

Bills of exchange and promissory notes – comparative perspective

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Abstract

This paper presents the legal system for the bills of exchange and promissory notes, and also the similarities and differences between the bills of exchange and promissory notes in the Romanian law and private international law. This article analyzed: procedures for issuing bills of exchange and promissory notes, the essential terms must include bills of exchange and promissory notes, rights and obligations arising from document exchange and the promissory notes, transmission of bills of exchange and promissory note, presentation of bills of exchange and promissory notes for payment in the original or truncation (in electronic format), the law applicable to bills of exchange and promissory notes in international trade law. This article investigates and rules in the new Romanian Civil Code of the aspects of private international law on bills of exchange and promissory notes. The conclusions of this article emphasizes the particular usefulness of these debt securities for the contemporary market economy. The institutionalization of this debt securities circulation represents one of the most important contributions of the commercial law to the progress of modern commercial activity.

Keywords: bill of exchange, promissory note, drawer, drawee, issuer, acceptance.

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1. Introductory considerations

One of the modern legal forms of goods' circulation is represented by the circulation of deeds (titles) that incorporate certain patrimonial values. These values are circulating following the transfer of the deeds that represent them, deeds like: shares and bonds issued by holding companies, drafts, promissory notes, consignment notes etc.

The institutionalization of deeds' circulation represents one of the most important contributions of the commercial law to the progress of modern commercial activity.²

For the denomination of the titles that incorporate certain patrimonial values it is used the general notion of *debt securities* or *credit notes*. The term of

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² D. Galasescu-Pyc, *Bills of exchange and promissory notes*, Vol. I, Bucharest, "Tiparul universitar" Publishing House, 1939, p. 2.

debt securities is used in the Neo-Latin law. The notion of credit note is part of the German law.³

The credit note, following the incorporation of the claim right in the instrument, becomes a value-paper, which can be an object of property and of legal operations. The purpose of claim is closely related with the document's existence. Unlike any other instrument with legal effects, the credit note is essential for the purpose of the claim incorporated in it. This cannot be transferred without title, the payment cannot be requested without presenting the title, from the legal perspective it is not possible any valuation of the debenture stock without the title and the claim cannot be amortized without the title transfer.⁴

Therefore, the credit note can be defined as an instrument based on which, its legal owner is entitled to exercise, on the settled date, the right specified in the instrument.

The credit note has the following characteristics:

a) The instrument has constitutive character, and the right incorporated into the title does not exist without the relevant instrument;

b) The instrument has an official character, being mandatory to have a legal form;

c) The instrument has a literal character, due to right's coverage and nature, and also the right's correlative obligation are exclusively determined by the mentions contained by the instrument;

d) The instrument grants an autonomous right, because the right and correlative obligation determined by title, are independent towards the legal instruments from which there are determined (the fundamental legal relation), and in case of title transfer, the purchaser shall become the holder of an owned right, which is a new, original right, and not a right derived from the emitter's one.

Based on their content, the credit note can be categorized as actual, representative and equity.

The actual credit note, known as commercial effects, include the obligation to pay a certain amount of money or to give a quantity of goods determined by type or an amount of credit notes. Such securities are the bills of exchange, promissory notes, checks, bonds issued by companies, the insurance policy. The commercial effects fulfill the function of cash, as payment instrument. There are also credit notes because they grant to the owner the right to charge the amount shown in the document, and the debtor is entitled to due credit. As may be transmitted by means of commercial law, the commercial effects are considered negotiable securities.

The representative titles are those that grant for the nominated owner a real right over a quantity of goods in storage or in progress of transportation. For example: the consignment note, bill, receipt of deposit, warranty.

³ S. D. Carpenaru, *Roman Commercial Law*, "Universul Juridic" Publishing House, Bucharest, 2007, p. 547.

⁴ R. Economu, *Practical Manual for Exchange Law*, "Lumina Lex" Publishing House, Bucharest, 1996, p. 5.

The equity certifies only the quality as participant of a company and not a real right and does not constitute a promise for future benefits. For example: shares in an anonymous company, participation in a company of people.

2. Bills of exchange

The bill of exchange is widely used both in domestic and international commercial relations. It has been the object of a uniform legal regulation. In 1930, in Geneva, it was signed the Convention providing a uniform law for bills of exchange and promissory notes.

Although Romania did not accede to this Convention, most of the provisions of this uniform law were assumed by the Romanian law. Law no. 58/1934 on bills of exchange and promissory notes used as a model the Italian law on bills of exchange and promissory notes from 1933, which was based on the uniform law of bills of exchange and promissory notes.⁵

By O.G. no. 11/1993, and also O.U.G. no. 39/2008, there were applied some modifications and amendments to Law no. 58/1934 on bills of exchange and promissory notes.

The National Bank of Romania issued certain standard rules concerning the trade practiced by bank holding companies and other credit institutions with bills of exchange, promissory notes and checks, and also technical rules concerning the bills of exchange and promissory notes, according to the current international practices. It is about the Standard Rules no. 6/1994 and the Technical Rules no. 10/1994.

Also, the National Bank regulated a computerized system with the purpose to strengthen the safety regarding the credit of bills of exchange, promissory notes and checks, by creating the Center for Payment Incidents (Regulation no. 1/2001).

Although there is no legal definition, the bill of exchange was defined into the doctrine.

The bill of exchange is an instrument by which a person, named drawer or issuer, assigns another person, called drawee, to pay on the due term an amount of money to a third person, called beneficiary or to its order.

The name of bill of exchange derives from the Italian word *cambio*, which means exchange. In the regulation of the Commercial Code, the bill of exchange was also called draft or commercial paper.

Usually, the issuance of a bill of exchange has as base the existence of some previous legal relations between the interested parties, which have certain legal acts as fundament. Based on these legal relations, called fundamental relations, each person has the quality of creditor or debtor, within the legal

⁵ In regard to the origin of the bill of exchange and the legal evolution see D. Galasescu-Pyc, *work cited*, vol. I, p. 58-142, see also S. Cristea, *The bill of exchange in comparative law*, "Lumina Lex" Publishing House, Bucharest, 2001 and P.V. Patrascanu, *Bill of exchange, promissory note*, "All" Publishing House, Bucharest, 1994.

relations they participate in. By issuing a bill of exchange and a payment there are executed the obligations of the pre-existent legal relations.⁶

In doctrine, the debt of the drawer towards the drawee, which justifies the issuance of the bill of exchange, is called provisions or guarantee, the beneficiary's debt towards drawer is called supplied value.

We can observe that the issuance of the bill of exchange does not lead to the cancellation of the fundamental legal relations. These legal relations subsist, excepting the case when the parties agree for a substituted contract, meaning the termination of the old obligation from the fundamental relation and its substitution with a new obligation, determined by the exchange report (art. 64 from Law no. 58/1934).⁷

Being a credit instrument and, therefore, an official document, the bill of exchange has to contain certain essential mentions, and in their absence, the document does not have the power of an instrument of credit valuing, as granted by law to this type of instrument.

The essential mentions of the bill of exchange are:

1. the name of bill of exchange inserted into the title and expressed in the language used for its drafting;
2. the simple order, meaning the unconditioned order to be paid a certain amount of money;
3. the drawee's name;
4. specification regarding the payment date, meaning the due date;
5. the payment place;
6. the name of the person or upon whose order the payment has to be made;
7. the issuance place and date;
8. the drawer's signature.

The order clause is the essence of the bill of exchange and, therefore, it is not necessary to be included into the title, as special mention.

The instrument which lacks one of the essential mentions does not have the legal value of a bill of exchange. But this principle involve some exceptions: if the due date is not mentioned, the bill of exchange is legally deemed as payment on demand, if it is not specified the payment place, the law considers that the payment shall be made at the place mentioned near the drawee's name, if it is not specified the issuance place, the law considers that it is the place specified near the drawer's name.

⁶ In regard to the accommodation bill, see P. Demetrescu, *Bill of exchange, promissory note, check*, "Tiparul Romanesc" Publishing House, Bucharest, 1942, p. 35.

⁷ In regard to the exchange relation and the fundamental report, see M.N. Costin, V. Luha, *The structural characteristics of the bill of exchange in „Revista de Drept Comercial”* n. 4/1995, p. 44-46.

According to art. 8 from Emergency Order nr. 39/2008, any signature of the bill of exchange has to contain:

a) In clear, the surname and name of the natural person or the name of the legal person or of the entity that undertakes;

b) The holograph signature of the natural person, respectively of the duly representatives or assignees of the obliged legal persons, the representatives or assignees of other categories of entities that use this kind of instruments”.

In all legislations, the property of a bill of exchange, with all the rights incorporated in it, are transferable by endorsement. The endorsement is an exchange contract, concluded between a party called endorser, and another party called endorsee, based on which the property over the bill of exchange is transferred from the first one to the latter. This legal operation is executed by specifying in writing on the bill of exchange or on the document attached to it, the name of the endorsee, dated and signed by the endorser.

The principle *nobody can transfer more rights than he, himself, has* is explained not only in case of restrained endorsement, but also for the cases when by endorsement it is transferred a bill of exchange that already reached its due date or which is not honored, and therefore the new endorsee receives a bill of exchange involved with all the legal liabilities.

The endorsement is specific institution of the Bill of Exchange Law of the countries that adopted the Geneva uniform law. It is not known to the Anglo-American Law. The endorsement is the instrument based on which a person called guarantor, guarantees the payment of the bill of exchange towards a debtor, called guarantee. It can be a guarantor, a person who is not part of the bill of exchange or even a signatory of the bill of exchange. The guarantee can be the acceptor, drawer, endorser or even the guarantor. If into the bill of exchange it is not specified the person for whom it was granted the endorsement, it is deemed that it was granted for the drawer, who is the principal debtor. The endorsement is granted on the bill of exchange or on its attachment, being inserted the mention for endorsement or for guarantee, followed by the guarantor's signature.

The endorsement can be granted for the whole amount from the bill of exchange or only for a part of it. The guarantor has the identical obligation, with the same content and the same coverage, as the guaranteed obligation. Therefore, the principle of non-opposability of exceptions is valid against guarantor, as it was valid also against the guaranteed debtor. In the same way, the principle of jointure of the debtors' bill of exchange is applicable also for the guarantor. The guarantor who pays the bill of exchange obtains all the rights determined by the bill of exchange, against guarantee, and also of the ones maintained by the latter, based on the bill of exchange.

In regard of acceptance, we can say that the drawee is not part of the exchange instrument, although he has the drawer's order to pay. The drawee becomes exchange debtor by acceptance. Hence, the acceptance is the act based on which the drawee engages himself to pay the amount from the bill of exchange to the person who shall be its legal holder on the due term. By acceptance, the drawee

becomes exchange obligor in a joint manner, along with the drawer, endorsers and guarantors. But while the drawee undertakes the obligation to pay, the others undertake the obligation to determine the payment, because they are held to pay only in case the drawee refuses the payment. The obligation undertaken by the drawee is literal, autonomous and abstract. The exceptions that can be opposed by the drawee towards drawer cannot be invoked against the other holders of the title.

The presentation to acceptance is facultative. If the drawer inserts into the bill of exchange a clause by which it is imposed the obligation of presentation of the title's holder on acceptance, the absence of the title to acceptance, on the settled term, has as consequence the lapse of the holder in exercising the right of regress. But the holder of the bill of exchange shall maintain the rights determined by the bill of exchange.

The bill of exchange with the due term on a certain date after demand, it has to be presented to acceptance, the specification of the due term being determined exactly by this presentation. The term of presentation is of one year after the issuance of the bill of exchange.

The acceptance has to be dated. An acceptance without a date shall have legal effects, but only towards the drawee.

The presentation of the bill of exchange on acceptance can be done at any moment until the due term. On the due term, the bill of exchange becomes exigible, and therefore it is possible only to demand the payment.

According to the conditions of the uniform law from Geneva, the refuse of acceptance or of payment has to be recorded based on an official instrument – concluded by the notary – an instrument called protest. The protest's existence is indispensable, in order for the beneficiary to capitalize his rights obtained based on the bill of exchange and for exercising the action of regress.

Nonetheless, the stipulation of clauses *without protest* or *without expenses*, recorded on the bill of exchange and signed, exonerate the legal holder of the bill of exchange in regard to the obligation to execute the protest.

Waiving the protest operates in regard to all the signatory of the bill of exchange, if it is written by the drawer, or only in regard to the one who inserted it into the bill of exchange, if it is written by an endorser or guarantor.

In all the laws regarding the bill of exchange, the protest, as authentic document, is subjected to certain formalities.

Into the laws of the countries that adopted the Convention from Geneva for settling certain legal conflicts concerning the bill of exchange and promissory notes, the form and terms of protest, and also the form of other measures for the exercise and preservation of the rights concerning the bills of exchange and promissory notes are regulated by the laws of the country where the protest has to be addressed or the relevant measures that have to be applied.⁸

⁸ For details concerning the legal system of the credit notes within the International Business Law see I. Rucareanu, B. Stefanescu, *International Business Law*, Didactic and Pedagogic Publishing House, Bucharest, 1983, p. 329-350.

Regarding the payment of the bill of exchange, art. 46¹ from the Emergency Order nr. 39/2008 provides: The presentation of the bill of exchange can be made in original or by truncation.

In the meaning of this law, by truncation it is understood the informational procedure that contains the following successive operations:

a) Transfer in electronic form of the relevant information from the original bill of exchange

b) Reproduction of the original bill of exchange image in electronic form; and

c) Transmission of the electronic information obtained by the operations provided to letter a) and b) towards the payer credit institution.

There can be the object of truncation only the accepted bills of exchange.

The submission for payment of a bill of exchange by truncation has the same legal effects like the submission for payment of the original bill of exchange, being provided that the latter one to be issued by respecting the legal provisions.

Art. 46³ from the same order provides that the total or partial refuse of paying a bill of exchange presented for payment, by truncation, shall be in electronic form, by the payer credit institution.

If the drawee pays the amount stipulated in the bill, it frees all the exchange debtors. Drawee's refusal to pay determines the joint liability of all exchange debtors. If payment is made by a debtor of regress, like a guarantor, this payment releases only the persons obliged based on the bill, that are specified into the title after him, meaning the successive endorsers and their guarantors; the previously exchange debtors continue to be obliged and can be followed under the bill.

The Geneva Uniform Law provides that the place of payment must be specified in the title. In the absence of such claims, the law presumes as place of payment, the location specified next to the drawee's name. If it is not mentioned into the bill the place of payment, following one of these two ways, it determines the nullity of the bill of exchange. The drawer can specify as payment place the residence of a third party.

According to Geneva Uniform Law, the owner of the bill cannot refuse the partial payment. This does not terminate its exchange rights over the part of the amount that remained unpaid. The principle behind this solution that escape from the common law, where payment is indivisible, is that payment is relevant not only for the title holder, but also for the other signatories jointly held for payment and who have the interest, at least partially, to be freed.

The Geneva Uniform Law distinguishes between the release of the drawer from the acceptance guarantee, on one side, and release from the payment guarantee, on the other side. The drawer can be released by the acceptance guarantee only by payment. But it is not allowed to be released from payment guarantee. Any contrary stipulation is considered by law as unwritten.

3. Promissory Note

The promissory note is an endorsable title, formally and integrally, and includes the unconditional obligation undertaken by the issuer to pay in the beneficiary's favor.

Generally, the promissory note follows the rules provided for the bill of exchange, and its regulation is in the same law that regulates the bill of exchange, namely Law no. 58/1934 on bills of exchange and promissory notes, and also into the standard rules no. 6/1994 and into the technical rules no. 10/1994 of B.N.R.

But, unlike the bill of exchange, where there are three people involved (drawer, drawee and beneficiary), the promissory notes involve only two people: the issuer who undertakes to pay at maturity and the beneficiary.

The essential terms that must be included in the promissory note, under the sanction of its ineffectiveness as promissory notes, are:

1. the name of promissory note, typed in the title text, in the language used for its conclusion;
2. the unconditioned promise to pay a certain amount of money on the due term;
3. the place where the payment has to be made;
4. the beneficiary's name to whom or upon who's order it has to be made the payment;
5. the date and place of issuance;
6. the issuer's signature.

Since there is no drawee, it is not implied the aspect of acceptance and the promissory note payable at a certain time limit must be presented for the issuer's certificate, within the legal term of one year or within the term mutually agreed by parties. The issuer's refusal in regard of the approval shall be recorded based on a protest, whose date shall constitute the starting point of the demand term. In regard of endorsement, if it was not specified for who is issued, is considered to be granted for issuer.

As art. 105 provides, the Promissory Note can be presented for payment by truncation, exactly like the bills of exchange, excepting the condition regarding the acceptance, the other condition settled for the bill of exchange having their effects to art. 46¹, 46² and 46³, except the condition regarding the approval, provided to art. 46¹ paragraph 3, having all the effects that the law settles for the original Promissory Note.

The differences between the bills of exchange and promissory notes are not derogated from the principles of the laws of bill of exchange, but only in regard of the adjustment to the own structure of the promissory note.

Article 106 of Law 58/1934 on bills of exchange and promissory notes adopt a system of references to the rules applicable for active promissory notes, expressly indicating those legal provisions that are applicable to a promissory note insofar as they are not incompatible with its nature.

Therefore, there are contained into the presentation of this article, the provisions regarding:

- endorsement (art. 13-23);
- maturity (art. 36-40);
- action in exchange execution (art. 47);
- copies (art. 83 and 86);
- modifications (art. 88);
- prescription (art. 94);
- days of legal holidays (terms' calendar) and inadmissibility of the guarantee term (art. 95-98);
- subscription by applying the finger (art. 99);
- the action determined by enrichment without a fair cause (art. 65);
- annulment and replacement of title (art. 88-93).

The applicability of the above provisions for the promissory notes is conditioned by their compatibility to the nature of promissory notes, and it makes reference to the conditioning of what constitutes the essential difference between the promissory note and bill of exchange, namely the absence of the drawee, as a third participant, as main debtor, to the issuance, circulation and execution of the bill of exchange.

They are also applicable to promissory notes, without the need to consider whether they are compatible with the nature of the bill of exchange, the legal provisions regarding the bill of exchange on:

- the bill of exchange payable by a third (commission) or in other locality than the one of residence of the drawee (art. 4 and 30);
- the interest stipulation (art. 3);
- the differences in indicating the payment amount (art.6);
- the effects of a signature subjected to the terms of art. 7;
- the effects of the signature of a person who acts without power of attorney or outside the limits of a power of attorney (art. 10);
- blank bill (art. 12).

Summing up the two categories of references to legal texts that apply to promissory notes, we will notice that in art. 106, deemed declarative, there are missing provisions that would naturally be applicable also for the promissory notes. It is about the content of exchange signature (art. 8), the signature from the bill of exchange as representative, without authorization or exceeding the limits of the power of attorney (art. 9), liability for non-payment (Article 11 adapted).⁹

As a corollary of the system of positive references, we admit that, *per a contrario*, there are not applicable for the promissory note a series of institutions specific for the bill of exchange, such as: the acceptance (art. 24-32), regress after partial acceptance (Art. 56) acceptance by intervention (art. 75-77), duplicates

⁹ R. Economu, *Practical Manual about the Bill of Exchange Law*, "Lumina Lex" Publishing House, 1996, Bucharest, p. 193.

(art. 83-85) and bill of exchange with the claim assignment, deriving from the sale of goods towards the drawee (art. 100-103).

The specific jurisprudence of the promissory specific is much poorer than the one concerning the bill of exchange.

There shall be adequately applied the solutions issued by the law courts, in settling the applicability of the legal applicable texts for promissory notes. Here are two particular decisions on the promissory note:

The first endorsement of a promissory note must be of the beneficiary, if he remained the owner of the promissory notes. The leaf signature of a person who is not part of the exchange relation does not constitute guarantee, nor an aval, if it does not have the mention *for aval*.¹⁰

For the promissory note where it is not specified the payment place shall be considered as payment place, the place of issuance, where it has to be addressed also the non-payment protest.¹¹

4. Bill of exchange and the promissory note in the international private law

The new Civil code in force from 1th of October 2011 settles these aspects in art. 2647 and subsequences, in this way:

The person who, according to the national legislation, does not have the authority to engage itself by the bill of exchange, promissory note and cheque, undertakes although in a valid manner, through such title, if its signature was given in a state whose law considers the subscriber as being capable.

The pledge assumed in regard to the bill of exchange, promissory note or cheque is subjected to the form conditions of the laws of the country where the pledge was subscribed.

If the pledge is not valid, according to the legislation provided to art. (1), but is complying with the law of the state where it takes place the subscription of an ulterior pledge, the irregularity of form of the first pledge does not infirm the validity of the ulterior one.

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The law of the state where it is payable the bill of exchange settles if the acceptance can be restrained from a part of the amount, and also if the holder of the title is or is not due to receive a partial payment.

¹⁰ Cas. III, 22 mai 1941, unpublished.

¹¹ Cas. III, 4 November 1919, Buc. 1919, p. 365, Cas. III, 10 November 1926, Bul. 1926, p. 500.

The law of the state where the bill of exchange or the promissory note are payable determine the measures that could be applied in case of title loss or theft.

5. Conclusions

The bill of exchange and the promissory note continue to be applied after 1990, being adopted by the market economy as extremely useful instruments.

The rule from art. 3 of the Commercial Code, regarding the order in products or goods was already falling in desuetude before the enforcement of the new Civil Code, on October 1st 2011.

The OUG no. 39/2008 for the amendment of Law no.58 / 1934 concerning the bill of exchange and the Governmental Order regulating the presentation of a bill of exchange for payment, show that it is possible to be made in original or by truncation (informational procedure), specifying that there can be the object of truncation, only the accepted bills of exchange.

We appreciate that the regulation of the truncation procedure facilitates, starting with 2008, the presentation of the bills of exchange for payment.

Also, we salute the regulation in the new Civil Code of the issues of international private law concerning the bills of exchange and promissory notes, with the abrogation of Law no. 105/1992 concerning the reports of international private law.

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