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CASE LAW AND THEORETICAL PERSPECTIVES REGARDING THE PAYMENT AND CREDIT INSTRUMENTS; THE BILL OF EXCHANGE, THE PROMISSORY NOTE AND THE CHEQUE

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ABSTRACT: *The study aims to analyse the most important aspects concerning the typology of the credit and payment instruments and their characteristics. Even if the regulation in this matter, both the domestic and the international rules, has a traditional character, its application in practice generates interpretations and a case law that are subject of analysis in the present study. Furthermore, the importance of the topic is emphasized by the relatively recent provisions of domestic international private law comprised in the Civil Code republished in 2011, Book VII. The scope of the study is to be a means and a support in the field of theory and case law for the business environment.*

KEYWORDS*: payment, credit instruments, bill of exchange, promissory note, cheque, endorsment, guarantee*
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1. PRELIMINARIES

The study analyzes significant aspects of the complex matter of payment and credit instruments – bill of exchange, promissory note and cheque, from the perspective of law, theory and case law in the matter, in an approach intended to highlight both elements of traditionalism and novelty in the regulation and practice of these legal instruments used in the business environment.

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1.1. Considerations concerning the definition, regulation and substantive requirements in the matter of payment and credit instruments

In a doctrinary definition, the negotiable instrument represents "a document whose legitimate owner is entitled to exercise, at a determined date, the right incorporated in the instrument" (Catană, 2013, p.54).

In the practice of business environment, the negotiable instruments represent *credit and payment instruments* that may be "assigned, either in full ownership, or as collateral in order to obtain a credit, an amount of money before the due date" (Turcu, vol.II, 1998, p.84).

From the regulatory point of view, the provisions in the matter stipulated by Law no.58/1934 on bill of exchange, promissory note (published in the Official Gazette of Romania, Part I, no.100/01.05.1934) as subsequently amended (recently amended and supplemented through art.16 of Law no.76/2012 for the enforcement of the new Code of Civil Procedure, consolidated on 15.02.2013, hereinafter called "Law no.58/1934, consolidated version), and respectively Law no.59/1934 on cheque (published in the Official Gazette of Romania, Part I, no. 100/01.05.1934) subsequently amended (in consolidated version of 01.02.2014, hereinafter called "Law no.59/1934, consolidated version) were *alligned to the international regulations* coming in accordance with the principles deriving not only from the Italian regulation inspiring it but also from the International Convention of Geneva on 7 June 1930 on uniform regulation regarding bill of exchange and promissory note and from the International Convention of Geneva on 11 March 1931 on uniform regulation regarding cheque, as the doctrine underlines (Turcu, vol.II, p.85; Cărpenaru, 2002, p.507; Cărpenaru, 2016, p.647, p.696; Ştefănescu, Căpăţână et al, 1986, p.60).

The International Convention of 1930 regarding the uniform law on bill of exchange and promissory note registers the commitment of the signatory states (Romania did not take part in the Convention and did not ratify the international document although it takes over the principles of regulations in the matter) to apply the dispositions of the uniform law that regulates the bill of exchange – in Title I, and promissory note – in title II, while annex II of the convention stipulates the queris raised by the signatory states with respect to certain regulatory aspects in the text of the uniform law. Similarly, the International Convention of 1931 regarding the uniform law on cheque, in which Romania did not take part and neither did ratify it, establishes the signatory states' commitment to apply the rules agreed, under the queries tolerated by annex II of the convention (Ştefănescu, Căpăţână and coauthors, 1986, p.61, p.73).

The regulations comprised by the mentioned *special laws* are supplemented, where compatible, with the regulation of specific aspects of private international law regarding these payment and credit instruments of the Civil Code republished in 2011, consolidated version, (hereinafter called Civil Code, consolidated version) Book VII " Private International Law regulations", Title II "Conflicts of laws", Chapter VII " Bill of exchange, promissory note and cheque", art.2647 – art.2658.

Concerning the *prevalence of the enforcement of the special law in the matter of debt securities in relation to the common law regulations*, the Supreme Court of Cassation and Justice through the united courts, handed down decision no.4 of 19.01.2009 on the examination of the appeal in the interest of the law, submitted by the Prosecutors' Office

attached to the High Court of Cassation and Justice, in relation to the interpretation and enforcement of the dispositions of art.374[1] of Code of civil procedure, such as they were introduced through Law no.459/2006, in relation to provisions of art.61 of Law 58/1934 on bill of exchange, promissory note and cheque, subsequently amended and supplemented, and provisions of art.53 of Law no.59/1934 on cheque, subsequently amended and supplemented, regarding the enforcement of the bill of exchange, promissory note and cheque.

Therefore, within Law no.58/1934, the bill of exchange is regulated in title I, art.1 – art.103, and the promissory note is subject to title II, art.104-art.107, the latter being briefly regulated in three articles, without being instituted an express regulation of the legal regime applicable to the promissory note, the legislator considering sufficient making reference to the regulations applicable to bill of exchange "considering their common character as commercial securities and their role in commercial relations", as it was pointed out also by the constitutional case law (Constitutional Court, Decision no.31/19/01/2012 on bill of exchange and promissory note, published in the Official Gazette of Romania, Part I, no.141/02.03.2012)

The bill of exchange is not defined by the law, however the doctrine filled this gap by stating that the bill of exchange represents a document through which a person – the drawer (also called issuer), orders another person – the drawee, to pay a determined amount of money at the established date and place or at the order of the latter, to a third person – called beneficiary, (Cărpenaru, 2002, p.508 and cited authors; Cărpenaru, 2016, p.648 and cited authors; Catană, 2013, p.56 and cited authors; Puie, 2015, p.53; Ștefănescu, Căpățână and co-authors, 1986, pp.60-61). From the perspective of the bill of exchange seen as a negotiable instrument and its judicial mechanism, we determine that it serves as a negotiable credit and a payment instrument under private signature, issused by the drawer – as creditor, who orders the debtor (drawee) to pay an established amount of money, at a certain date, to the beneficiary, at the order of the latter (defined in Miff, Paun, 2006, p.487).

Indeed, the issue of a bill of exchange and the payment made according to this negotiable instrument is based on preexisting legal relations between the participants who are part of a creditor-debtor type of relation, but these relations – called by the doctrine "fundamental relations" – do not interfere with the qulification of the bill of exchange as being a *independent, stand-alone instrument,* that assures an autonomous right, given the fact that the correlated rights and obligations generated by the negotiable instrument are independent from the legal act they arise from (sales contract or other document, such as a loan contract or a judicial act), and the issue of the bill of exchange does not necessarily lead to the termination of the fundamental relations. As a consequence, in legislative terms, the operations concerning bill of exchange are governed by own set of rules, distinct from those which rule the fundamental relations, instituted by the *special law* that covers the development of *legal relationships of bill of exchange, the transfer, guarantee and payment of the bill of exchange.*

The development of the legal relationship of bill of exchange, resulting in the issue of the bill of exchange and subsequently in its transfer, implies the express demonstration of will of the drawer, the drawee, the beneficiary, respectively in case the bill of exchange it is transferred the demonstration of the will of the endorser, endorsee, under the *conditions strictly provided by the law*.

The *substantive requirements* for the validity of the bill of exchange are not stated by the special law, meaning that are applicable the requirements provided by the *common law provision* for the validity of the legal acts, respectively the relations implying obligations, the contracts (Civil Code, consolidated version, art.1179 stating the 4 esential elements of the validity of contracts: consent, capacity, object and cause).

The particularities in the case of the relationships of bill of exchange concern the *consent and the cause* considering the fact this relationship or obligation exists independently of the fundamental relationship between the parties and it is materialised in a self-standing negotiable instrument that generates an autonomous, original right which is not derived from the transferor's right. In other words, the cause of the obligation of the bill of exchange does not depend on the cause that generated it, as it is an obligation without cause. As the doctrine observes regarding the matter of the connection between the relation of the bill of exchange and the fundamental relation as well as the *cause of the obligation raised by the bill of exchange* "the bill of exchange is a tipically abstract negotiable instrument in the meaning that from its content it does not result what caused to be issued, an essential element of any judicial act that justifies the payment of an amount of money. The bill of exchange has a cause but indicating it does not condition the validity of the obligation it contains (Costin, Luha, 1995, p.44).

The *formal requirements* for the bill of exchange are rigorously established by the special law, the bill of exchange as document having a considerable *formal* character revealed by the *mandatory entries* that it must comprise, and in the absence of which it is invalid, except for the cases shown by art.2 of Law no.58/1934, consolidated version. Hence, any negotiable instrument that does not meet all the mandatory clauses provided by art.1 of the law, does not have the value of a bill of exchange, excepting the following cases: the bill of exchange without specified due date is considered payable on demand; in the absence of a special mention, the space indicated next to the name of the drawee shall be considered place of payment and at the same time the place of residence of the drawee; the bill of exchange does not indicate the place where it was issued and it is considered to be signed in the space next to the drawer's name; if in the bill of exchange are mentioned several places of payment the holder will be able to present it for acceptance or payment at any of these places.

The mandatory content of the bill of exchange refers to the usage of *standard wording of the text* expressing clauses of judicial value (Miff, Păun, 2006, p.488), precisely: the word bill of exchange included in the negotiable instrument and expressed in the language used for writing the bill; the unconditional order to pay a determined amount of money; the name of the person on whom a bill is drawn (drawee); the code of the drawee, that is a unique number of identification stipulated in the documents of identification or registration of the drawee; the maturity date; the place where the payment has to be made; the name of the person to the order of whom the payment has to be made; the date and place of issue; the signature of the issuer (drawer).

The *promissory note* represents a negotiable instrument but also a payment instrument, consisting of a written document through which a person – the issuer or maker in its capacity of debtor undertakes to pay a certain amount of money at a determined date or on demand, to another person – *beneficiary* in its capacity of creditor, or on its demand (defined in Cărpenaru, 2002, p.555; Cărpenaru, 2016, p.692; Turcu, vol.II, 1998, p.128).

Similarly to the bill of exchange, the legal regime of which it follows, mainly in order to complement the special regulations that configure the promissory note, the latter is a formal negotiable instrument in the form of a document that must strictly follow the entries provided by the law.

The content of the promissory note is determined by art.104 of Law no.58/1934, consolidated version, that imperatively establishes the *clauses necessary for the validation of the negotiable instrument*, as follows: name of the promissory note entered in the security text and expressed in the language used for this negotiable instrument; unconditional promise to pay a specified amount; indication of maturity date; indication of the place where payment must be made; name of the person to whom or at whose order the payment must be made; indication of the date and place of issue; signature of the issuer, respectively the handwritten signature of the natural person holding the capacity of issuer, or if applicable, the legal representative or trustee of the issuer, natural person, legal person or entity using such instruments; issuer's name, respectively the first name and last name clearly written by the natural person, legal person or entity that undertakes to pay (if the name of the issuer is longer that the space allocated on the negotiable instrument, then there shall be written the first letters of the first name and last name, respectively of the name of the legal person, in the limits of the especially allocated space, in a manner that does not attract the invalidity of the promissory note); the issuer's code, respectively a unique number of identification as written on the documents of identification/registration of the issuer.

The absence of one of the mandatory entries attracts, except for the cases provided by the law, the invalidity of the promissory note, in the meaning of art.105, para.1 of Law no.58/1934. The compliance with the formal requirements provided by the law is of practical interest also from the point of view of the fact that even if the bill of exchange, the promissory note and the cheque represent enforceable negotiable instruments, according to the law, it is required to render them enforceable in order for these payment instruments to be enforced for recovery of debt.

But as the case law determines, the validity of the document, which is conditioned by the formal requirements, is the "only aspect that has to be analyzed at the moment when it is rendered enforceable. The analysis of the fundamental relations between the parties exceeds the framework of the application for enforcement, following that they would be examined on the occasion of the beginning of the forced execution, within a possible opposition to the bill of exchange" (Valcea County Court, decision no.692/17.05.2012, cited by Lege 4. Professional, Jurisprudență, which indicates source: portal.just.ro)

In other words, on the occasion of the analysis of the application for enforcement of the promissory note, respectively of the bill of exchange or if applicable, the cheque, the court of law has the obligation to examine the *fulfilment of the formal requirements of the negotiable instrument*, aspect on which the Supreme Court of Cassation and Justice stated, in the united courts, through decision no.4/2009 of 19.01.2009.

Although benefitting from a common regulation stipulated by the same law, justified by their nature as payment and credit instruments, the promissory note and the bill of exchange act as negotiable instruments with a personal configuration generated by the mechanism of the creation of each of them, namely: the promissory note arises between two persons – the issuer and the beneficiary – without involving a third person, and consequently implies that the issuer undertakes its own obligation of payment, being

excluded the promissory note addressed to another person, such as in the case of bill of exchange (Turcu, vol.II, p.128; Cărpenaru, 2002, p.555).

The negotiable instrument that does not incorporate the mandatory elements of content indicated above, shall not be considered promissory note, except for the cases provided in art.105 of the Law, namely: the promissory note that does not have stated the maturity date is considered payable on demand; in the absence of a special entry, the place of issue of the negotiable instrument is considered the place of payment and at the same time the issuer's place of residence; the promissory note that does not show where it was issued is considered to be signed in the space next to the name of the issuer.

The remedies to which art.105 of the Law makes reference are solutions provided by the law for the "salvation" of these payment and credit instruments, as a reflection and application of the *private law principle for the prevalence of preservation of the effects of legal acts*, as opposed to their annulment as long as there are no clear and legal grounds for annulling them or the act (*actus interpretandus est potius ut valeat quam ut pereat*), a principle that is enshrined by the law in the field of contracts, in art.1268, para.3 of the Civil Code, consolidated version, according to which if a clause is likely be having two meanings it shall be interpreted in the meaning which can produce effects, and not in the meaning that would not produce any effect.

The promissory note without maturity date is considered to be payable on demand, therefore if it is payable anytime, the amount is presented to the debtor. The promissory note is deemed to be payable: at sight, at a fixed period after sight, at a fixed period after the date of issue, at a definite time. The maturity date must be possible and it must clearly result from the text of the promissory note.

The promissory notes bearing other maturity dates or successive dates are deemed invalid. It is also invalid the promissory note that bears a maturity date which is prior to the issue date or a maturity date that cannot be verified. The promissory note may be seen on the day it is issued but it must be presented for payment within maximum one year from the date of issue. The holder of the promissory note shall present the note to the place and address indicated for payment. The payment shall be requested at the debtor's residence, as natural person, or at the registered office of the debtor as legal person.

The promissory note issued with a due date must be presented at the bank on the due date or within maximum 2 working days following the due date, on the contrary the note shall be refused. The due date is the date on which the promissory note is payable and must be paid.

We should remark the fact that the provisions of art.41 of Law no.58/1934, consolidated version, which contain the obligation to present the bill of exchange for payment within maximum two days from its due date, applicable also to the promissory note, do not establish a sanction for not complying with the obligation to present the negotiable instrument within the term specified by the law, for which reason the case law stated that in the case of non-presentment of the promissory note for payment within the next two days from the due date "the is no impediment that would prevent the enforcement. On the other hand, we should bear in mind the aspect according to which the action of issuing the negotiable instrument was carried out in order to make available to the debtor of a credit, the creditor – bank also having the capacity of drawee, the operation of presentment for payment having an internal character, therefore purely formal"

(Giurgiu County Court, Civil Section, decision no.5/2010 of 06.01.2010, cited by Indaco Lege 4.Professional, Jurisprudenta)

The *cheque* is a document through which a person – called drawer, orders a bank – called drawee, in which he has deposited money, to pay an amount of money to another person – the beneficiary or at his order (Cărpenaru, 2002, p.558; Cărpenaru, 2012, p.602-647; Cărpenaru, 2016, p.696).

Similar to the bill of exchange, the cheque implies a relation between three participants who are the *drawer* (the person issuing the negotiable instrument), the *drawee* (capacity that may be held by only by a banking institution, except for the cheque drawn and paid abroad, which is valid as cheque even if the drawee is not a banking institution, as stipulated by art.3 of Law no.59/1934, consolidated version) and the *beneficiary* (the person who receives the payment). This legal mechanism is similar to the one which makes the relation objective and represents a common trait of the two negotiable instruments.

Although, mainly the cheque is included in the category of payment and credit instruments, together with the bill of exchange and the promissory note – because certain principles governing them are applicable also to the cheque, the latter one functions only as *payment instrument*, offering the advantage of avoiding the payments in cash but also the beneficiary's possibility to endorse the negotiable instrument in order to pay the debts.

The same way as for the bill of exchange and the promissory note, the special law does not provide stipulations concerning the *substantive requirements*, reason for which they follow the legal regime instituted by the common law.

The cheque constitutes a payment instrument of formal character and hence it must come under written form and follow the standard *content* provided by art.1 of Law no.59/1934, consolidated version, namely: the word *cheque* must be included in the name of the negotiable instrument and expressed in the language used for drawing the negotiable instrument; the unconditional order to pay a certain amount of money; the name of the person who must pay (drawee); the place where the payment must be made; the date and place of issue; the signature of issuer (the drawer); the name of the drawer – natural person, respectively the first and last name written intelligibly, or the name of the legal person or entity that is drawn upon; if the name of the drawer exceeds the space provided on the negotiable instrument then on the negotiable instrument shall be written the first characters of the first and last name, within the limits of the space provided, without this affecting the invalidity of the cheque; the drawer's code, respectively a unique number of identification stipulated on the documents of identification or registration of the drawer.

Additionally, issuing the cheque is conditioned by two "legal premises", as the doctrine determines (Cărpenaru, 2002, p.559; Cărpenaru, 2016, p.697): the availability of the amount of money the drawer must have in the bank account and the existence of a convention between the drawer and the drawee regarding the issuing of cheques.

It must be stressed out that according to art.84, pt.2 of Law no.59/1934 on cheque, consolidated version, *issuing a cheque without having sufficient amount available to be drawn* or using the full or partial amount available before the fixed dates for presentment have passed, constitutes an offence and it is sanctioned with imprisonment between 6 months to one year or with a fine, if the deed is not a more serious crime. The legal text invoked by the special law incriminates in the same way, at pt.1 – the issuing of a cheque

without having the authorisation of the drawee, at pt.3 – issuing a cheque bearing a false date or missing one of the essential elements stipulated by the law which are: "a) the title "cheque"; b) the amount that is to be paid; c) the name of the drawee; d) the date the cheque is issued; e) the signature provided by art.11", and at pt.4 – issuing a cheque in non-compliance with the provisions of art.6 para.3 of the law (art.84 was amended through pt.1 of Law no.187/2012 beginning with 01.02.2014).

The signature is an essential element of the cheque and must be mentioned in an intelligible manner the first and last name of the natural person or the name of the legal person or entity that draws it on itself, as well as the handwritten signature of the natural person, respectively of the legal representatives or trustees of the legal persons or other entities using this type of instruments and which draw the instruments on their account.

In the absence of any of the mandatory elements provided by the law, the negotiable instrument shall not be considered as being cheque, except for the cases established by art.2 of the law, as follows: in the absence of a special entry, the place indicated next to the name of the drawee is considered as place of payment; if several places are indicated next to the drawee's name, the cheque is payable at the first place mentioned, and in the absence of these or any other specifications, the cheque is payable at the place where the drawee has its registered office; if the cheque does not mention the place where it was issued then it shall be considered signed at the place indicated next to the name of the drawer.

The cheque is payable only at sight, does not have maturity date and shall be presented for payment within 15 days from the date it was issued.

1.2. Types of payment and credit instruments

The tipology of credit and payment instruments reveals the variety and particularities of these instruments, the criteria of classification not being formally unitary but reveal in a more or less synthetic manner, the same categories. Moreover, it offers an indication regarding the legal regime applicable to the category of negotiable instruments.

Therefore, in a classification by the doctrine (Turcu, vol.II, 1998, pp.85-87; Cărpenaru, 2002, pp.504-506; Cărpenaru, 2016, pp.644-646; Dumitrescu, 2012, pp.21-29) the negotiable instruments are groupped after the criteria of the content, the means of circulation and their lawful cause: with regards to their content and economic function, the negotiable instruments fall under the following categories: *commercial papers* (bill of exchange, promissory note and cheque), *transferable securities* (shares and bonds issued by companies) and *securities representative of goods* (bill of lading, warehouse receipt and warranty); from the point of view of the way in which they are transferred there are *registered securities* (they identify the holder of the right by mentioning the name), *pay-to-order instruments* (they incorporate rights that may be exercised only by a determined person – beneficiary or the person to whom the rights were transferred through endorsement) and *pay-to-bearer instruments* (they establish the rights without determining the person who holds them); in accordance with their lawful cause, we can distinguish between *causal instruments* (the documents that indicate the lawful cause of the obligation, as inherent element necessary for the right to be exercised by the holder, such as company shares, bill of lading) and *abstract instruments* (although they incorporate the obligation and the correlated right, the lawful cause of the obligation is not

mentioned and remains an external aspect, independent from the instrument itself, such as the bill of exchange, the promissory note).

A relatively recent classification (Catană, 2013, p.55), distinguishes between the *commerce papers*, which grant the right to an amount of money as means of payment, credit and collateral (bill of exchange, promissory note, cheque) and *transferable securities*, which grant complex rights resulting from the capacity of shareholder or bond creditor, and *securities representative of goods*, which grant property and/or guarantee rights over goods located in silos, wharehouses, temporary storage (warranty receipt, wharehouse receipt) or are under bill of lading regime.

In another classification (Angheni, Volonciu, Stoica, 2002, p.528), following the criteria of their content, the credit instruments are *representative of goods* (incorporating a right in rem over goods located in silos, wharehouses, such as collateral receipt, bill of lading) *instruments that grant right to a certain payment from the debtor* (bill of exchange, promissory note) and *instruments that incorporate complex rights* (rights that result from the shares of a company, rights of patrimony regarding the participation to benefits or non-patrimonial rights relating to the participation to the shareholders' general assembly or to the designation of the company's managing body). Having in view the criterion of the means of transfer, the credit instruments can be *registered* (shares, bonds), *pay-to-order or pay-to bearer* (Angheni, Volonciu, Stoica, 2002, p.529). Finally, after the connection with the commercial environment, the *commercial papers* include the bill of exchange, the promissory note and the cheque, or they are *financial instruments* used with the purpose of reimbursing the credit granted to the clients of a credit institution.

1.3. The formalism and authonomy of the negotiable instruments of payment and credit

The payment and credit instruments must be viewed from the perspective of the two valences - the valence of *negotium* (which highlights the judicial relations between the signators concerning the judicial operation such as it was agreed by them), and respectively, de *instrumentum* (more exactly, the piece of writing or document that acknowledges the judicial relations between the signators, the rights and obligations that are in its content)

If the meaning of *negotium* brings under attention the judicial relation that implies the obligations of the parties, the *de instrumentum* underlines the formal requirements that must be met by these negotiable instruments in order for their efficiency to be proved in practice.

Regarding the traits of the analyzed payment and credit instruments, the doctrine particularly underpins *the formal and independent character* towards the cause which generates them, their formalism being justified by the elements of security necessary for the protection of the third parties (Dumitrescu, 2012, p.21 and cited author). In other words, the validity and efficiency of the obligations undertaken by the drawer of the titles are conditioned by the "fulfillment of the formal requirements and the inherent elements for qualifying the will expressed when the instrument was issued". (Dumitrescu, 2012, p.22).

The *formalism* of the credit and payment instruments is, as revealed by the doctrine, a trait that highlights the essence of these negotiable instruments" as they do not exist unless

they are made in written form, regularly in the form of a document under private signature" (Dumitrescu, 2012, p.44 şi autorii citaţi). Consequently, their existence as well as the entire procedure of the negotiable instruments which is focused on the circulation of instruments, the capitalization of property rights comprised by the analyzed instruments and last but not least, their enforcement "depends on the existence of the documents which incorporates them, being subject to certain special consitions" (Dumitrescu, 2012, p.14 and cited authors).

The formal elements of the payment and credit instruments are expressed by the *essential entries* that they must include, such as they are stipulated by Law no.58/1934, consolidated version, in art.1 for the bill of exchange, art.104 for the promissory note and art.1 of Law 59/1934 on cheque, consolidated version, presented in section 2 of the present study.

Therefore, the essential entries that must be included on the payment and credit instruments refer to the name of the title, the unconditional order to pay a certain amount of money respectively the unconditional promise to pay a certain amount of money, the name of the drawee who has to make the payment (the drawee – in the case of bill of exchange and cheque, respectively the issuer in the case of promissory note); the place of payment; the date and place of the issue of the instrument; the issuer's signature (the drawer in the case of bill of exchange and cheque); the name of the issuer/drawer –natural person, written intelligibly, or the name of the legal person or entity that is drawn upon; if the name of the drawer exceeds the space provided on the negotiable instrument then shall be written the first characters of the first and last name, within the limits of the space provided, without this incurring the invalidity of the instrument; the drawer's code that is a unique number of identification stipulated in the documents of identification or registration of the drawer.

There are particularities proper to the cheque, from the point of view of the content, considering the fact that unlike the bill of exchange it does not comprise two of the mandatory entries which are: the law does not impose the written mention of the name of the cheque's beneficiary (the mention is optional, except for the registered cheque pay-to-order) and need not be mentioned the due date of the payment obligation because the cheque is payable "at sight" and that is on presentment.

The issuer's signature (drawer) on the credit and payment instrument is an essential element but as the doctrine determined, the fact that the issuer's representative signed the promissory note in the space called "issuer's signature at sight" and no longer signed in the box "the issuer's signature" does not cause the invalidity of this negotiable instrument. The court also determined that for the validity of the promissory note it is not relevant the appealant's assertion according to which her signature is written in another box that the one called the issuer's signature, as long as the issuer's signature, which is not questioned by the appealant, is written in the box "issuer's signature at sight" and all the other requirements for validity provided by the law are met. (Buzau County Court, decision no.19/12.03.2014, cited by Indaco Lege4.Professional.Jurisprudenta, which cites source portal.just.ro).

The other traits that make complete the description of the instruments analyzed are the *wording accuracy* and the *autonomy* of the credit and payment instruments. The *constitutive* character of these instruments is approached separately by the doctrine (Cărpenaru, 2016, p.644), we assume this is done in order to accentuate their *negotium*

valence, considering the fact that the right which is incorporated in the title may be exercised only in respect of the written acknowledgement (*instrumentum*) which has the character of a *rights constituent.*

The *wording accuracy* finally emphasizes the will of the issuer whi determines in the contant of the instrument the extent of the right and obligation resulting from it and which exists only as far as it is written on the written acknowledgement of the credit and payment instrument (Dumitrescu, 2012, pp.44-45 and cited authors).

The *autonomy* emphasizes the *independent character* of the judicial relation on which is based the instrument – bill, promissory note, cheque, vis-à-vis the fundamental judicial relation that led to the issuing of these payment and credit instruments.

Concerning the autonomous character of the bill of exchange and of the promissory note, case law stated that they represent "credit instruments that imply obligations of general, abstract character which are autonomous and independent from the fundamental judicial relation that generated the payment obligation and in relation to which acts as self-standing obligations. The legititmate holder of such a negotiable instrument excercises his/her right and the issuer fulfills the obligation assumed on the grounds of the instrument and not based on the fundamental relation that generated the issuing of the instrument. The autonomous character of the obligations related to negotiable instruments is the reason why the debtor's possibilities of defence are more restrained than those by the common law", reason why Law no.58/1934 provides in art.63 that "In the litigation on negotiable instruments initiated either by action in court or by opposition to the summons of execution, the debtor will be able to oppose the holder only the exceptions of invalidity of the instrument, in accordance with provisions of art.2 as well as those which are not exempted by art.19" (Buzau County Court, decision no.19/12.03.2014, cited by Indaco Lege4.Professional.Jurisprudenta, which cites source portal.just.ro).

Art.2 of Law no.58/1934, consolidated version, invoked in the above case law provides that the negotiable instrument that does not fulfill the requirements of content indicated at art.1 shall not be considered bill of exchange, except for the cases stipulated by the law (the bill of exchange that does not mention the due date is deemed payable at sight and if the bill does not mention the place where it was issued it shall be deemed signed in the place indicated next to the drawer's name; if in the bill of exchange are mentioned several places of payment, the holder of the bill is entitled to present it for acceptance or payment at any of these places; in the absence of a special mention, the place indicated next to the name of the drawee is considered place of payment and also the drawee's place of residence).

Art.19 of the Law states the procedural means that can be used by the persons against which was opened legal action on negotiable instrument and who cannot oppose the holder with the exceptions based on their personal relations with the drawer or previous holders, except for the case in which the holder who acquired the bill of exchange "awarely acted to the debtor's prejudice" (art.19 of Law no.58/1934,

Finally, apart from the aspects mentioned above, (for the similarities and differences between the bill of exchange and the promissory note, see Voica, 2011, p.97-106) is would be appropriate to point out, also as a common trait and not as a difference, *the premise for the issuing* of these instruments, determined by the existence of a fundamental judicial relation between the parties, which acts independently and autonomously from the relation based on the bill or promissory note. The relation based

on the bill of exchange or on the promissory note appear to be – from a temporal point of view – subsequent relations in the meaning that they are generated by the initial relation created between the parties, but it is essential to point out that they are recongnised as independent and autonomous in relation to the initial relation.

The doctrine constantly underlined the distinction between the relation based on the bill or promissory note and the fundamental commercial relation which generated it, showing that "the obligation of the bill of exchange derives from and pairs with the fundamental relation from which results the payment obligation – the immediate purpose of the obligation provided by the bill – however it becomes detached from that initial relation, keeping only few points of interference with it, depending on the reason – the immediate purpose- why the bill was issued, but which is not part of the instrument"(Costin, Luha, 1995, p.44 and authors cited).

Regarding the judicial relations generated by these credit and payment instruments, one of the themes frequently encountered in the case law on payment instruments – bill of exchange, promissory note and cheque, is that the termination of the fundamental relations between the parties does not influence the rights and obligations generated by these negotiable instruments, as they create autonomous and abstract obligations, independent from those resulting from the fundamental judicial relation (Buzau County Court, decision no.19/12.03.2014, cited by Indaco Lege 4. Professional. Jurisprudență, that indicates source: portal.just.ro; Dolj County Court, commercial judgement no.147/10/02/2011, accessed on http://www.asistenta-juridica.eu/jurisprudenta.php?id=29574 on 07.10.2016; Supreme Court of Cassation and Justice, section II on civil matters, decision no.4657/22.11.2012, accessed on http://www.scj.ro/cautare decizii.asp, on 07.10.2016)

1.4. Endorsement and guarantee of the payment and credit instruments

1.4.1 The endorsement of the payment and credit instruments

The payment and credit instruments (bill of exchange, promissory note and cheque) may be transferred through endorsement, basically they can be endorsed to other persons, but the endorsement must be unconditional and made in full as any condition to which it is subject would be deemed unwritten. The partial endorsement is ineffective.

The endorsement is described as a judicial act through which the holder of the instrument – the endorser transfers to another person – the endorsee, through a declaration written and signed on the instrument as well by delivering the instrument, all the rights derived from the title (Cărpenaru, 2002, p.557; Cărpenaru, 2016, p.664 and cited author).

The endorsement must be written on the statement of debt and also signed by the endorser. The endorsement is valid is the beneficiary is not mentioned or if the endorser wrote only the signature (endorsement in blank). In the case of endorsement, the payment shall be made to the person in favour of whom the instrument was endorsed.

The endorsement transfers all the rights resulting from the statement that acknowledges the analyzed payment and credit instruments (bill of exchange, promissory note, cheque), and if the endorsement is in blank, then the holder may fill in his/her own name or the name of another person, or further endorse the instrument in blank or at the order of a specified person, or merely deliver the instrument if the last endorsement is in blank.

Under the aspect of the consequences of endorsement, the operation allows not only the transfer of the instrument (bill of exchange, promissory note), but also the guarantee for the subsequent acquirers, as it gives rise to joint obligations, namely on maturity, the last holder of the instrument may proceed against the issuer and demand him/her to pay, and if the payment is refused by the issuer, then request the payment to be made by any of the other endorsees, in no predefined order. Although the endorser undertakes the obligation to guarantee the payment of the instrument (bill of exchange, promissory note, cheque, etc.) this obligation is undertaken not only in relation to the endorsee but also towards all the subsequent holders of the instrument, the endorser becoming obliged to an action of regress and taking the liability together with all the other debtors of the instrument.

The endorsement must be made for the entire debt provided by the instrument. The mention regarding the endorsement is placed on the back of the instrument. If the endorsement is written on the front of the instrument, then it must be specified that it is endorsed in order not be confused with the guarantee. Together with the endorsement it shall be delivered also the instrument promissory note to the endorsee.

The endorsement is carried out before the maturity and before making the protest of non-payment. The endorsement of the cheque carried out after the protest or after any equivalent certification, or after the expiry of the presentation term, produces only the effects of an ordinary assignment, in accordance with art.25, para,1 of Law no.59/1934, consolidated version, and according to para.2, the endorsement of the cheque without a date is considered, until opposite proof, as having been made before the protest or the equivalent certification, or before the expiry of the presentation term.

Unless stipulated otherwise, the endorser is responsible for the acceptance and payment of the bill of exchange and the promissory note, respectively responsible for the cheque. He/she may interdict the further endorsement, in which case he/she is not liable towards the persons to whom the instrument was subsequently endorsed.

In order for the payment instrument in question not to be able to be endorsed it must be inserted on it the mention "not-to-order", which means that the endorsee can no longer endorse the instrument in favour of another person, and as a consequence, the title is transferable only through ordinary assignment and its effects. The cheque stipulated to be payable to a specified person with the clause "not-to-order"or an equivalent expression, is transferable only under the ordinary assignment and its effects, as provided by art.15, para.2 of Law no.59/1934, consolidated version.

In view of exempting the endorser's liability for having accepted and paid the instrument, in the case of bill of exchange and promissory note it can be written the mention "without guarantee" or "without liability"or "without regress".

1.4.2. The aval of the payment and credit instruments

The aval was defined by the doctrine as representing the judicial act through which a person – the avalist, undertakes to guarantee the obligation assumed by one of the debtors of the instrument – bill of exchange, promissory note or cheque (Cărpenaru, 2002, p.557; Cărpenaru, 2016, p.673).

In a definition of case law, the aval is considered to be "the judicial act through which a person, called the avalist, guarantees the obligation undertaken by the debtor. As a self-standing judicial act (even is the obligation of guarantee is subsidiary to the main one), the aval is not affected by the expiry of the obligation of the party guaranteed, except for the

case in which the promissory note has an essential formal breach". (Pitesti Court of Appeal, civil section, decision no.817/2009 of 02.09.2009, cited by Indaco Lege 4.Professional.Jurisprudenta).

The payment of a title from the category of instruments analyzed (bill of exchange, promissory note, cheque) may be guaranteed by ***aval*** for the entire amount or just for a part of it (art.33 of Law no.58/1934, consolidated version, and art.26 of Law no.59/1934, consoludated version). The guarantee may be given by a third party or by the signator of the title himself, but in the case of cheque it is not permitted the aval by the drawee – namely the bank that is making the payment – as this would "be equivalent with acceptance of the cheque, which is forbidden by the law (art.4)" (Cărpenaru, 2002, p.562; Cărpenaru, 2016, p.700).

The aval is written on the instrument (bill, promissory note, cheque) and is expressed through the words "for aval"or any equivalent wording, and it is signed by the avalist, as established by art.34, oara.2 of Law no.58/1934, consolidated version, respectively art.27, para.1 of Law no.59/1934, consolidated version. The aval must specify for whose account it is given, but in default of this, it is deemed to be given for the drawer. In what concerns the effects, the avalist is liable to the same extent as the person in favor of whom the aval was given (for futher developments on the aval of the bill of exchange and the promissory note, see Turcu, 2013, p.397-407).

As a consequence of the autonomous and independent character of the judicial relations created by the analyzed payment and credit instruments, the obligation of the avalist remains effective even if the obligation that he/she guaranteed is invalid on account of any other reason but the formal breach (art.106, last paragraph related to art.33 and art.35, para.1 and 2 of Law no.58/1934, consolidated version).

In this regard, the case law determined in a case on promissory note issued by a debtor undergoing bankruptcy under Law no.85/2006 (presently abrogated), promissory note avalised by the company's administrator without the authorisation of the syndic judge, respectively of the judiciary administrator, that the promissory note comprises two distinct and autonomous obligations, respectively: the issuer's obligation – who is undergoing insolvency proceedings, and the avalist's obligation – who is a natural person not affected by the enforcement of Law no.85/2006 (in force at the date of the dispute settlement), so that the "fact that the obligation of the debtor is not effective as the judicial act was concluded after the opening of the insolvency proceedings and without the authorisation of the syndic judge, does not attract the invalidity of the avalist's obligation (on whom the insolvency proceedings is not applicable), an obligation that is different from that of the issuer of the promissory note".

The court stated that the promissory note is effective in what concerns the avalist, considering the fact that "It cannot be ascertained that the promissory note, despite provisions of art.104, pt.7 of Law no.58/1934, is invalid on the account of missing the issuer's signature, in the meaning that the latter was not represented by the judiciary administrator but by the company's administrator. This way it is determined on the one hand that on the promissory note it is fulfilled the box "issuer's signature" by the stamp of the company and by the signature of the company's representative, while on the other hand issuer SC C SRL was legally represented by the administrator of the company, as long as it was not proven that the company was lifted the right to administrate."

Also, the court of appeal ascertained that "the judicial act and the payment solicited through the issuance of the promissory note are not subject to the provisions of art.49,para.1 and 2 of the Law on insolvency proceedings, meaning that they do not fall under the regular requirements on the current carry out of the debtor's activity, they were not carried out under the judiciary administrator's supervision and neither were they authorised by the judiciary administrator" and therefore "not fulfilling the requirements above mentioned and neither having been authorised by the syndic judge, they are considered invalid on the grounds of art.46, para.1 of the same law", motivated also by the fact that "the validity of the obligation that results from the promissory note is not relevant and it is not investigated in the cases where are applicable the provisions of art.46, para.1 of insolvency law, because this law institutes a total sanction of the act and of the obligation, for the state of insolvency which the issuer of the note declares to be undergoing ".

Consequently, the court of appeal granted the appeal and partially amended the judgement by partially admitting the application on opening legal action and ascertained the invalidity of the promissory note only in what concerns the issuer and not the avalist. (Piteşti Court of Appeal, civil section, decision no.817/2009 of 02.09.2009, cited by Indaco Lege 4. Professional. Jurisprudenţă).

As a consequence of the payment made on the account of the instrument, the avalist receives the rights resulting from the respective instrument (bill of exchange, promissory note, cheque) against the person for which he/she guaranteed and against the persons who are obliged towards the latter, in accordance with the instrument.

1.5. Payment, refusal and payment incidents

1.5.1. Payment and refusal to pay

The regulations applicable to the payment of the bill of exchange and promissory note are stipulated in art.41-46 of Law no.58/1934, consolidated version, respectively in the case of cheque by art.29-37 of Law no.59/1934, consolidated version.

Unlike the bill of exchange and the promissory note, to which are applicable common regulations, the cheque benefits from a particular regulation, justified by certain measures specific to this payment instrument, such as the absence of the obligation to obtain the acceptance of the drawee, considering that the cheque is payable at sight, more precisely on presentment; therefore, the incorporation on the instrument of a mention for acceptance of the cheque is sanctioned by the law as it is deemed not to have been written on the instrument, in accordance with art.4 of the law.

Moreover, as the doctrine determines, the cheque is a payment instrument "being deprived of the function of a credit instrument" (Cărpenaru, 2016, p.696), but it is allowed for it to be included in the category of credit instruments as a result of the application of common principles that govern the bill and the promissory note.

In what concerns the *bill of exchange* , the payment may be requested, depending on each case, to the main debtor who is the accepting drawee, or to the resident indicated in the instrument, or directly to the avalist of the drawee, and even to the debtors of regress, if the the legal formalities were fulfilled. *The presentment for payment* of the bill of exchange is a requirement for making payments based on this instrument and for the acknowledgement of the validity of the protest in the case of refusal of payment.

The enforcement of common regulations applicable to the bill of exchange and promissory note does not exclude, however, the existence of certain particularities in the case of promissory note which must not be presented for acceptance like it is provided in the case of the bill.

Hence, the issuer of the promissory note has the obligation to pay, at maturity, the amount and accessories provided in the instrument, therefore he/she is obliged in the same way as would be the acceptant drawee of the bill of exchange, conclusion which may be drawn from art.107 of the law. As exception, the law provides the formality of the holder to present the promissory note for validation by the issuer, within one year from the date the instrument was issued, if the promissory note has the maturity date at a fixed term after sight. In the last case, the purpose of the formality of the validation by the issuer is only "to establish the date when the obligation becomes payable"(Cărpenaru, 2016, p. 695).

The payment of the *cheque* shall be made by the drawee (namely the bank or the credit institution where the drawer holds the money) on presentment of the instrument by the beneficiary or holder, at the registered office of the drawee (bank) for payment, given the fact that the cheque is payable at sight. But the judicial position of the drawee within this judicial relation with three parties – the drawer, the drawee and the beneficiary, is not that of a debtor towards the beneficiary of the holder of the title, in the meaning that the drawee is not liable for the payment of the cheque as this liability is incumbent on the drawer, aspect underpinned also by the doctrine (Cărpenaru, 2016, p.701). The drawee has only the capacity of payer making the payment from the available funds, at the drawer's order, based on the agreement concluded previously between the drawee (bank, credit institution) and its client (drawer).

Nevertheless, the drawee is obliged to check the fulfilment of the formal requirements of the cheque, in order to make a valid payment, and check the regularity of the successive endorsements if the drawee is paying an endorsed cheque, but he/she does not have the obligation to verify the authenticity of the endorsers' signature.

In accordance with art.29 of Law no.59/1934, consolidated version, the cheque is payable at sight, any other stipulation to the contrary being deemed unwritten.

The presentment for payment of the cheque issued and payable in Romania shall be made within 15 days from the date of issuance, otherwise the beneficiary loses the right of regress against endorsers and guarantors (avalists), but the term for presentment for payment is of 30 days in the case of cheque issued in a foreign country and payable in Romania, respectively 70 days if the cheque was issued in a country outside of Europe. The non-compliance with these terms caused by force majeure or unforeseeable circumstances obliges the holder of the instrument to bring, without delay, to his endorser's attention the respective situation.

Presentment for payment of the bill of exchange, promissory note and cheque shall be made with originals or by truncation. Presentment for payment by truncation of these negotiable instruments produces the same effects as the presentment of the instruments in original, on condition that they were issued in compliance with the legal requirements (in the case of bill of exchange only the accepted bills may be truncated).

Truncation designates, as stated in the doctrine, an informatics procedure that cumulates the successive operations of transposure into electronic format of the relevant informations contained on the original instrument which materialises the payment

instrument – bill of exchange, promissory note, cheque, reproducing their image in electronic format and transferring the data obtained to the credit institution acting as payer (Cărpenaru, 2016, p.676, p.701).

The credit institutions may employ the procedure of truncation on condition that there exists between them a previous convention in the context of a payment arrangement or a convention stipulating their adherence to a system of payments. The transfer of relevant data and the image of the bill of exchange to the credit institution –payer, carried out by truncation, must be operated so that the authenticity and integrity of the data is ensured by the use of any technical procedures recognised by the law.

When it is presented for payment a truncated bill of exchange, the credit institution is obliged to verify if that bill in original, complies with the form and content provided by the law, including the regularity of the successive endorsements, except for the authenticity of the drawer and endorsers 'signatures, and must guarantee the accuracy and conformity of the relevant data for truncation transferred electronically, with the data written on the original bill of exchange, as well as the conformity of the image of the bill with the original bill.

Regarding the *consequences of non-payment,* or of the non-presentment for payment of the instruments analyzed, some particularities may be observed in the case of cheque compared to the regime of the bill of exchange and promissory note.

The non-presentment for payment of the cheque within the legal terms draws consequences only on the exercise of the right of regress against the endorsers and guarantors, this right being lost if the drawee did not make the payment, however it is maintained the right of the cheque beneficiary to demand the drawee, within the legal term of prescription, to pay the amount of money written on the instrument.

Hence, for the non-presentment of the bill for payment, the law admits to any debtor of the bill, the right to register the amount mentioned in the bill to the Deposit and Consignment Office or to any other institution legally authorized to carry out this type of operations, on the expense and risk of the holder of the bill, following that the receipt of registration to be submitted to the court of the place of payment, as stipulated by art.46 of the law.

If the analyzed payment instruments are refused for payment, the creditor has the right to choose between the *direct action or action of regress and forced execution.*

The refusal to pay the bill of exchange and the promissory note is determined through ***protest*** which is drawn-up within 2 days from the day on which the payment was due to be made, according to art.41 of the law. The clause "no expenses", respectively "no protest", exempts the beneficiary of the bill or note from the responsibility of carrying out the protest for refusal of payment, which is required in submitting the regress action. Therefore the protest is not necessary if the issuer writes on the bill and on the note the mention "no protest".

Based on the refusal, the credit institution that holds the original bill of exchange shall write on it: the date of presentment for payment in order to establish whether the presentation was done within the legal period of time; the declaration of refusal dated and signed by the legal representatives or trustees.

The total or partial refusal to pay a bill of exchange, promissory note, cheque, presented for payment by truncation shall be made in electronic format by the credit institution – payer.

1.5.2. Payment incidents

The Payment Incidents Register, hereinafter called PIR, functions within the National Bank of Romania and it is a database that registers the data specific to payment incidents involving bills of exchange, cheques and promissory notes (The Informational Flow of the Payment Incidents Register, see on http://www.bnr.ro/Reglementari-3247.aspx, accessed on 07.10.2016).

In PIR are registered the payment incidents produced by the holders of account for payment of cheques, bill of exchange and promissory notes, that are major ones, according to the reason for which the payment is refused; information about the payment instruments that are lost, stolen, broken or annulled. The major payment incidents produced by the holders of accounts for payment of cheques determine the registration of the respective account holder in the National File on Risky Persons (Informational Flow of the Credit Risk Register, see http://www.bnr.ro/Reglementari-3254.aspx, accessed on 07.10.2016).

The account holders who produced the major payment incidents involving cheques – practically are not paid a cheque submitted, within 15 days, are sanctioned through the interdiction to issue cheques for a period of a year from the date of registration in the PIR of the respective payment incident. The promissory note issued with maturity date, presented for payment after the maturity date generates – if refused for payment – a minor payment incident.

A particular and constant case law emerged following the submission of action through which is requested the annulment by the issuers of the payment incident arisen as an effect of the refusal to pay the promissory note and the banking interdiction to issue promissory notes/cheques, of which we would like to mention:

- Decision no.1327/2012 of 9 March 2012, delivered by the Supreme Court of Cassation and Justice, civil section II, by which are made statements about the case in which it was requested the annulment of the incident of payment related to the instrument of payment on grounds that the promissory note was introduced in the banking flow by error of the accountant of the credit company, and the defendant notified PIR about the refusal to pay (accessed on http://legeaz.net/spete-civil-iccj-2012/decizia-1327-2012 on 07.10.2016)

- Decision no.313/2013 of 30 January 2013, delivered by the Supreme Court of Cassation and Justice, civil section II, by which retained the appellant's assertion that on the same day with the maturity date of the promissory note, namely 23.02.2011, the entire debt was paid in full and consequently the bank issued illegally the application to register the banking refusal in the National File of Promissory Notes;

- Decision no.92/2009 of 15 October 2009, Brasov Court of Appeal, commercial section – that stated on the annulment of the payment incident as the debtor sent two letters to the creditor, through which it was requested the agreement for the amount corresponding to promissory notes to be paid in the same day, 18.02.2009 by means of payment order from an account opened at BCR, the two creditors having agreed, and on 18.02.2009 , probably by error, both demanded to collect the amount stipulated through promissory notes (accessed on www.jurisprudenta.org, 07.10.2016);

- Decision no.126/A-C/7 November 2007, delivered by the Pitesti Court of Appeal, commercial section on contentious, administrative and fiscal matters, in case no.763/1259/2007 that stated that the appellant showed that on 22.01.2007 issued in

favour of SC E Bucharest a promissory note for the amount of 13.232,36 lei, due on 24.03.2007. Because the due date was Saturday and it is not considered working day, the parties agreed to issue a new promissory note. Therefore on 24.01.2007 the appellant issued a new promissory note in favour of the same company and same amount, due on 27.03.2007, but by error the first promissory note was submitted for payment at R. BANK which refused it partially motivating insufficient funds in the account, more precisely for the amount of 5.361,70 lei (accessed on http://legeaz.net/spete-civil/incident-bancar-bilet-la-ordin-126-2007, on 07.10.2016).

2. CONSIDERATIONS ON THE FORCED EXECUTION AND ENFORCEMENT OF PAYMENT AND CREDIT INSTRUMENTS

An aspect that generated broad debates regarding the payment and credit instruments is their ability to constitute themselves as enforceable titles and gain enforceable character necessary for the execution of the instrument.

The nature of *enforceable title* held by the bill of exchange, the promissory note and the cheque – *for the capital and accessories established in accordance with the regulations of the special law* – unquestionably results from the provisions of art.61, para.1 and 3 of Law no.58/1934, consolidated version, respectively from art.53, para.1 and 3 of Law no.59/1934, consolidated version, which grants to the district courts the *competence of rendering enforceable the negotiable instruments.*

The matter of the compulsory enforceability of the bill of exchange, promissory note and cheque was a controversial one as per the theory and practice of the law of negotiable instruments, being finally clarified through decision no.4/2009 of 19.01.2009 delivered in the united sections of the Supreme Court of Cassation and Justice which stated on the obligation to render enforceable the negotiable instruments regulated by the two sets of special regulations – Law no.58/1934 and Law no.59/1934 – in accordance with the *specialia generalibus derogant principle*, having in view that the priority of the incidence of the regulations on negotiable instruments is strictly conditioned by the fulfillments of specific formalities for the recovery of the credit titles and that the execution of the negotiable instruments constitutes a unified system of enforceability, specific to the regulations on negotiable instruments, the requirements and formalities include the enforceability of negotiable instruments" (Supreme Court of Cassation and Justice, unified sections, decision no.4/2009 of 19.01.2009, published in the Official Gazette of Romania, Part I, no.381/4.06.2009).

As stated by the Supreme Court of Cassation and Justice "the special regime, regulating the procedure of execution of negotiable instruments is justified by the nature of the bill of exchange, promissory note and cheque, of being payment instruments with scriptural money, characteristic which imposes a judicial regime of increased rigorousness" doubled by the necessity of ensuring the *celerity and security of the judicial relations* specific to the regulations on negotiable instruments. Consequently, although the analyzed payment and credit instruments constitute, according to this special law, enforceable titles, the formality that is previous to the enforcement was very appreciated by the law-maker and considered useful" for the judge in giving him/her the possibility to examine the fulfillment of the formal requirements for the validity of the instruments", so that only through their enforceability they become enforceable titles for the amount

written on them and for the determined accessories" (Supreme Court of Cassation and Justice, unified sections, decision no.4/2009 of 19.01.2009, published in the Official Gazette of Romania, Part I, no.381/4.06.2009).

Therefore the enforcement of the bill of exchange, promissory note and cheque is conditioned by the character of enforceable title, as disposed by art.61, para.3 of Law no.58/1934, consolidated version, and art.53, para.3 of Law no.59/1934 consolidated version, granting the district court the prerogative to render the credit titles enforceable, the writ of enforceability not being subject to appeal (on the enforcement of the credit and payment instruments under the special law in the matter and the provisions of the old Code of Civil Procedure (Buta, 2003, pp.498 –500).

The enforcement of a negotiable instrument is described by case law as being "the formal provision previous to the actual initiation of the forced execution procedure, so that the application for rendering enforceable shall be submitted to the district court of jurisdiction, procedure that will be carried out by the district court where the place of payment is located, pt.320, letter f) of the Framework regulation of the National Bank of Romania, no.6/1994 , orders expressly through decision no.952/2013 of 22.02.2013 of the Supreme Court of Cassation and Justice, civil section, respectively decision no.3895/2013 of 19.09.2013 of the Supreme Court of Cassation and Justice, civil section (cited by Indaco Lege 4. Professional. Jurisprudenţă, which indicates as source: scj.ro).

Since, in practice the courts that were addressed the application for enforcement did not interpret the law in a unified and uniform manner, the provisions of procedural law, consequently generating negative conflicts of jurisdiction. The Supreme Court of Cassation and Justice, civil section, in charge with issuing a resolution, issued judgments of this type on the material and territorial competence of the court in accordance with the procedural regulations provided by the special law in the matter of credit and payment instruments and the *common law rules of procedure in* the Code of civil procedure.

Recently, through decision no.752/2015 of 05.03.2015 and decision no.2699/2015 of 26.11.2015 delivered by the Supreme Court of Cassation and Justice, civil section (cited by Indaco Lege 4. Professional. Jurisprudenţă, which indicates as source: scj.ro), is was stated on the *alternative teritorial competence of* the court which is requested to render enforceable, in the context given by the regulation of common law , more precisely art.641, para.2 of the Code of Civil Procedure, republished in 2015, amended and supplemented through Law no.138/2014. In compliance with art.641, para.1 of the Code of Civil Procedure in force at the time when the judgements were delivered, the enforceable titles – *other that the court judgements,* may be executed only if they have enforceable title, and in accordance with para.2 of the same law, the application of enforceability shall be resolved by the district court located in the same jursdiction as the creditor or debtor, whether in closed session, without summoning the parties, being instituted an alternative territorial jurisdiction that allows the appealant to exercise the *right to choose between several courts of the same competence.*

Before the amendment and supplement of the Code of civil procedure through Law no.138/2014, and the introduction of art.640^1 which became art.641of the Code of Civil Procedure in the version republished in 2015, the case law stated regarding the exclusive jurisdiction in the matter of enforcement of credit and payment instruments (bill of exchange, promissory note, cheque), in favour of the district court from the place of payment, according to the special rules in the matter of payment instruments – the

framework regulation no.6/1994 issued by the National Bank of Romania according to which, the procedure of forced execution shall be carried out by the district court in the jurisdiction of the place of payment "therefore also the competence in solving the application for the enforcement of the payment instrument is granted to the court having jurisdiction at the place of payment" (Supreme Court of Cassation and Justice, civil section, decision no.3895/2013 of 19.09.2013, cited by Indaco Lege 4. Professional. Jurisprudenţă, which indicates as source: scj.ro),

At present we observe that art.641 named the "declaration of enforcement" of the Code of civil procedure, republished in 2015, was amended through the effects of provisions in pt.5 of the Government Emergency Ordinance no.1/2016, beginning with 04.02.2016, in the current wording the legal text being called "Document under private siganture" and has the following content "Art.641 – Documents under private signature are enforceable titles only in the cases and conditions specified by the law. Any clause or contrary convention is void and deemed unwritten. The provisions of art.664 and subsequent. According to art.640 "credit instruments" from the code " the bill of exchange, promissory note and cheque, as well as other credit intruments may constitute enforceable titles if they fulfill the requirements provided in the special law" (the GO mentioned makes reference in the foreword to the Decision no.895/2015 of the Constitutional Court on the rejection of the exceptions of unconstitutionality of provisions of art.641 and art.666 of the Code of Civil Procedure). The the current legislative context we notice that common law rule of procedure makes reference to the conditions resulting from the special law in the matter of the analyzed credit and payment instruments, the special rules that provide at the same time for the bill of exchange, promissory note and cheque, the need for them to be declared enforceable, the jurisdiction being granted to the district courts. The special rule does not comprise any type of explanation regarding the territorial jurisdiction and consequently, are applicable the provisions of the common law of procedure from the Code of civil procedure, consolidated version, art.113, para.1, pt.7, according to which the alternative jurisdiction in what concerns the bill of exchange, promissory note and cheque, belongs to the court of the place of payment, in compliance with pt.7.

Art.113 para.1 pt.7 of the Code of civil procedure, consolidated version provides: "The court of the place of payment, in the applications regarding the obligations that derive from bill of exchange, promissory note and cheque of other negotiable instrument".

3. ASPECTS OF INTERNATIONAL PRIVATE LAW IN THE MATTER OF PAYMENT AND CREDIT INSTRUMENTS

The aspects of private international law are mainly generated by the conflict of laws which takes place whenever must be settled disputes generated or related to negotiable instruments, but also disputes referring to the law applicable to the effects of obligations resulted from bills of exchange, promissory notes, are stipulated in the Civil Code, consolidated version, art.2647 – 2658 of Chapter VII of Book VII called " Dispositions of International Private Law".

The dispositions generally applicable to all credit titles concern the determination of the law applicable to the capacity of the persons who issue or use bills of exchange, promissory notes and cheques, the determination of the law applicable to the formal requirements, the action of regress and the protest. Section 2 of the set or articles which

make-up *sedes materiae*, art.2651-2654 has in view the bill of exchange and the promissory note from the perspective of the law applicable to the effects of obligations, debt acquirement and accept, as well as the law applicable in the case of loss or theft. Finally, section 3, art.2655 – art.2658 is aimed at clarifying the scope of the international private law rules on cheque as well as on dtermining the law aaplicable to it and the effects of derivatives, including the invalidity of the cheque.

Altogether, in what concerns the requirements for the validity of the bills of exchange, promissory notes and cheques, from the point of view of substantive requirements, the Romanian international private law rule of art.2647 of the Civil code, consolidated version, provides on the law applicable to the capacity of the person who creates obligations for him/herself through the credit title, in the meaning that this person who, according to his/her national law, lacks the capacity of binding him/herself through such title, however he/she can be legally bound if the signature was given in a country where the law considers the subscriber to be liable. As for the formal requirements, the engagement taken through these credit instruments is subject to the formal requirements instituted by law of the state where the commitment was subscribed but in the case of cheque it is sufficient the fulfillment of the formal requirements provided by the law applicable to the place of payment. If however, the commitment assumed under the incidence of the law mentioned previously is not valid but it is still in accordance with the law of the state where the subscription to a future commitment will take place, the validity of the subsequent commitment is not ruled out or affected by the formal deficiency of the first commitment, as provided by art.2648 of the code.

4. CONCLUSIONS

Consequently, as it can be concluded from the present study, the advantage of payment made through promissory note or guarantee (aval) of payment by promissory note – this being the most widely used instrument of payment and credit in the business environment, is that on maturity, the promissory note gains the character of enforceable title. In the case where the debtor has not fulfilled the payment obligation, the creditor may resort to the forced execution of the debtor, without having to go through the phase of trial in court of law and wait for the delivery of a judgment that would afterwards be enforced under the terms provided by the procedural rules.

Having in view the consequences of failure to pay on time the negotiable instruments , those outlined above, but also the consequences having detrimental impact on the economic spiral, it would be very beneficial if in the practice of relations between professionals to verify the documents a potential contractual partner may have registered in the PIR. The information in the PIR database can be accessed only by means of a bank, but the information concerning the payment incidents are stored in the database of the Payment Incidents Register for a period of 7 years from the posting date.

In this manner one can obtain information without stating the identity of the banks that reported the information. Useful information could be that which concerns a certain payment instrument (bill of exchange, promissory note, cheque) or an instrument which was lost, stolen, destroyed or annulled, but especially relevant would be information regarding the history of payment incidents of a particular account holder, that might become a future contracting partner.

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