

CHEQUES vs PROMISSORY NOTES

1. MAIN APPLICABLE LEGAL REGULATIONS

- Law no 58/1934 on bills of exchange and on promissory notes, with subsequent amendments and supplements (hereinafter called “Law 58/1934”);
- Law no 59/1934 on cheques, with subsequent amendments and supplements (hereinafter called “Law 59/1934”);
- Framework – norms no. 6/1994 of the National Bank of Romania regarding the trading of bills of exchange and of the promissory notes by banking companies and other credit companies, with subsequent amendments and supplements (hereinafter called “Norms 6/1994”);
- Framework – norms no. 7/1994 of the National Bank of Romania regarding the trading of bills of exchange and of the promissory notes by banking companies and other credit companies, with subsequent amendments and supplements (hereinafter called “Norms 7/1994”);
- NBR technical norms no 4/2008 on cheques (hereinafter called “Norms 4/2008”);
- NBR technical norms no 5/2008 regarding bills of exchange and promissory notes (hereinafter called “Norms 5/2008”);
- NBR Regulation no 1/2001 regarding the organization and functioning in connection with the NBR of the Payment Incident Bureau Head Office, with subsequent amendments and supplements (hereinafter called “Regulation 1/2001”).

2. CHEQUES

A cheque is a simple payment instrument and does not constitute a credit title. A written order on a bank directing a certain amount of money to be paid to a named person, or “to his order”, or “to him” or “to the designated bearer,” or simply to “bearer,” is called a cheque. The cheque is payable on its presentation, and any contrary provision is being considered ineffective. As a payment instrument, the cheque benefits of shorter terms with regard to the presentation on payment of the cheque issued and payable in Romania, i.e. 15 days. In case the cheque which is payable in Romania is issued in another country, the terms are obviously longer, i.e. 30 days for European countries and 70 days for non – European countries. The payment of the cheque may be in its entirety or a partial one, and in the later case the drawee has the possibility to insert in the document a specification for partial payment as well as to issue the invoice pursuant to the recent amendments which have been brought by Law no 59/1934.

According to art. 1 of Law 59/1934, the conditions requested for the validity of a cheque are as follows: i) the word “cheque” must be included in the title and expressed in the language used in order to formulate the title; ii) the cheque must include the unconditional order of payment of a certain amount of money; iii) the cheque must specify the name of the drawee; iv) the cheque must specify the place where the payment will be made; v) the cheque must specify the issuance date and place; vi) the cheque must include the name, signature and the code of the drawer; vii) the drawee may only be a banking institution, except for the case when the cheque is drawn and payable abroad, where the drawee may be a legal personality other than a banking company; viii) the drawer may issue the cheque only if a cash deposit has been arranged with the drawee to have been set up prior to the issuance of the cheque and the said cash deposit must be of a value at least equal to that of the cheque; ix) the drawer need have signed an agreement with the drawee, prior to the issuance of the cheque, where the latter gives his permission for the cheque to be paid.

Taking into account the fact that a cheque must be presented for payment to the bank within a maximum period of 15 days from the date of its issuance and considering also point v) above which denotes that the cheque must specify the issuance date and place, it is questionable whether the cheque can be used as a guarantee instrument. That means that if a person receives a cheque on the 1st of January, that person has to present it to the bank within 15 days, i.e. no later than the 15th of January. The possibility of leaving the issuance date of a cheque blank is questionable, because of the content of art. 84 para 3 of Law 59/1934 which denotes that anybody who issues a cheque containing a false date or any other of the essential elements as missing - including the date - may be held liable and be imposed with a fine between 5.000 Ron – 100.000 Ron and/or sentenced to an imprisonment of a period between 6 months and 1 year.

Notwithstanding the above, according to the provisions of art. 14 of Law 59/1934, a cheque can be issued as blank at its issuance (i.e. it is possible that it is signed solely by the drawee) provided that it is later on filled in by the beneficiary, in accordance with a priorly formulated agreement between the drawee and the beneficiary. That practically means that if two persons have an understanding, i.e. an agreement (contract) stipulating regular payments with blank cheques, and if in the contract it is expressly stated that the beneficiary may fill in the cheques at certain dates and, if the cheques are, subsequently, filled in accordance with the above, then such cheques are valid. Norms 7/1994 also provides instructions on how a beneficiary may fill in a blank cheque, meaning that this possibility of issuing a cheque with a blank date is valid.

Conclusion: *Considering that for both of above mentioned opinions regarding a blank cheque there are strong arguments, our recommendation, for the avoidance of any risk, is to use only filled in cheques and not blank ones, as the former type of cheques provide a much more framed security than the latter one.*

Failure to respect the presentation terms does not lead to the loss of the beneficiary's right to demand from the drawee to pay the amount corresponding to the value prescribed on the face of the cheque, but only to the loss of the right of redress against the endorsers and the endorsees.

The refusal of the drawee to pay, opens the way for a redress action against the endorsers, the drawer and of all other persons obliged by law to a redress action. For the exercise of such an action, the cheque must have been presented for payment in due time and the refusal to pay must have been certified according to the law in force. In its turn, the protest or the equivalent certification must be have been fulfilled prior to the expiry of the presentation term.

The protest resulting from a failure to pay, constitutes the authentic document which in its turn results to the non payment of the cheque. The refusal to pay may be certified whether by a protest for failure to pay or by a declaration of the drawee, written and dated on the cheque, or by a confirmation which has been dated officially by a compensation office.

Although the protest or the equivalent certification of the protest might not have been executed, the holder maintains the right of redress against the drawer. The redress action is prescribed by a 6 months term from the expiry of the presentation term for payment of the cheque.

In case of failure to pay, the cheques are deemed by law as constituting writs of execution for the capital, as well as for the accessories, interest and expenses respectively incurred. According to Law 59/1934 the cheques must be previously rendered enforceable by a judge, i.e. they must be previously vested with the relevant executory authority. In case someone issues a cheque with no corresponding to the cheque money in the relevant account, that person may be held liable and be imposed with a fine ranging between 5.000 Ron and 100.000 Ron and/or may be sentenced to an imprisonment of between 6 months and 1 year.

3. THE PROMISSORY NOTE

A promissory note is a written promise to pay a certain sum of money at a specified time. There exist three types of such promissory notes, i.e. firstly an individual promissory note, secondly a promissory note made by one party and destined to pay another a certain sum of money at a specified time, or a joint promissory notes, i.e. a promissory note which is much the same as the foregoing except that it is signed by two or more parties all of which are liable jointly but not severally, and thirdly a joint and several promissory note, in which two or more parties severally and separately agree to pay a certain sum at a specified time and whereby each signer of such note is responsible for the whole payment.

The promissory note is essentially a simplified bill of exchange, therefore a credit title. NBR has established a new standard form for the promissory note, as of September 1st 2008. In order for the promissory note to be valid, it must include the following elements: i) the phrase "promissory note" has to be included in the title; ii) an unconditional promise from the issuer to pay a determined amount need also be included; iii) a specification of the maturity date need also be included; iv) a specification of the place where the payment must be made need also be included; v) a specification of the person the payment must be made to need also be included and, lastly vi) a signature of the issuer need also be included.

The endorsement represents the typical way of transmitting rights resulting from the promissory note. It must be unconditional and referring to the whole amount. Via NBR Norm 7/1994, which implements a new standard form for promissory notes, the endorsement has to be written on the front part of the promissory note and not on the extension or addendum part of it, which was allowed previously. It is valid even if the beneficiary is not specified on the title, provided that there is the signature of the transferor.

The promissory note can be guaranteed. The guarantee is the specific method by which an individual, foreign to the promissory note named guarantor, guarantees the fulfillment of the payment obligation provided by the promissory note. In most cases the guarantor is the bank. The guarantee may be given for the drawee, or for the issuer or for any of the successive holders of the promissory note and the guarantor will be liable jointly and in the same way as the individual who had undertaken to provide the guarantee. The guarantee is given on the promissory notes and is expressed by the words "for guarantee" or by any other equivalent words. The simple signature on the front of the promissory note with no other mention will be interpreted as a given guarantee of the issuer.

As a principle the guarantee procedure is applicable to the cheque in a similar way, the difference being that a guarantee form the drawee is not acceptable.

A protest on a promissory note is a formal statement by a notary public, stipulating that the paper was presented for payment and that payment was subsequently refused. When a note is not duly paid on presentation, it is said to be "dishonored" and is taken to a notary public, who again presents it, and, if not paid, he notes its non-payment, and afterwards draws up a formal protest, that legal proceedings may be taken for recovering the amount due. Should there be available endorsers but no protest is made, the endorsers may, as per the local legal regulations applying in some prefectures, be released.

The holder of a note may give notice of protest either to all the previous endorsers or solely to one of them; in the latter case he need select the last endorser, and the last one has the obligation to further notify the last one before him, and so on.

Where notice of protest is duly addressed and deposited in the post office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

A promissory note made payable at a bank and held there for payment until the usual hour of closing, need not be presented to the issuer in person so as to bind the endorser. It may be protested, as in the

case of drafts, immediately on the close of bank transactional hours. Payment must be immediately demanded of the endorser if he resides in the same place; if he is a non-resident he must be notified at once by written letter.

A promissory note which does not state on its face that it bears interest, will bear interest only from the time point of its maturity. If the words "with interest" are included in a promissory note, the latter draws the legal rate of interest from the date of its issuance, however if the promissory note is drawn up so as to attract a rate of interest higher than the legally prescribed one, but not higher than the one that the local law statute of the relevant prefecture allows, then the rate of interest need be further specified.

Conclusion: *In our opinion the safer way to get paid is by promissory notes endorsed by the administrator of the company that owes money. This means that both the company and the administrator in person are liable in the same way towards the beneficiary.*

In case of failure to pay, the promissory notes are deemed by law as writs of execution for the capital, as well as for the accessories, interest and expenses which have respectively been incurred. According to Law 58/1934 the promissory notes must be previously rendered enforceable by a judge, which means that they need be vested with the required relevant executory authority. In case somebody issues a promissory note with no corresponding to the promissory note designated money in the relevant account, that person may be held liable and be imposed with a fine.

4. PAYMENT INCIDENT BUREAU (PIB)

PIB is a center managing the specific information for payment incidents of public interest, including those destined for the users' purposes. The specific data for the payment incidents are sent, distributed and put to value on the basis of information which may have even been collected or may have existed prior to the payment due date, as well as information included in the registers and relating to acts and/or facts of a fraudulent or litigious potential and/or producing risks for failure to pay, including risks able to affect the finality of the sum which will be deducted.

In case of payment incidents generated by issuance of a cheque/promissory note that is e.g. non-covered, the person responsible for this receives a banking interdiction of a one year duration, and within this interval may not issue any new cheques/ promissory notes.

Conclusion: *Before accepting a cheque/promissory note from a company, it is advisable that one investigates, with the help of a bank, whether the said issuer has had any payment negative incidents in his credit history.*