CREDIT IN MEDIEVAL AND POST-MEDIEVAL ROMAN LAW. The idea of "credit" has its roots in the Roman concept of *creditum* (to believe). In a broad sense, this concept appears in Justinian's law books as the denotation for claims generally (for example, Digests [D.] 16.2.1, concerning setoff of debts and claims). Thus, a creditor is anyone who puts another in his or her debt; he or she is the owner of only a claim, in trust that the debtor will make good on this. In particular, a creditor is someone expecting monetary payment (D.50.16.10–12). This broad idea of creditor remains in force in the *ius commune* (common law; Accursius, gloss to *Insti-tutiones* [I.] 4.6.6, "Si quis in fraudem," fol. 56v; Glück, § 776, pp. 460–461). In a narrower sense, "creditor" designates one who has entrusted an object or piece of pro-perty (*res*) to another, and awaits its return (D.12.1.1.1). Within this mode of entrustment (*fides*), loan (*commodatum*) and pledge (*pignus*) are to be distinguished from credit (*mutuum*; D.12.1.1.1). *Commodatum* and *mutuum* remained distinct from one another both in the content of contracts and in the Latin legal idiom of the Middle Ages and (early) modernity. The national languages, in contrast, did not always distinguish—even in juridical texts—between loan and credit: the German *Leihe* served for *Leihe* (loan), *Darlehen* (credit), and *Lehen* (feoff); the French *prêt* for *commodat* (loan) and *prêt à consommation* (credit); the Italian *prestito* for *comodato* (loan) and *mutuo* (credit); and the Spanish *préstamo* for *comodato* (loan) and *simple pré stamo* (credit).

The most important sources concerning the thing that was entrusted (*res credita*) as credit (*mutuum*) in its narrowest sense (Glück, § 776, p. 461) are to be found in Justinian's *Digests* (D.12.1) and in his *Codex* (C.4.1). There are also innumerable local or territorial regulations. Because of its strong similarity to credit, deferment of payment (*pactum de non petendo*, *pactum conventum*; see I.4.13.10) also appears in the innermost concept of *res credita*. In the following, however, only credit will be considered.

Definition of Credit. *Mutuum* is a contract wherein a thing that is defined in terms of number, dimension, or weight (that is to say, defined solely by its quality and quantity, not by its physical identity) is given; later, another thing of the same quantity and quality is to be returned (D.12.1.2; Pufendorf, 1.15.11, p. 244; Noodt, 12.1, pp. 220f.; art. 1894 Code Civil des Français [Civil Code of the French] 1804). Of the things suited for this, money is particularly prominent; it is to some extent still today understood as a physical object. The recipient of credit accepts the object into his or her possession and may use it to the point of consumption (cf. *prêt à consommation* in art. 1892–1914 Code Civil; *verbruikleening* in art. 1791–1806 Burgerlijk Wetboek [Dutch Civil Code], 1838; both terms mean "loan for consumption"). This differentiates credit from loan (*commodatum*) and rent (*locatio [conductio]*) which entitle the recipient to only nonconsumptive use.

Credit can exist, in principle, without payment. Should money be given as the object of credit, the recipient owes no interest (*usurae*, *interesse*). The parties to the contract can, however, agree to set a rate of interest. Strictly speaking, credit with interest should be called not *mutuum* but *faenus* or *foenus* (D.22.2). Over the course of time, though, these ideas have been less and less sharply separated, and *mutuum* can also designate credit with interest (as in Pufendorf, 1.15.11, p. 245). Because of this, more recent

codes have integrated concepts of and regulations for credit both with and without interest (art. 1892, 1905 Code Civil 1804; art. 1753, 1755 Código Civil [Spanish Civil Code] 1889; § 607 Bürgerliches Gesetzbuch [German Civil Code, BGB] 1896; § 488 Bürgerliches Gesetzbuch [German Civil Code, BGB] 2002).

Contracting for Credit. The contract of credit emerges through an oral or written agreement (*consensus*). Following Roman law, however, the contract only comes into force when the credit-object is transferred to the recipient of credit (to be distinguished from the "borrower" in cases of loan for the aforementioned reasons), especially in cases of money credit involving the transfer of capital. The credit transaction is a so-called real contract: only with the beginning of its execution does it come into force. Something must pass from the property of the creditor to the property of the recipient of credit (I.3.14.pr; D.2.14.1.3; D.12.1.1.1–12.1.2.2; 1.11.653 Allgemeines Landrecht für die Preussischen Staaten [Prussian Civil Code, ALR] 1794; art. 1892 Code Civil; § 983 Allgemeines Bürgerliches Gesetzbuch Österreich [ABGB; Austrian Civil Code] 1811; art. 1819f. Codice Civile del Regno d'Italia [Civil Code of the Kingdom of Italy] 1865; art. 1753 Código Civil; Windscheid and Kipp, vol. 2, § 370.2, p. 572).

However, that said agreement is sufficient to create an effective precontract. This precontract (*pactum de mutuo dando*) binds the parties to, respectively, give and receive credit (§§ 936, 983 ABGB; Windscheid and Kipp, vol. 2, § 370.2, p. 573). This tendency to accord binding force to simple speech was supported through regional legal customs most especially in Central Europe; these often did not recognize such a thing as a real contract, considering credit instead as a consensual transaction like any other contract (Stryk, 12.1.1–12.1.5, pp. 394–398), and thus did not see any need for the construction of a precontract. Further, this allowed an open monetary debt to be converted to a *mutuum* through simple consensus.

In addition to the real contract of the *mutuum* (and the precontract thereto), the formal transaction of stipulation (*stipulatio*, *verbis obligatio*; I.3.15) was available to the contractual parties. Generally, stipulation was considered—as it was already in late antiquity—to be not only the formally spoken word, but also any written compact (whether or not it was notarized or legally registered). Initially, people saw stipulated credit as a sort of *creditum* transaction different from *mutuum*; over the course of time, however, the distinction disappeared, and people came to see stipulated credit, too, as a *mutuum* (Faber, p. 7, on D.12.1.2.5). In certain cases, the written compact was even an essential requirement (1.11.729 [ALR]). Although the transfer of capital was not necessary for the validity of the stipulation, the recipient of credit owed repayment only upon receipt of that capital (D.12.1.30). Up to that point, the plea that the money had not yet been paid remained available to the recipient (*exceptio non numeratae pecuniae*; C.4.30). This plea worked from the perspective of natural reason (*ratio naturalis*) and natural equity (*aequitas naturalis*), because it protected the recipient of credit from extortion (Baldus, Rubrica zu C.4.30, fol. 79 recto). The recipient, however, could freely force the creditor who had already paid out the money into a situation in which he or she was unable to prove that fact.

Modern jurisprudents developed the contract of credit into a purely consensual transaction (unclear in § 607 BGB 1896; significantly clearer § 488 BGB 2002; § 522 Civil Code of Hungary 1959; art. 720 Civil Code of Poland 1964). But there are still more recent codifications that distinguish between a preparing consensual contract of credit and the final contract of credit that comes into force at the moment of payment (art. 806 Civil Code of Greece 1940; art. 1813 Codice Civile [Civil Code of Italy] 1942; §§ 241, 244 Zivilgesetzbuch [Civil Code of the German Democratic Republic] 1975; art. 807, 819 Civil Code of Russia 1995).

Who Can Accept Credit? Fundamentally, anyone capable of contracting can accept credit. There are, however, following the examples of antiquity, limitations for children under paternal power, wives, public servants, public bodies, and so forth (for example, 14.7, 22.2 Nürnberger Reformation 1479; 1.11.675–706 ALR; Windscheid and Kipp, vol. 2, § 373, pp. 583–590). Today, the European legal systems contain special provisions for the protection of consumers who seek credit (following European Consumer Credit Directive 87/102/EWG, 1986): the contract for consumer credit must be in written form, and the consumer has a right of withdrawal within a certain time limit.

Security. Security for the debt of credit must be specifically agreed upon by the creditor and the recipient of credit. Only as an exception does the creditor have a right to the property for which the recipient of credit has used the money; the same was true in sixteenth-century Augsburg city law with respect to construction (see also D.20.2.1). Anyone who gave the instructions to pay a credit out (a mandate to pay credit, or commission of credit) to a third party was liable to the creditor like a guarantor (I.3.26.6; § 778 BGB 1896).

Terms of Repayment. The length of a credit generally depends upon the arrangement in the contract. Either it has a time limit or it does not; in the latter case, it may either be called in at any time or at certain times, themselves subject or not subject to a period of notice (art. 1899ff. Code Civil; art. 1740 Código Civil; § 609 BGB 1896; Windscheid and Kipp, vol.2, § 371, p. 575; art. 1825ff. Codice Civile 1942). The money is to be replaced in the same currency and quantity (the nominal-value principle). The regulations do not treat in a unitary fashion the question of whether the recipient of credit owes an adjustment for the debasement of coinage in the meantime, or for other such losses of purchasing power, nor of what should happen when the agreed-upon medium of exchange

increases in value. This problem appears not only with credit, but also in general for longer-term payment obligations (2.28 Kursächsische Konstitutionen [Constitutions of the Electorate of Saxony] 1572; Faber, chap. 8, pp. 153ff. [on *creditum*]; 4.14.7 Codex Maximilianeus Bavaricus Civilis [Bavarian Civil Code] 1756; art. 1895 Code Civil; §§ 988, 989 ABGB). Modern adjudication and legislation have recognized adjustment as necessary only in cases of extreme change in the value of currency, as for example in Germany of the 1920s.

[*See also* Usury, *subentry on* Medieval and Post-Medieval Roman Law.]

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