debt certificates in German laws are applicable to the holders of bearer securities, and the rights owner of bearer securities is the securities holder. For the latter, firstly the apparent rights are conducive to protecting the obligator. The holder of securities is the obligee or agent, and even if he makes payment to the holder whom he knows does not have disposal rights, the obligator does not violate the principle of reliance. However, if the obligator knows the holder does not have rights and still pay when there is clear evidence showing that the holder has no such rights, the obligator is usually considered as violating the principle of reliance. Secondly, apparent rights are conducive to protecting the obligee. From the perspective of claim responsibility and proof responsibility, apparent rights can liberate the obligee from claim responsibility, and proof responsibility of lacking of disposal right of securities belongs to the obligator. Thirdly, apparent rights are conducive to protecting the bona fide third party. If bearer securities are regarded as movable properties, they can be applied with the principle of acquisition in good faith, and possession of securities has effect under apparent rights to the third party in good faith. Therefore, possession of securities not only exempts the obligator of bearer securities from the review obligation that whether the holder of securities is the obligee, but also exempts the obligee from the proof obligations, and even if the holder acquires securities from a person who does not have rights, he should also be protected by laws.

Jacobi defines the concept of negotiable securities based on Brunner theory, taking the circulation of rights as the external goal of negotiable securities, therefore excludes registered securities from the scope of negotiable securities, so endowing the rights of negotiable securities with apparent forms. Although criticized by other scholars, he believes that if the extrinsic goal of negotiable securities lacks internal basis, the concept of negotiable securities can be derived from the external goal; but current laws have common provisions for negotiable securities, so that the concept of negotiable securities is not congenitally constituted but determined by substantive laws. Therefore, taking liquidity as the external goal of negotiable securities has legitimacy.

From Jacobi's theory of apparent rights, it can be seen that in the developmental process of laws negotiable securities have demonstrated different forms. His theory studies various regulations from the perspective of legal basis and legal objective, explores the concept of negotiable securities in substantive laws, and tries to grasp the nature of negotiable securities. These methods have been implemented in all his discussions and are great contributions. At the same time, Jacobi seeks the essence of negotiable securities in apparent rights, introduces liquidity, and takes the economic purpose as the external purpose,

to make sure the evolutionary method of liquidity effect preferable. However, the difficult problem is about the research of registered securities, which in his concept of negotiable securities lack clear explanation and definition, that is a great regret. In spite of this, Jacobi's concept of negotiable securities has the liquidity, explores the nature of negotiable securities from apparent rights, and skillfully depicts the principles for laws of negotiable securities. It is the origin for Jacobi's negotiable securities law system, and has positive significance to theoretical studies on negotiable securities laws.

3. THE CONCEPT OF NEGOTIABLE SECURITIES WHOSE CORE IS RIGHTS CIRCULATION

3.1 The Establishment of the Theory of Liquid Securities

German scholar Adler holds that the basic idea of negotiable securities laws is to promote the liquidity of securities rights. The disposal of securities rights is carried out according to the disposal of securities, based on which the concept of negotiable securities should re-examine its intrinsic goal. The transfer of rights of bearer securities is based on the transfer of ownership of securities, so is the orders of payment. Therefore, the concept of negotiable securities should be expressed as that negotiable securities are the securities which recognizes property rights, and the disposal of recognized rights is based on the disposal of securities (Izumida, 1992). Adler's theory is called as the theory of liquid securities. The types of negotiable securities include bearer securities and orders of payment, and registered securities are similar to negotiable securities, which are the intermediate form between negotiable securities and evidence securities.

The theory of liquid securities is in the minority position in Japanese negotiable securities law theories. Among them, the Honma theory considers that negotiable securities refer to the transformed rights or transfer of other legal rights and the securities which takes transfer as the prerequisite (Kiichi, 1932). The reason is that the purpose of negotiable securities is to promote liquidity of private rights. The Ishi theory holds that negotiable securities are the securities which recognizes private rights, and transfer of rights takes securities delivery as the premise (Ishii & Otori, 1976). The reason is that the combination of rights and securities is not for the enforcement of rights but on the liquidity of rights. The enforcement of rights of registered shares does not take securities as the necessity, and transfer of rights of registered shares takes the delivery of securities as the necessity. The Suzuki theory holds that negotiable securities are the securities which recognizes private rights, and transfer and exercise of rights take securities as the necessity (Takeo, 1957). The reason is that the transfer of rights takes securities as the necessity, which must be established on the premise that enforcement of rights takes securities as the necessity.

The transfer of rights of registered shares eventually takes securities as necessity, and the reason is that the rights are to be exercised eventually upon presence of securities.

3.2 The Evaluation of the Theory of Liquid Securities

The theory of liquid securities holds that the purpose of combining rights and securities is transfer behaviors. Considering that the main purpose of rights and securities combination is to promote circulation of rights, the recognized rights must be transferred together with securities. This concept has always been reflected on bearer securities and orders of payment when which have been disposed the recognized rights have also been disposed. However, whether this means the promotion of liquidity is the decisive factor which constitutes the recognized rights of negotiable securities? The theory of liquid securities differentiates registered securities from orders of payment, which also has flaws in the argument. Prohibit endorsement bill refers to the bill which records negative indicating wordings, that no longer belongs to negotiable securities according to the theory of liquid securities, and the bill which does not show negative indicating sentences belongs to negotiable securities. So when the bill which records negative wordings is issued, is it negotiable security? Japan laws don't regard order bill of ladings as negotiable securities, but the bill which records positive sentences belongs to negotiable securities. The theory of liquid securities takes registered securities as the securities similar to negotiable securities, and registered securities conform to provisions of negotiable securities to a certain extent, and also admit the principle of obtaining with good will, which does not clearly differentiate from the theory of private law relations. Brunner theory establishes the concept of negotiable securities based on a mean of circulation, despite its theoretical terms have been generally accepted, it cannot avoid the problem of distinguishing securities which has the similar nature, especially the problem of cannot elaborate registered securities. Chapter 33 of Swiss Debt Act 1936 has designed the general rules for negotiable securities, which have clearly defined that registered securities are negotiable securities. The definition of negotiable securities in the provision 965 of the Civil Law: negotiable securities are the securities combining rights and certificate, and rights cannot be claimed or transferred without certificate. This is the classic definition of negotiable securities by continental substantive laws. Compared to the theory of liquid securities, the concept of negotiable securities in Brunner theory is more superior.

4. THE CONCEPT OF NEGOTIABLE SECURITIES WHOSE CORE IS TO PERFORM RIGHTS

4.1 The Establishment of the Theory of Enforcement of Rights

This is the generally accepted theory of negotiable securities in current Germany, which holds that the enforcement of private law rights on negotiable securities takes

the possession of securities as the necessity (Fukutaki, 1998). The enforcement of rights is the decisive factor of the necessity (concept of negotiable securities). This factor is not drawn because rights are to be disposed according to the disposal of securities, but because enforcement of rights takes securities possession as the premise. The essence of negotiable securities means the exclusive possession, and securities as a medium is able to prove the existence of the recognized rights, therefore, not only credible securities belong to negotiable securities, but also bearer securities belong to negotiable securities. Scholar Hueck believes that the purpose of issuance of negotiable securities is to expand the scope of rights on the basis of combination of rights and securities, which can be seen from the stipulations that exercise of rights must also be compliant to the property law. Scholar Zöllner holds that negotiable securities are the securities under which rights cannot be exercised without securities and rights can only be proved with securities. Because stock storage, bill presentation, and bond delivery take securities possession as the necessity, so registered securities is also negotiable securities (Ryozo, 2007).

4.2 The Evaluation of the Theory of Enforcement of Rights

The theory has been formed on the basis of amendment of Brunner theory. The main feature of negotiable securities system is to obtain the benefits of the legal system through combination of rights and securities, and indeed this is the starting point to define the concept of negotiable securities. No matter as the endorser in the intermediary legal relationship or the third person, the securities holder can obtain benefits through the enforcement of the rights, and the obligator can make benefits by refusing to perform the payment. The concept of negotiable securities should be defined around performance of rights. Undeniably, enforcement of rights takes the presence of securities as the premise, but the focus of negotiable securities cannot be polarized to be the presence of securities. While considering the significance of combination of rights enforcement and securities, clarifying the reason of strengthening the combination of securities and rights, and ensuring holders to obtain benefits, the position of the assignee should also be strengthened, so the flow of recognized rights can be promoted. Therefore, the concept of negotiable securities can be deduced not only from the performance of rights, but also from transfer of rights.

5. THE BASIC IDEA OF DOMESTIC CHOICE OF THE CONCEPT OF NEGOTIABLE SECURITIES

It can be found from the rheological studies on the concept of negotiable securities that the theories are the elaborate concepts emphasizing one or two aspects of negotiable securities based on Brunner theory of performance of rights. Therefore, some scholars have called this as the contention between monism and dualism of

basic elements of negotiable securities (Wang, 2004), but the domestic civil and commercial theories do not have a lot of discussions on the concept of negotiable securities. The definition of negotiable securities made by Professor Xie Huaishi 20 years ago has been the basis for domestic studies on securities, whose writings say: Negotiable securities are the securities which recognize the private rights of property value. The occurrence, transfer, and enforcement of rights in whole or in part take securities possession as the necessity. With the increase in the types of securities, this definition becomes too narrow, so another definition has been adopted. Negotiable securities are the securities indicating private rights, and the performance of rights takes the securities possession as the necessity (Zhao, 1997). The former definition is called as the narrow negotiable securities, also known as the complete negotiable securities. The latter is called as the broad negotiable securities, also known as the incomplete negotiable securities. Scholars in Taiwan usually adopt the narrowly defined concept, which is consistent with the above mentioned Japanese early general concept. Some scholars support the current Japanese general concept (Li, 2004), while some others support the current Japanese minority concept (S. X. Zeng, C. M. R. Zeng, & W. R. Zeng, 2002). In short, influenced by German and Japanese laws, the researches of negotiable securities of China still stay in the initial stage of German and Japanese studies. However, securitization of rights is very worthy of study. Securitization is the process which converts non-securitized rights into securitized rights, whose essence is the process to coordinate and integrate legal systems and create a series of legal tools so that non-securitized rights can be converted into securitized rights. Hence, the research of our country on the concept of negotiable securities has started from securitization of rights, which is consistent with the concept that has been founded the earliest in Germany.

Terms of negotiable securities have been applied as early as in 1854 *Non-Litigation Procedure Laws* of Austria and in 1861 *Old Commercial Code* of Germany. However, countries usually explain it according to legal purposes and adjusted ranges, resulting in the embarrassing situation that the terms of substantive laws cannot get rid of legal phrases. The concept of negotiable securities proposed by scholars of the continental legal system has changed the use chaos of the term of negotiable securities in substantive laws. From Germany general concept based on Brunner theory it can be seen that the differences among liquid bearer securities, orders of payment, and illiquid registered securities cannot be ignored. The theory holding that performance of rights takes securities as the necessity has made an opposite conclusion with the theory focusing on liquidity on the issue of whether registered securities is negotiable securities, so opposition of theories is not practical, and law systems of negotiable securities without the discussions of registered securities are incomplete. Chinese commercial law theories have a common understanding on negotiable securities based on various concepts and theories. Due to the lack of rheological researches on the concept of negotiable securities, a variety of negotiable securities research lack unified

theoretical basis, thus have not formed the domestic understanding of the concept of negotiable securities. Chinese research on negotiable securities should be based on such a basic idea: to look at the nature of negotiable securities from the perspective of liquidity, what can be found is the narrow concept of negotiable securities. To look at the nature of negotiable securities from the perspective that performance of rights takes securities as the premise, what can be found is the broad concept of negotiable securities.

CONCLUSION

Civil and Commercial Laws in China do not have a conclusive provision on negotiable securities. The terms of negotiable securities in commercial separate laws cannot be directly converted into the concept of negotiable securities in theories. In contrast, commercial legal theories should understand the nature of negotiable securities and determine the concept of theories, based on which the meaning of negotiable securities is to be defined and explained. Despite of the divergences among these theories, the explanation of combination of rights and securities has become the basic theoretical fulcrum for a variety of concepts and theories for negotiable securities. Faced with the various types of negotiable securities, the Chinese commercial law theories are bound to study the general conclusion of various securities, thus the rheological studies on the concept of negotiable securities have become particularly important.

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