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Distinctive Elements of Cheque Payments

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DISTINCTIVE ELEMENTS OF CHEQUE PAYMENTS

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Abstract:

Cheque related laws, which also describe its distinctive characteristics, existent in every law system, prove the fact that it is a handy instrument for the business environment and not only, being one of the most used payment instruments, together with the electronic ones.

The study herein is intended to make an analysis of the full payment process, from the parties' obligations at cheque issuance, its description, and the actual operation of the payment, to the legal means provided to the beneficiary of the cheque in order to recover the unsettled payment from the issuers or signatories of the bill. A short analysis of the regulations of the Civil Code concerning the law applicable to cheque payment will also be provided.

Keywords:

payment instrument, cheque, provision, truncation.

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Nita, M., (2013). Distinctive Elements of Cheque Payments, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:107-118

Generalities

Even though quite similar from the regulations' point of view with the bills of exchange and promissory notes, the cheque is a distinct payment instrument with the purpose of payment settlement, at order, by a credit institution.

Cheque confers a person holding funds from a credit institution able to make its payments through it, avoiding cash payments (Postolache, R., (2012) : 171). In Romania, the cheque is one of the most frequently used payment instruments, even if electronic payment instruments are also widely used. Following the other traditional payment instruments: bills of exchange and promissory notes, cheques have started having an ascending trend only after the law regulating them became effective. Their use was otherwise extremely scarce.

Due to the fact that one of the cheque's functions[2] is that of payment instrument, this study will focus on the distinctive elements of the payment.

The definition of cheques can be extracted from the text of the Law 59/1934 and that of the Geneva Convention from 1931 on the Uniform Law on cheques: The cheque is a payment instrument through which a person, referred to as drawer, orders a bank or another credit institution, in its capacity of drawee, where they have an appropriate availability, to pay at sight a cash amount to the beneficiary (Căpăţână, O., Ştefănescu, B., (1985) : 93; Mazilu, D., (2003) : 361).

It can be stated that the cheque is a payment warrant on a bank deposit for which the drawer is the deponent and the depositary credit institution is the drawee.

Analysis of drawee compared to the drawee of the bill of exchange

As shown above, the payment is made by the drawee, but we must highlight the fact that this drawee is not a debtor of a bill of exchange, but has the capacity of payer to the drawer and thus, is not responsible for the unsettlement of the cheque. The main person indebted is the drawer, who will be liable for the unsettlement of the payment.

[2] Cheques have two main functions: *a)* Instrument for funds withdrawal from creditor account attached to the bank account; *b)* Payment instrument in scriptural method.

Nita, M., (2013). Distinctive Elements of Cheque Payments, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:107-118

If the cheque is issued with the remark "at sight" or "at certification" written on it, even if it is presented before its due date, it becomes payable in the day of its presentation for payment. This is a characteristic of the cheque. The failure to comply with such a provision is effective only in relation to the drawer's right to withdraw the cheque before the date of its presentation.

The presentation at sight or at certification can only provide confirmation of the availability. If there isn't any availability, the cheque can however be paid even after the expiry of the presentation term, if the drawer's account is fed.

A characteristic of the cheque is the existence of provisions, i.e. of the obligation to open a bank deposit at the credit institution which acts as drawee, or in other words, the existence of the availability in an account of the drawee.

The specialized literature has raised the issue of the moment when the availability must exist. In the literary meaning of the law, the availability must exist at the date of cheque issuance, but its absence does not have an impact on the validity of the cheque.

The availability has a practical importance at the date of its presentation "at sight", "at certification", or "for payment". Mentioning by the drawer of the means of presentation also has a practical importance.

The availability may exist at the date of issuance, but the cheque issuance does not block the availability. Only for the cheques certified by the credit institution, according to the norms, the certification made on the day of issuance blocks the amount within the account; difficult to implement (Niță, M., (2010) : 166-184), though.

Presentation for payment and cheque payment

In the Genevese system, the cheque is payable at sight[3], regardless of the contrary remarks. This characteristic is so peremptory, that even if a date for the presentation for payment is mentioned, the cheque is payable in the day of its presentation.

[3] Government Emergency Ordinance no. 38/2008 abolishes paragraph 2 of art. 29, i.e. the elimination of the postdating option, respectively the demand for payment of a cheque which has a date of issuance subsequent to the date of presentation, due to the fact that, in this situation, the date of issuance is considered a so-called "due date", given the fact that the cheque is a payment instrument payable at sight.

Nita, M., (2013). Distinctive Elements of Cheque Payments, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:107-118

Cheque's presentation at a clearing house is equivalent with its presentation for payment.

A characteristic of the Genevese cheque is the fact that the legal terms for the presentation for payment are different according to the geographical location of the place of issuance and of the place of payment. Thus:

a) For the cheques drawn and payable in the same country, the term for presentation for payment is of 8 days;

b) For the cheques issued in a country and payable in another country, the term for presentation is of 20 or 70 days, depending on the place where they are issued and payable (20 days if they are on the same continent and 70 days if they are on different continents)[4].

The common-law system deals separately with the cheques and bills of exchange, in what the presentation of the cheque for payment and the discharge of the credit institution's obligation to make this payment is concerned.

When the cheque is not presented for payment "within a reasonable amount of time" and as long as the issuer or the person on whose account the cheque was issued still had the right to request the payment to the credit institution, the cheque's beneficiary is liable for the actual damage suffered by the previously mentioned persons because of this delay. The reasonable time frame is settled, in this case, by taking into account the nature of the document, the commercial and banking practice and specific circumstances of the case (Hachman, M., (1930) : 738). The bank's obligation, but also its right to pay a cheque is discharged by means of countermand of payment and by its notification of the customer's death[5].

In Romania, the Law no. 59/1934, modified by the Government Emergency Ordinance no. 38/2008 stipulates the following terms:

[4] According to art. 29 of the Convention on Uniform Law on cheque, Geneva, 1931.

[5] The Uniform Law of Geneva on cheque does not stipulate this method for discharge of bank's obligations. Thus, art. 33 stipulates the fact that "neither the death of the drawer, nor his disablement, occurred subsequently to its issuance, do not have any impact on the cheque's effects"; see Manuela Niţă, *book cited*, p. 180.

Nita, M., (2013). Distinctive Elements of Cheque Payments, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:107-118

a) If the cheque is issued and payable in Romania, it must be presented for payment, under the sanction of losing the right to sue for compensation the underwriters and guarantors, within 15 days[6];

b) The cheque issued in a foreign country and payable in Romania must be presented for payment within 30 days, and if it is issued in a non-European country, within 70 days.

Due dates are considered as of the date mentioned on the cheque as date of issue[7].

If a cheque issued in Romania is payable abroad, the term for the presentation for payment is the one stipulated by the law of the place where the payment is done. For example, in France, it will be presented in 20 days from its issuance, without taking into account the date of its issue. If the term is reached on a non-working day, it will expire in the next working day.

According to the Government Emergency Ordinance no. 38/2008, the presentation for cheque payment can be done by having its original, or by means of truncation.

Payment by presentation of the original cheque. Law no. 59/1934 on cheque, gives the option of presenting only the original cheque, directly to the drawee or at a clearing house.

Before making the payment, the drawee must check if the cheque complies with the formal conditions provided for by the law, and if the cheque was underwritten; they will also check the validity of the chain of endorsements, but not also the underwriters' signatures (art. 35 of the Uniform Law on cheque).

[6] The text of art. 30, paragraph 1, in its previous form, stipulated two terms for the presentation for payment: 8 days if it is payable in the very same town it was issued and 15 days for any other situation. The Government Emergency Ordinance no. 38/2008 chose to set a single deadline for the presentation for cheque payment, whether it is paid in the town where it was issued or not, due to the fact that, in the case of central electronic processing of the payment instruments of the credit institutions, different terms for the presentation for cheque payment depending on its place of issuance was no longer applicable.

[7] According to art. 29 of the Convention on Uniform Law on cheque, Geneva, 1931 and according to art. 30 paragraph 3 of the Law no. 59/1934. However, in Romania the Frame Norms for the implementation of the law on cheque, no. 9/1994, issued by the National Bank of Romania (BNR), provide a different version for the calculation of these terms. Thus, at point 182, the terms mentioned at art. 30 of the law are calculated as of the next day from the cheque's date of issue.

Nita, M., (2013). Distinctive Elements of Cheque Payments, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:107-118

Payment can refer to the full amount, or only to a part of it, the holder of the cheque being bound to accept it.

Against the payment, the drawee may request the title with the remark "paid" written on it. If the payment is partial, the drawee can request the inscription of this payment on the cheque, a receipt being also issued to him in this respect.

The drawee credit institution is liable for the full value of the cheque, if before the expiry of the due date which matures at the midnight of the next working day from the reception of the cheque, has not made the payment, or depending on the context, did not return the cheque or did not communicate the denial of payment.

The cheque's issuer may oppose to the cheque payment if it was issued as a result of an error or if the goods paid with the respective cheque are not compliant to the contractual provisions. The payment order given to the credit institution through the issuance of the cheque can be revoked verbally or in written. If the credit institution does not obey this order and pays the cheque, it is liable towards the customer for the amount paid. The payer credit institution is liable for the groundless denial of payment. The denial is justified, as shown before, if the chain of endorsements is broke, if one of the signatures is false or if the cheque was not presented according to the legal procedure.

The consequences of the failure to comply with the legal term for presentation are:

a) Loss of the right to sue the underwriters and guarantors for compensation if the drawee doesn't pay;

b) The beneficiary of the cheque does not lose the right to request to the drawee the payment of the amount stipulated in the cheque, his right remaining valid within the prescriptive period (Cărpenaru, S., (2007) : 521).

Payment by truncation. Truncation is a modern processing alternative, which means that the credit institutions can apply this processing option only if they have agreed so by signing some bilateral or multilateral agreements or by signing the contract for the participation in a payment system.[8]

[8] Art. 32[1] paragraph 4 stipulates the fact that: "The credit institution can use the truncation procedure, provided that they have concluded a previous convention in the

Nita, M., (2013). Distinctive Elements of Cheque Payments, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:107-118

Art. 32 of the law stipulates the fact that the presentation for payment of a cheque can be done by presenting its original or by truncation. The "truncation" is the informatics procedure performed through the following consecutive operations:

a) transfer in electronic format of the relevant information mentioned on the original cheque;

b) reproduction of the original cheque in electronic format and

c) sending the electronic information obtained through the operations performed at points a. and b. to the payer credit institution.

The moment when the presentation for payment is made is the moment when the payer credit institution/the payment system receives the relevant information and the electronic image of the cheque (art.32^{1}).

Sending the payment information and the image of the instrument will be made in such a way that it ensures the authenticity and integrity ("with the help of any technical procedure accepted by the law"), to eliminate the risk of fraud by means of content modification.

Therewith, art. 32^{2} also stipulates the obligations of the credit institution which presents a cheque for payment by truncation; thus, they must:

a) verify if the original copy of the cheque is compliant, in form and content, with legal provisions, including the frequency of endorsements sequence, except for the authenticity of the drawer's and guarantors' signatures;

b) certify the accuracy and conformity of the relevant information for truncation, sent electronically, with the data within the original cheque, as well as the conformity of the cheque's image with the original cheque.

In case the above mentioned obligations are not complied with, the credit institution bears the liability for any loss incurred.

Also, the legislator regulates the way in which the denial for payment will be done, considering the fact that, through this IT procedure (truncation), the cheque is no longer submitted to the credit institution in

context of a payment agreement, or a convention which refers to their adhesion to a payment system".

Art. 32^{1} paragraph 5 stipulates the fact that: "Relevant information for truncation, mentioned on the original cheque, are set according to the provisions of paragraph 4".

Art. 32^{1} paragraph 6 stipulates the fact that: "the image of the original cheque is the electronic copy of the original cheque. The image of the original cheque must comply with the standards set according to the conventions provided for in paragraph 4".

Nita, M., (2013). Distinctive Elements of Cheque Payments, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:107-118

hard copy[9]. Thus, the credit institution who holds the original document must write on it the mention of the denial for payment, having as support document of the denial the electronic notification from the payer credit institution[10].

The mention for denial contains the following elements:

a) the date of its presentation for payment, in order to acknowledge whether the presentation was made within the term stipulated at art. 30;

b) the declaration for denial dated and signed by its legal or authorized representatives.

Partial payment and payment in instalments

The law on cheque and the uniform law accept a partial payment, the holder not having the right to refuse such a payment. It is obvious that this partial payment does not cancel the payment obligation for the rest of the amount.

The modifications made by the Government Emergency Ordinance no. 38/2008 also refer to the partial payment by means of truncation. Thus, after the cashing in of a partial payment, the credit institution which holds the cheque will write on it a mention concerning the payment made in order to be clear that the title is valid only for the rest of the amount. The drawee receives from the credit institution which has made the payment, the proof of payment, according to the agreement concluded between the two parties, without the handing in of the original title with the remark "paid" written on it.

Recourse for non-payment

The recourse, in what securities are concerned, is the legal means provided to the beneficiary or payer of a bill to recover the unsettled

[9] Thus, the Norm given by the National Bank of Romania no. 7/2008 stipulates the fact that, in the case of the presentation for payment by means of truncation, the circulation of the hard copy of the original bill of exchange is held at the credit institution which makes the truncation; all the operations made between the credit institutions in relation to the presentation for payment, payment, denial for payment are made, in the case of truncation, only in electronic format.

[10] "Total or partial denial for payment of a cheque presented for payment by truncation is electronically performed by the payer credit institution" (art. 32^3 paragraph 1); "The remarks written on the original cheque, according to paragraph 2, in compliance with the provisions of art. 44 paragraph 1, represent the proof for the denial of payment".

Nita, M., (2013). Distinctive Elements of Cheque Payments, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:107-118

amount or the amount paid from those who are bound to or signatories of the bill.

In the case of cheques, unlike the recourse for the bills of exchange, there is only a recourse for non-payment due to the fact that the cheque is an "at sight" payment instrument.

The cheque's beneficiary can use only the recourse action against the guarantors, the drawer and against the other persons bound by the recourse, because unlike in the case of the bill of exchange, the beneficiary cannot take direct action against the drawee, who is not a debtor of the cheque, but only its payer.

This recourse for non-payment of the cheque is subject to the common form of protest draw up (acknowledgement of the denial for payment) if the cheque was presented for payment before the due date. The protest[11] can be done through:

a) authentic document;

b) declaration given by the drawee dated and written on the cheque[12]. This is an easier and quite frequent method used in practice. It is actually the observation made by the credit institution with respect to the denial and its motivation;

c) dated confirmation from a clearing house, which certifies the fact that the cheque was handed in before the due date and that the payment was not settled.

The date of the protest must be before the expiry of the term for presentation. If the presentation was made in its last day of validity, the protest must be done in the next working day. The issuer may mention the exemption from protest by an unequivocal phrase: "no protest" or "no expenses".

The beneficiary's lack of action, i.e. the failure to present the cheque before its expiry or the failure to draw up the protest, does not signify the holder is elapsed from the rights he has against the drawer.

The holder of the cheque may request by means of recourse:

[11] In order to eliminate the extension document, the Government Emergency Ordinance no. 38/2008 modifies art. 59 paragraph 1 stipulating that "The protest can be drawn up by separate document or on the very original of the cheque, or its duplicate". Even if the ordinance does not cancel the text of paragraph 2 of this article, we consider this falls in desuetude.

[12] "The protest requested by art. 43 can be replaced, if the holder agrees, by a declaration of the denial for payment, written and dated on the title and signed by the drawee" (art. 62 paragraph 1 of the Law 59/1934, modified).

Nita, M., (2013). Distinctive Elements of Cheque Payments, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:107-118

a) the unsettled amount;

b) interest of 6%, as of the presentation day;

c) expenses incurred with the pursuit.

Also, the payer can request from his underwriters:

a) the full amount that he has paid;

b) interest to the amount paid, calculated at a rate of 6%, as of the day of payment;

c) expenses incurred.

The rules concerning the cheque recourse are compliant with those of the bill of exchange recourse, to which we will not come back.

Prescription of recourse actions. As opposed to the bill of exchange, for which the prescription time period is of 3 years, the recourse action of the cheque is prescribed after 6 months, term which runs, depending on each situation, as of the expiry of the term for presentation, as of the date of cheque payment by the person bound or as of the starting date of the recourse action. This third hypothesis takes into account the recourse of the person bound, who in his turn, is pursued in recourse.

Payment effects on multiple copies

Like in the case of the bill of exchange, the cheques issued within a country, but payable in another country, except those to bearer, can be drawn in several identical copies[13]. They must be numbered, otherwise they will be held as different cheques.

The payment of any of the copies is liberator both for the drawer and for the drawee.

When the guarantee was made to different persons, the copy which was not returned to the underwriter binds the latter.

In case of alteration, loss, destruction, the efficiency or replacement is working according to some rules similar to those of the bill of exchange.

In the matter of cheque, due to the title's nature, the issuance of copies is not accepted.

[13] According to art. 49 of the Convention on Uniform Law on cheque, Geneva, 1931.

Nita, M., (2013). Distinctive Elements of Cheque Payments, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:107-118

Law applicable to cheque payment

The civil code brings under regulation, in the 7th Book named: Dispositions concerning the Private International Law, in the Second Title: Law conflicts, distinctly regulates cheques.

In this way, our legislation is harmonized with the norms of the Geneva Convention of 1932 on the settlement of law conflicts with respect to cheques.

Thus, in what the payment of cheques is concerned, art. 7 of the convention, as well as art. 2658 of the civil code stipulates the fact that the law on the place of payment regulates:

a) whether the cheque is mandatory at sight or if it can be drawn at a certain time interval from sight and also, which are the effects of postdating;

b) the term for presentation;

c) whether the cheque can be accepted, certified, confirmed or approved and which are the effects of these mentions;

d) the situation in which the holder of the cheque can make the demand and if he is bound to receive partial payment;

e) whether the cheque can be crossed or may be superscribed with the clause for settlement into an account, or other equivalent phrase, and which are the effects of this crossing or of this clause or equivalent expression;

f) whether the holder has special rights over the provisions and which is the nature of these rights;

g) if the drawer may revoke the cheque or oppose to its payment;

h) the measures to be taken in case of cheque loss or theft;

i) whether a protest or an equivalent acknowledgment, is necessary for the preservation of the right of recourse against the guarantors, the drawer and other persons bound.

Conclusions

The frequency of cheque use between business partners has proven the fact that it is an efficient payment instrument, with a complicated configuration at first sight, but which, in reality provides security to contractual partners. This is due to the fact that the cheque has mainly one way of coming to maturity, i.e. at sight, to the fact that the drawee is always a banking institution and last but not least to the

Nita, M., (2013). Distinctive Elements of Cheque Payments, Jurnalul de studii juridice, Year VIII, No. 3-4, December 2013, pp:107-118

obligation of having a provision or an availability (bank deposit) at the credit institution which acts as drawee when the cheque is issued. Also, the IT procedure of truncation is a modern processing alternative which supports the credit institutions to make the payment of the cheque easier.

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