

ABOUT TRANSMISSION, GUARANTEEING AND PAYMENT OF AN OBLIGATION ASSUMED BY A CHECK

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In a dynamic range as the one of securities, the analysis proposed in this paper provides to the experts a theoretical and practical image, structured and updated in terms of legislation. The study consists of specific elements about transmission, guaranteeing and payment of an obligation assumed by a check, both in terms of common law and of regulations of their own domain.

Keywords: checks; endorsement; downstream; certification; payment.

The concept of "check", in special legislation and doctrine, numerous definitions of the term "check" are constantly developed and analyzed

Thus, the first definition is retained in the text of Law. 59/1934 which establishes mandatory elements a document must meet in order to be considered a check. The legislator was inspired by the Italians who took over the Convention containing uniform law on checks and adopted in 1931 in Geneva.

However, in Norm nr.7/1994 of the National Bank of Romania it was established the legal relationship as a result of using checks (item 4), stating that "the instrument is created by the drawer, based on an established available prior to a bank, gives an unconditional order, which is held in position of drawee, to pay at the presentation, a determined amount to a third party or to the drawer itself, who is in a position of beneficiary".

Representatives of the doctrine have been and are concerned with the study of this security, as proved by numerous approaches including the concept of checks, which usually start from defining the term. Thus, some authors define the check as representing the "credit title that includes an order

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that the drawer gives to a bank thru which he orders him to pay to the beneficiary a sum of money".¹ Another definition states that "the check is a document that someone called drawer, orders to the bank where his money is available, called drawee, to pay at the title presentation a sum of money to another person, called the beneficiary".² The check is defined as the "credit title that contains the order to pay a sum of money, drawee on a bank, by the one who has available funds there."³

Discussion of the endorsement – specific means of transmission of the obligation assumed by check

The check can be sent both by means of common law (assignment) and by specific endorsement, thus confirming its dual legal nature.⁴ On the other hand, check's category also includes determination and transmission of obligations under that document.

Thus, a "check nominative" transmission can operate only by assignment of debt, because it contains the clause "not to order" which doesn't allow manual transfer by endorsement or tradition, while a "bearer check" is transmitted only through manual tradition. If the endorsement is on a "bearer check" the guarantor will respond as provided in the fall, without title to be turned into a check to the order.

In case of "check in order" and the check is issued by clause "not transmissible", their transmission operates through endorsement, taking into account the particularities of transmission through endorsement of the check issued by clause "non-transferable" because in the latter case clause is inserted by drawer on beneficiary's demand and thus determines the last owner who can take possession of the amount entered in the title.⁵

We conclude that a check is sent by endorsement, if it's payable to a particular individual, with or without an express clause "to order" and if it is stipulated payable to a person "not at order" it is sent having the form and effects of an ordinary common law assignment.

The law expressly defines endorsement of the check, and devotes its written form (deleted endorsement is deemed unwritten) and signature

¹ I. Dogaru, L. Săuleanu, A. Calotă Ponea, *Theory and practice in the field of securities trading value - bill of exchange, promissory notes and checks*, Didactic and Pedagogical Publishing House-RA, Bucharest, 2006, p. 166.

² St. D. Cărpenaru, *Romanian Commercial Law*, The 5th Edition, All Beck Publishing House, Bucharest, 2004, p. 560.

³ Pyk Gălășescu, *Banking course*, "I.C. Parhon" Publishing House, Bucharesti, 1950, p. 174.

⁴ A.D. Dumitrescu, *Securities. Regulation. Doctrine. Jurisprudence*, Bucharest, C.H. Beck Publishing House, Bucharest, 2011, p. 331.

⁵ Ion Dogaru, Lucian Săuleanu, Armand Calotă Ponea, *works cited*, p. 177.

requirement set by the guarantor. If only the guarantor signs the endorsement, it is valid only if it is written on the check, even if the beneficiary is not mentioned.

Moreover, the provisions of the Rules of the National Bank of Romania no.7/1994 are relevant in this problem, since on one hand, section 73 provides that the endorsement is a bill thru which the endorser, holder of the check, transfers to the endorsed, by written and subscribed statement on the instrument together with delivery, all rights arising from the check written and completed, and, on the other hand, the rules stated in item 88 says that endorsement "in full" involves guarantor's declaration, signed and dated, including the order addressed to the drawee to pay some specific persons. Endorsement "in full" must include the guarantor's signature, endorsed name and the endorsement date (if the date is not mentioned, it can be proven by any means of evidence admitted).

An endorsement becomes effective only if the title is remitted and the partial endorsement is null. Endorsement is transmitted through all the rights arising from the title, so the guarantor will be liable to yaw and to subsequent owners of the check.

In this context we can discuss about the application of certain principles enshrined in law, as the principle of good faith and the principle of indivisibility.

Common law principle of protection the good faith says that one, who loses title possession, cannot recover it from the current owner, whether the check is payable to bearer or transferable by endorsement, unless the new owner acquired the check in bad faith or following a serious mistake in connection with its acquisition.

The principle of indivisibility is present in sanctioning by check nullity two situations – when endorsement and partial endorsement given by the drawee.

Endorsement allows the transmission and analysis regarding the mandate, because the mandate applications are included in the check in general and endorsement in particularly.

Therefore, we see that, if the endorsement contains the words "to buy", "value coverage", "for collection" or equivalent wording, shall be presumed a general mandate and the check owner is entitled to exercise all rights under it, but it may endorse it only if he's authorized.

Regarding endorsement affected by the way, we note that the check guarantee, must not be conditioned or encumbered by consideration, or the sanction consists in that that condition shall be deemed unwritten.

The practice retains many situations where a person can endorse the check in the interest of another drawer or interest required by check, and they can endorse the check back later (business management). If the endorsement

is given in the benefit of the drawee, it is worth a receipt unless the endorsement has several establishments and that the drawee is made for an establishment that does not coincide with that on which the check was drawn.

An interesting situation is "white endorsement " or endorsement "to bearer", stated by Article 90 of the Rules of the National Bank no.7/1994 which provides that a "white endorsement " consists only of guarantor signature entered either on the back check, or on its margins.

If the endorsement is "white", the title holder may have to check whether in the purpose of completing his name or the name of another person on it, or to endorse (endorse again) or give it to a third party.

The rule is that responsible for payment is the guarantor, unless the clause is contrary.

Draw a check in several copies, make a guarantor who sent these copies to different people, but also the coming sureties, to respond for all the non-returned copies bearing the signature of such persons.

It is considered legitimate the possession of a transferable check, as far as the title holder can justify his right by a continuous series of signatures.

Another problem that arises when analyzing the liability of persons involved in check traffic is the problem of force majeure and that of unforeseeable circumstances.

If these situations occur, the document owner is immediately obliged to inform his endorser and to check out the mention of it, signed and dated.

However, the unforeseeable circumstances or force majeure does not include purely personal facts of the check owner or person authorized by the facts to present the title, by making the protest or equivalent finding. When the situation stops, the title holder must present the check to payment and possibly to draw protest or finding.

Guarantee obligation assumed by check

Guaranteeing securities can be achieved both by common law guarantees⁶ (guarantees and collateral) and the specific guarantees these documents.

The specific payment guarantee is the downstream given by a third party, other than drawee or a signatory of the check, for the full amount or

⁶ Provisions of Art. 2279-2322 of the Civil Code refers to personal guarantees (fideiussione and autonomous guarantees), and art. 2323-2499 of the Civil Code governing the privileges and collateral materials (privileges, mortgage, pledge, retention of title). In addition, The Civil Code provides now two independent guarantees of obligations different by the object of the obligation assumed. Thus, the guarantor assumes to pay a sum of money, or the obligation to do or not do, in a comfort letter.

part of it.⁷ Downstream is given on the check or addition and it shall be signed by the avalist by words: "to downstream" or other equivalent formula.

Downstream of the check may be given by a third party, other than drawee or a check signatory. Regularly, it is stated the person to whom is given further, and if not, is believed that it is given for the drawer.

The avalist position is equated to the position of the one who gave the downstream, in the sense that both are equally bound, but the avalist's obligation is autonomous relative to the guaranteed obligation, so the avalist's obligation is valid even if the guaranteed obligation is zero.

If downstream appears as a specific warranty obligation arising from the security in general, other security – "certified check" is specific to check.

Trade rules no.7/1994 regarding credit checks institutions provides (item 38): "The term certified check means a check that a credit institution in a position to drawee confirms, before handing the check to the beneficiary, the existence of required funds payment ordered by that instrument"⁸.

It is specified that check certification means signing title by the drawee (the bank), which confirms at the time that the provision of bank covers the check amount. Moreover, the amount can't be withdrawn by the drawer, nor can it be used for other purposes, certainly guaranteeing the check at the bank.⁹

So, the certification statement written and signed on the check by the drawer, confirms the existence of available funds. The drawer is prevented to withdraw the cash before the transition time of presentation, and the beneficiary check deception is impossible since the company banking is financial responsible if its officers are certified the fictitious check, without the necessary provision.

Certification may be required by the drawer to the issuing banking company before giving it to payment or by subsequent owners, check's beneficiaries. The banking society certifies the bank checks with the expression "certificate", with the full name of his legal representative designated to perform this function, followed by his signature and stamp of the bank.

Settle the obligation by paying the check

The main effect of obligations and their main mode of extinguishing is represented by the payment.

Generally, the payment will settle the obligation under article 1503 of The Civil Code. Thus, if the original acknowledging the debt document is

⁷ A.D. Dumitrescu, *Securities. Regulation. Doctrine. Jurisprudence*, Bucharest, C.H.Beck Publishing House, Bucharest, 2011, p. 337.

⁸ Item 38 was amended by item 3 of the art. III of the Regulation no. 6 of June 5, 2008, published in Official Journal no. 509 of July 7, 2008.

⁹ M.N. Costin, *Dictionary of International Business Law*, 1st Volume, Lumina Lex Publishing House, Bucharest, 1996, p. 163.

voluntarily submitted, in our case, the security, from the creditor to debtor, one of the co-debtors or fideiutor, it arises the presumption of extinguishing by payment the obligation, and if the document submitted shall be authentic, the creditor is entitled to prove that delivery was made for other reasons than redemption of the obligation (for example, bills or remission check in original). We have a different solution if the authentic original document is remitted – it does not stand the presumption that the obligation has been extinguished by payment because its authentic document suggests the need for greater legal protection, the protection of an interest not only between parties but also between third parties.

Regarding pay check, there are different provisions than those in bills of exchange because the check is payable on demand and is not subject to acceptance by the drawee who is only a payer and is not responsible for unpaid amount.¹⁰

If the full amount is paid, check signatories (drawer, avalists or guarantors) are absolved of obligations they have assumed, and failure to pay within the statutory title entails loss of the right of recourse against the guarantor or against the avalists without causing the settle of obligation undertaken by the drawer by issuing the check.

The analysis of obligation settlement by payment has three components: presentation of payment, effective payment and refuse to pay.

The first activity, presenting the check for payment is made by a drawee, the banking company or clearing house, and the credit title presents the same effect as the original or truncation.¹¹

Mandatory mentions on checks include a "code" and a unique identification number (according to article 1 section 8 of the Law no.59/1934 on checks and "the drawer code – a unique identification number, taken from or registration identification documents of the drawer "), the consequence of such provision consisting in the fact that the check can be presented for payment by truncation and it's an electronic document bearing an electronic signature, under condition of existing between credit institutions a prior agreement in this respect.

¹⁰ A.D. Dumitrescu, *Securities. Regulation. Doctrine. Jurisprudence*, Bucharest, C.H. Beck Publishing House, Bucharest, 2011, p. 339.

¹¹ Norm no. 7/1994 on trade made by credit institution with checks, item 166.1. "Checks can be presented for payment by truncation, in accordance with SENT system Rules or if the cropping operation can not be achieved through the presentation at the collection, in original, directly from the drawer credit institution or from the beneficiary drawee credit institution, according to existing procedures concerning agreements between credit institutions involved. Item 166.1 was introduced by item 30 of Art. I of Regulation no. 6 of June 5, 2008, published in Official Journal no. 509 of July 7, 2008.

The drawer, the credit institution must verify that the original check comply with legal background form, has to ensure accuracy and compliance of relevant information transmitted electronically from the original data and to ensure compliance check to check original image.

The supreme court¹² held that can not be accepted a bill of exchange action based on a check which has not been proved by the applicant that was presented for payment in due time and that was protested for non-payment, the applicant being entitled to appeal based on the report, using the check as a written document through can be established the report.

In judicial practice it was decided that some courts have erroneously concluded that the check may be an active claim – an inheritance good which is tax recorded, but the presentation¹³ of the check owner to be paid is an operation derived from check obligations.

In considering the forms that must be observed in performance of an obligation (where the execution is performed and not those where the obligation was incurred, if the place of performance is in another country is to apply the law of that country), we note that the check owner which does not meet these formalities is deprived of recourse against the action against the one who endorse the check.

The effective payment of the check by the drawee empowers him to claim that the document shall be handed to him by the holder marked as "paid" total or partial.

If payment is partial one, the drawee's interest is to require its notification on the title and to be issued a receipt which can prove the payment. Also, check payment is made according to available amount in the account, and if the cash is not enough, the payment is made in the existing amount, without the drawee or the beneficiary to invoke and refuse partial payment.

As a following to the payment, the bank is entitled to give the title with the word "paid" and check the regularity of succession of endorsements. It does not check the authenticity of signatures of the executive officers. Bank role is crucial, as it controls the payment made by check and the payment formalities within the issuer up before available funds.¹⁴

The doctrine¹⁵ states that although the payment instrument that meets the formal conditions laid down in law on checks may not be accepted by the

¹² High Court of Cassation and Justice, Section III, nr.1465/1932 decision published in Florin Ciutacu, *Commercial Law. Reports of cases. Commercial legislation. Model contracts. Models of action*, Themis Cart Publishing House, 2003, p. 487.

¹³ Court of Cassation, in December. nr.758/1928, *Judicial practice in commercial*, p. 123.

¹⁴ I. Dogaru, L. Săuleanu, A. Calotă Ponea, *works cited*, Bucharest, 2006, p. 188.

¹⁵ I. Dogaru, L. Săuleanu, A. Calotă Ponea, *Idem*, p. 189.

drawee, he may be required to certify it, at the request of the drawer or beneficiary, confirming the existence of availability in drawer's account.¹⁶

The bank is not directly bound by the check certification, but it may be required to indemnify the beneficiary of the check, if the amount was not blocked and the amount was used for the drawer.

The payment can be made both personally and through intermediary (agent of the drawer), and if the representative or the false representative exceed their powers to sign a check, they are personally obligated for the full amount provided in check.¹⁷

The law provides¹⁸ the sole responsibility of the drawer for serving as payment a check and other arrangements, which would include the transfer of obligations on a third party, will not be considered by the parties.

The check will have the same effect and its holder will have the same rights, even if after the issuance of the document occurred death, inability of the drawer or its capacity restriction, and the effect will be freezing the amount entered in title of which certification is required.

After expiry of the presentation period, the drawer can revoke the payment order established by issuing checks, but its revocation during the presentation can be made only if the instrument is lost or stolen.

If the drawer does not address to the drawee that he is not available to pay, the beneficiary may present the check and benefit from its effects in the general limitation period (item.168 no.7/1994 of National Bank Rules).

The check is paid in the currency of the place, but item.182 of National Bank Rules no.7/1994 departs from the rule by inserting two exceptions. The first exception occurs if the drawer expresses the amount payable in other currency than in lei and payment is to be made in that currency, in which case payment can be made only if the cash drawer to hold that currency. In the second case, if the drawer expresses the amount payable in a currency other than lei, but states that the actual payment to be made in lei, at the day, the

¹⁶ Item 38 National Bank Rules. no.7/1994: "The term *certified check* means that a check is confirmed by the drawer bank, before handing the check to the beneficiary, the existence of necessary funds payment ordered by the instrument of payment; item 41 establishes a rule for certification made by the National Bank "National Bank and the banks certifies checks with the expression" certified "and with the name and surname clearly written of his legal representative designated to perform this operation, as well as his signature and stamp of the banking company or the National Bank of Romania"; item.39 "Certification of a check may be required to the bank by the issuing drawer company before giving it to payment, or by one of the subsequent owners, beneficiaries of the check".

¹⁷ Article 12 of *Law 59/1934* on checks and item 60 of the rules of the National Bank Rules no.7/1994.

¹⁸ Article 13 of *Law 59/1934* on checks.

clauses contained in endorsements drafting that would alter the currency risk clause set at the issuance of the check are void.

Total or partial refusal of payment of checks presented for this purpose may be related both to the refusal of payment of original checks, or to refusal of payment of checks presented by truncation.

Following the refusal, the credit institution who holds the original check will note on it certain information, factual evidence of refusal of payment – payment date check to see if the presentation was made in due time and the declaration of refusal, signed by their legal representatives or their assigns.

The effect of not paying the amount of the check is held until expiry of the presentation, and without order, the drawee may pay after the deadline, too.

Conclusions

The check is a security issue, with special legal statute, which comes to meet professionals¹⁹ interested to transact conveniently and economically, in "other currencies", whose feature requires careful analysis and insight, in order to reach the purpose of the existence of such an instrument. From this perspective, the study shows the usefulness of transmission, guaranteeing and payment of an obligation assumed by a check.

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¹⁹ V. Dumitriu, *Bills law*, Al. T. Radu Voda Doicescu 41 bis Publishing House, Bucharest, 1926., pp.141-145. Use and utility bills of exchange as means of payment title and execution of contracts was motivated primarily by reference to check.