

## Comparison between the Juridical Regime of the Debt Instruments: Bill of Exchange, Promissory Note and Cheque

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**Abstract:** The bill of exchange, the promissory note and the cheque are debt instruments regulated by the bill of exchange law. The debt instruments are differentiated from other instruments used in civil and commercial relations by the inclusion of the debt in the instrument, hence the name of debt instrument. The main features of the debt instruments are: formal, literal and autonomous nature. The debt instruments are **formal** in the sense that the creation, the existence, the circulation and the exercise and the use of the patrimonial rights included depend on the existence of the elements included in the instrument. Moreover, the high rigorous nature of the debt instruments is reflected by the obligation to meet some requirements regarding the form (the bill of exchange, the promissory note and the cheque imply some compulsory requirements in order to be valid). The debt instruments are **literal**, in the sense that the existence and the coverage of the patrimonial rights are established through the wording included in the instrument; thus, the juridical relation that caused the issuing of the debt instrument no longer influences the right deriving from the instrument (whether a sales-purchase agreement, or a loan or a debt opening); no possibility for the debt instrument to be interpreted or completed with other documents. The **autonomous** nature of the debt instruments can be seen, on the one hand, in relation to the fundamental juridical relation that caused it, and in this case, we shall consider that the individual who issued the instrument has an obligation which is not under the existing fundamental relation but exclusively under the instrument which the individual signed; on the other hand, each new signatory has an autonomous juridical position and acquires a new, original right, not a **transferred** right. The autonomy of the debt instruments explains the principle according to which the holder of the instrument exercises one's own right and exceptions cannot be opposed to him, namely the protection measures that could be opposed to the previous holders (principle of non-opposability of exceptions).

**Keywords:** bill of exchange; cheque; promissory note; drawee

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### 1. The Bill of Exchange

Terminologically speaking, the term of bill of exchange comes from the Latin "cambium", which was a version of the "*permutatio*" agreement, designated for the exchange of money for money, by which the people of the Antique Ages that

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had a currency wanted to exchange that currency for another currency (today's „currency exchange” phrase).<sup>1</sup>

### 1.1. The Bill of Exchange – Payment Instrument

At a stage where the commercial activity suffered because of the rudimentary nature of communications, of the lack of security in transportation and of the variety of payment instruments, the bill of exchange had a new evolution.

A trader from country A, as a result of business done in country B, could entail debts to the traders in country B (for instance, sales of merchandise that the buyer undertook to pay on a date that was after the delivery of the merchandise). Once back in country B for other business, it wouldn't have been possible for that trader to undertake to pay one's own debts by using the debt he had to the buyer for whom the deadline of payment had not come to pay one's own liabilities by using the debt he had from the buyer whose due date has not come (corresponding, in the bill of exchange law, to the **fundamental relation** based on which the bill of exchange is issued)?

The mechanism that makes possible the link between debts and liabilities is the following: the trader from country A (called **drawer**) instead of paying in the currency of country B, one's own liabilities to a personal creditor from the country B (called **beneficiary**, and the juridical relation between the beneficiary and the drawer is called **provided value**) invites the buyer-debtor of the payment of the price (called **drawee**) to pay in his place.

The juridical operation shall have the following form: the trader in country A (called drawer) issues (draws) a bill of exchange (writing) which, after being given to a person called the beneficiary, gives the right to the latter to receive an amount of money from the drawee on the date mentioned in the instrument. (*Practical Handbook of exchange law*, 1996, p. 12)

This is today's bill of exchange.

**The advantages** of the juridical operation presented are impressive:

- The drawer no longer needs to exchange currency because the drawee paid the beneficiary in the same currency, of country B;
- The drawer no longer needs to transport the currency needed for the payment from one country to another;
- The beneficiary was supposed to be paid by a trader (drawee) on the same territory, so he could turn to national courts to enforce payment.

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<sup>1</sup> For the function of the bill of exchange in the currency exchange, see (*Manual practice de drept cambial/ Practical Handbook of exchange law*, 1996, p. 12)

- Still, some **inconvenient** remains that could not be avoided upon that date, namely:
- What happened if the drawee refused to pay;
- Why wouldn't be possible for the beneficiary, before the deadline, to give the bill of exchange to other persons who are his own creditors, thus paying one's debts without cash payment.
- To ensure the payment of the drawee, the beneficiary was supposed to have the same rights like the transmitter-drawer.

There are two aspects to analyse to understand the importance of the circulation of the bill of exchange:

- 1) On the one hand, the transmission of the bill of exchange implies existence of a period a time that should be long enough between the moment when the bill of exchange is drawn and its deadline (this issue shall be dealt with in section 1.2.);
- 2) On the other hand, what should be the most appropriate juridical technique to transmit the bill of exchange. This issue was solved by the procedure of transfer of debt, an institution existing in the civil law which however needs some corrections before being taking over in the commercial law.

## **1.2. The Bill of Exchange – Credit Instrument**

Because the payment is effected at a later date, the bill of exchange is a credit instrument.

In the case mentioned at the beginning of section 1.1. of this chapter, the sales-purchase agreement between the drawer-seller and the drawee-buyer, the latter, a debtor for the payment of the price of the merchandise, shall have enough time to re-sell the merchandise, receive the price and pay the debt upon the due date of the bill of exchange.

Regarding the beneficiary (in capacity of a holder of a debt from the drawer) and holder of the instrument, he shall either wait for the instrument to become eligible (to reach maturity upon the due date), or transmit the bill of exchange to a banker who can re-discount it.

The bill of exchange is the advantage to represent the debt, while the possession of the instrument gives the holder the guarantee of the payment; so the discount and re-discount operations for the bills of exchange are frequent in the banking practices.

### 1.3. Features of the Bill of Exchange

In order to reinforce the juridical statute of the holder of the instrument, the law consecrated the commercial, highly rigorous, literal, autonomous and abstract character of the bill of exchange obligation. These are only effects or manifestations of the formalism required for the validity of the instrument (in section 1.4. we shall see the 8 requirements for compulsory form, while the existence of the fundamental relation – corresponding to the *provision* in the French law is not compulsory for the validity of the bill of exchange in the Romanian law); the requirements regarding the form often prevail over the requirements regarding the contents.<sup>1</sup>

The obligation shall be **commercial** irrespective of the fundamental relation that caused the signatory to undertake the obligation of the bill of exchange, so even if he is not a trader; it shall have a high level of **rigour** of execution, in the sense that a grace deadline shall be excluded (postponing of the due date shall be forbidden; if the payment deadline is, for instance, 01.10.2001, it shall not be extended), the refusal of acceptance or of payment of the debtor (we mentioned above that the drawee shall undertake a bill of exchange only by acceptance of the bill of exchange) shall be acknowledged in a solemn manner (notification of the fact that the drawee has not affected the payment), and the exercise of regress (when the drawee-acceptant, direct debtor, does not affect the payment, the indirect debtors shall become compelled to effect the payment: the drawer, his avalists, the previous endorsers of their avalists, and the action towards them is called action in regress) and it is done through a simplified procedure.

- **The literal character** lies in the existence and the extension of the obligation are established only through the elements included in the instrument.

To note that the capacity of the signatory implies the will to undertake the obligation of the bill of exchange (by signing the instrument as: drawee-acceptant, beneficiary, endorser, endorsee or avalist).

The literal character is obvious if we mention the following example: the endorsee-mandatory has, under a paid mandate agreement, a debt against the beneficiary-mandator tantamount to 10 million lei, while the bill of exchange bears the amount of 9 million lei; the answer to the question: what is the amount to pay to the endorsee, and we must understand that, although the direct relations mandator-mandatory entail a higher debt (10 million lei), according to the bill of exchange relations, the only amount to be claimed shall be 9 million lei. **What is written in the bill of exchange shall prevail** and it can be known by any signatory (not the extra-bill of exchange juridical relations among the signatories; in our case, not 10

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<sup>1</sup> For details see (Galasescu-Pyk, 1939, pp. 163-181)

million lei, but 9 million lei, the amount owed by the drawee to the drawer when the bill of exchange was drawn).

- At the same time, the bill of exchange obligation is **autonomous**, namely the bill of exchange obligation of each signatory has an autonomous juridic status; its validity cannot be affected by the nullity or the vices of the obligations of other signatories.
- The bill of exchange is **abstract**, in the sense that it is independent from the fundamental relation that generated it.

The bill of exchange is therefore a **complete** instrument. If one of the elements considered as fundamental is missing, the bill of exchange obligation cannot be saved by other documents, even if the bill of exchange instrument refers to these documents.

By adopting a **formal definition**, we shall consider the **bill of exchange** as the instrument that, when given by the drawee to the beneficiary, it gives the latter, or to the person who ordered it, the right to request payment, on a certain date, of a certain amount of money, according to Vivante, it is “a formal and complete credit instrument, that includes the obligation to pay, without compensation, an amount of money, on the due date and at the location mentioned in the instrument”.

#### **1.4. Compulsory Elements**

- The bill of exchange, as a written document by which a person, called drawer or issuer, requests another person, called drawee, to pay an amount of money to a third person called beneficiary upon a due date, or when ordered by this person, includes the following compulsory elements<sup>1</sup>:

The name of bill of exchange; the unconditional order of payment for a certain amount; the name of the drawee;

The due date; the place to effect the payment; the name of the beneficiary; the issuing date and place; signature of the drawer.

Law no 58/1934 regarding the bill of exchange and the promissory note stipulates that, the absence of one of the above mentioned elements shall cause such a document lose the character of a bill of exchange and shall be, however, considered to be a document under private signature that reflects a common law obligation.

On the other hand, Law no 58/1934 stipulates that the absence of some compulsory clauses shall be compensated by norms introduced in this respect. For instance, **if**

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<sup>1</sup> For the analysis of the compulsory elements, see (Galasescu-Pyk, 1939, pp. 233-423; Ionescu, Demetrescu, Georgescu 1934, pp. 119-228; Cristoforeanu, 1936, pp. 94-158; Capatina & Stefanescu, 1987, pp. 83-84)

**the due date is not stipulated**, the instrument shall be considered to be payable “at sight”, **if the payment location is missing**, the payment shall be considered to be effected at the location stipulated next to the name of the drawee, and **if the issuing place is missing**, we can assume that it was issued at the location indicated next to the name of the drawer.

#### **a) Existence of a document**

There can be no verbal bill of exchange obligation. All bill of exchange declarations shall be complete, accurate and shall derive from the instrument as, according to a classical saying: “*quod non est in cambio non est in mundo*”.

Non-compliance with this requirement results in only one consequence: lack of validity of the bill of exchange.

Usually the bill of exchange obligations are undertaken on standard forms that can be bought on the market, accompanied by a legal stamp.

#### **b) The name of bill of exchange**

Among the compulsory elements stipulated in the Law no 58/1934, the first is the name of bill of exchange which should be retrieved “*expresis verbis*” in the instrument and must be expressed in the language used to fill in the instrument. This rigour is justified by the warning given to the issuer of a bill of exchange about the consequences that this instrument may have.

In the Romanian bill of exchange law, the name of “bill of exchange” (**cambie**) cannot be replaced with other names like “**trată**” or “**poliță**”, used in the law field.

The framework norms of the National Bank of Romania stipulate that the lack of the name of bill of exchange entails nullity and the name of bill of exchange shall not be written on the margin, or on the diagonal or at the bottom of the instrument but it shall be written above the signature of the drawer.

#### **c) The unconditional order of payment for an established amount of money**

The second compulsory element is to stipulate in the instrument an unconditioned order addressed by the drawer to the drawee to pay an established amount of money. This condition includes 2 correlative elements: the payment order and the established amount.

Regarding the first, its unconditional character lies in the fact that the payment order cannot be subject to a compensation, cannot be subordinated to suspensive or resolutive conditions and cannot include clauses or conditions in an improper sense that would restrict the bill of exchange obligation or would make it depend on the contents of another document or on the juridical relation existing between the drawer and the drawee, between the drawer and the beneficiary or between other signatories of the bill of exchange. This interpretation is based on the fact that

the will to undertake a bill of exchange obligation is expressed by the payment order; if it were affected by a condition or reserve, it could not be considered as a manifestation of will in this respect, and on the other hand, since the conditions of the payment are not known, the circulation value of the instrument may be affected.

The wording used is the imperative “Effect the payment” or any other synonymous phrase, such as “Please effect the payment.”

The amount to pay shall be established and expressed in cash. This ensures the circulation of the bill of exchange because, thus, the holder of the instrument can know what he is owed upon the due date and the debtor can be certain about the coverage of his obligation.

#### **d) Specifying the drawee**

A drawee can be any subject of law, either physical or legal person. Specifying the drawee does not entail the payment obligation for him; only the acceptance of the drawee entails the payment obligation.

To identify the drawee, we need not write the full name (surname and name), the Romanian bill of exchange law requires only the surname. The name is not needed and it can be indicated only by initials or abbreviated. An orthographic mistake in the surname cannot entail the nullity of the instrument as long as the surname is written in such a way as to allow identification of the person designated as a drawee.

#### **e) Specifying the due date**

According to the Law no 58/1934, the due date can be formulated in four different manners:

1. due date at sight (upon submittal, upon request);

This entitles the beneficiary to reclaim the payment on the date when he wants to have it effected. He may request it, in principle, on the day when the instrument is issued but no later than 1 year since this date.

2. due date after some time after at sight;

This compels the holder to submit the bill of exchange to the debtor whenever it suits him and the due term starts from that moment on.

3. due date after some time since the issuing date;

If the issuing country and the payment country have different calendars, the due date shall be established from the day corresponding to the issuing date according to the calendar of the place of payment.

4. due date on a specific date;

The due date shall be considered as established according to the calendar of the place of payment, if different from the calendar of the issuing country.

Irrespective of the manner, the due date of the bill of exchange shall be precise and unconditional, and shall not include alternative or successive terms but one term for the entire amount. The bill of exchange that does not have such a due date shall be considered as null.

#### **f) Specifying the place of the payment**

The bill of exchange shall specify the place of the payment. The place shall be either the place indicated in the bill of exchange as the place of the payment or the place stipulated next to the name of the drawee. The drawee may want that the payment be effected at the domicile of a third person from the same town or from another town. Thus, according to the Law no 58/1934, if the bill of exchange does not stipulate that the payment shall be effected by the drawee at the domicile of the third person, we can assume that it shall be effected by the third party. These are domiciliated bills of exchange and the paying party shall be the domiciliary third party.

Usually, the drawer indicates the place of payment and the domiciliary third party upon the issuing of the bill of exchange. If he mentions only the place of payment, other than the domicile of the drawee, he can indicate the person who shall effect the payment at the place indicated by the drawer. If this element is missing, we can assume that he undertakes to effect the payment himself at the place indicated. When the bill of exchange is payable at the domicile of the drawee, he can indicate, upon acceptance, an address in the town where the payment shall be effected.

If the place of the payment indicated in the bill of exchange is different from the domicile of the drawee, the bill of exchange shall be submitted upon acceptance at that place.

#### **g) Specifying the name of the beneficiary**

It is compulsory to include in the bill of exchange the name of the beneficiary who is the first legal holder of the bill of exchange.

The drawer shall be entitled to designate himself as beneficiary in the contents of the instrument, as well as other, beneficiaries, in turn. To note that the beneficiary shall be either the person entitled to request, in one's own name or through mandatary, the amount owed, or the subject of law upon whose request the payment shall be effected.

Any bill of exchange, therefore, except for the blank one, shall be submitted as an instrument having the beneficiary clearly indicated.



#### **h) Specifying the issuing date and place**

Specifying the issuing **date** is useful for several reasons:

- to calculate the due dates of the bills of exchange that are due after a certain term, at sight;
- to establish if the drawer was or not able to undertake the bill of exchange obligation;
- to check if the basic form requirements were met at the moment when the instrument was issued by applying the “*tempus regit actum*” principle.

The date shall be expressed in a non-equivocal way, shall be certain and possible.

The date written on the bill of exchange shall be considered as certain and opposable to all. If contested, the proof of the real date can be done through any evidence by the interested debtor.

Unlike the lack of the date which entails the nullity of the instrument, the lack of the place is compensated by the law. When both the date and the place are missing from the bill of exchange, the bill of exchange is null.

Especially in the case of international bills of exchange, specifying the place is useful to check if, depending on the place, all requirements regarding form under the local legislation were met, in compliance with the private international law: “*locus regit actum*”.

Regarding the stamps on the bill of exchange, the date on the stamp does not compensate the absence of the issuing date, and the stamp with the address compensates the absence of the issuing place.

#### **i) Signature of the drawer**

The last compulsory element is the signature of the drawer. Law no 58/1934 has not established the elements of a signature and leaves it to national legislators.

The signature shall be **autograph**, as a distinctive sign of the signing party and graphic expression of the will to undertake the bill of exchange obligation.

The lack of the signature can be invoked by any interested party as an objective exception.

Printed, lithographic, stamped or sealed signatures shall not be accepted as they entail the nullity of the bill of exchange.

### 1.5. Transmission of the bill of exchange through endorsement

**The endorsement** is a juridical act by which the holder of the bill of exchange, called endorser, transmits to another person, called endorsee, all the rights arising from the instrument.

The endorsement shall be mentioned **on the back of the bill of exchange** (hence, the term of “andosare” in Romanian in which the element ”dos” means “back”) or on a separate document called allonge by using the phrase “Please pay to ...” or “Please pay upon the request of ...”. This phrase shall be followed by the signature of the endorser and the date, and also followed by the **submittal** of the instrument.

Classification of endorsement depending on the object of the transmission<sup>1</sup>:

- translative endorsement (including transmission of rights and guarantees arising from the bill of exchange, from the legitimizing and the guaranteeing of the acceptance and from the payment);
- non-translative endorsement.

**The translative endorsement** has the effect of investing the endorsee with one’s own autonomous right, so the new holder acquires higher rights than his antecessor (in the sense that the exceptions opposable to the holder cannot be used with the endorsee). The Romanian doctrine solved the controversy regarding the real accessory rights in the sense that, the accessory guarantees are transmitted together with the instrument.

The translative endorsement has the effect of **legitimizing** the possession of the instrument: the holder of the bill of exchange is considered to be the lawful holder if he justifies his right through a continuous series of endorsements.

Based on the translative endorsement, the **endorser takes the responsibility towards the endorsee for the acceptance and the payment of the bill of exchange in solidarity** with the other signatories of the bill of exchange; the endorser undertakes the double obligation to ensure the effecting of the payment, and he shall be also obliged to effect the payment of the bill of exchange in person if the drawee refuses to pay.

**The non-translative endorsement** can be:

- pignorative (constitute a right of pledge in favour of the endorsee over the bill of exchange debt by inserting the clause value in guarantee or value in pledge);

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<sup>1</sup> For details and for the presentation of the endorsement in the Anglo-Saxon law, see (Cristea, 2001, pp. 70-82)

- for mandate (to be cashed in) – gives a mandate to the endorsee to cash in the amount written on the instrument in the name of the endorser.

### **1.6. The aval**

**The aval** is the guarantee undertaken by a person that the instrument shall be paid upon the due date.

The person who undertakes the obligation is the **avalist**, and the person guaranteed is the **person guaranteed by aval**.

The aval is an institution often used in banking practices. In order to give loans, banks ask applicants that guarantee the loan with commercial effects (bills of exchange or promissory notes) to obtain the guarantee of the aval of the instrument by a person in order to ensure the fulfilling of the obligation of the debtor who made the loan.

The aval is used not only as above mentioned but also in the circulation of the bills of exchange, when a signatory of the instrument does not enjoy trust regarding the payment of the instrument and therefore he turns to another person, a third party, to have him sign together with himself, thus guaranteeing the fulfilling of the bill of exchange obligations. In some cases, to prevent any doubt entailed by the use of the aval, thus discrediting the person guaranteed by the aval, the guarantee can be disguised as acceptance of the bill of exchange or as endorsement of the bill of exchange.

The aval shall be written on the bill of exchange and shall be signed by the giver, by using the phrase “For aval” before the instrument.

The aval can be given to guarantee the execution of the obligation by a drawee or by the drawer or even for another avalist.

The aval has the following **features**:

- it cannot be given under requirements;
- it can guarantee only part of the obligation;
- if the person guaranteed by aval is not specified, we assume that the aval is given to guarantee the obligation of the drawer.

**The effects of the aval<sup>1</sup>** are:

- although similar to the fidejussor, the person guaranteed by aval does not have the benefit of discussion (only the benefit of division), even in

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<sup>1</sup> For details see (Condor-Cristea , 2000, pp. 9-11).

case of nullity of the obligation of the person guaranteed by aval, the avalist shall be still bound to pay.

- The avalist can oppose to the holder of the instrument the exceptions that the debtor guaranteed by aval had against him.

- By paying the bill of exchange, the avalist undertakes some of the rights of the paid-holder and he can exercise direct action against the drawee (or his avalists) or the regress action against: the drawer, his endorsers (and their avalists).

## 2. Promissory Note

**The promissory note** is a document by which a person, called issuer, or underwriter, undertakes to pay an amount of money upon the due date to another person called beneficiary or upon his request.

### 2.1. Compulsory elements

According to the Law 58/1934, the promissory note, in order to be valid, shall include:

The designation of promissory note; the unconditioned promise to pay an established amount of money on the due date; the place of payment; the name of the beneficiary; the issuing date and place; the signature of the issuer.

Since the juridical regime of the promissory note is similar to the bill of exchange, here are the differentiating features:

- the bill of exchange has more requirements for validity, (8) than the promissory note (7); the promissory note lacks the name of the drawee because in the case of the promissory note, the drawer and the drawee are identified;
- The promissory note implies only two participants: the issuer (drawer) and the beneficiary as against the bill of exchange which implies 3 participants;
- In the case of the promissory note, the person who undertakes the payment is the issuer himself;
- The promissory note is not submitted for acceptance; not even in the case of the promissory note with due date after some time from sight which shall be submitted within 1 year from the issuing date, this submittal does not

have the value of an acceptance of the instrument and only serves at establishing the moment of exigibility;

- If the instrument does not stipulate the issuing place, we shall interpret that the issuing place is the place mentioned as the place of payment (because the issuer is the person who pays).

### 3. Cheque

**The cheque** is a document by which a person called the drawer gives order to a bank where he has money available, a bank called drawee, to pay, upon submittal of the instrument, an amount of money to another person called *beneficiary*.

#### 3.1. Compulsory elements

According to Law no 59/1934, regarding the cheque, a valid cheque shall include the following compulsory elements:

- The name of cheque;
- The unconditional mandate (order) given to the bank to pay a certain amount of money;
- The name of the drawee (bank);
- The place of payment;
- The issuing date and place;
- The signature of the drawer.

Although the cheque has a juridical regime that is similar to the bill of exchange, it is **different**.<sup>1</sup> through the following:

- The juridical relation between the drawee and the drawer, called fundamental in the case of the bill of exchange, is called reserve or amount available for cheque and it is essential for the existence of the cheque, it is an agreement concluded between the drawer and the bank where the amount available is constituted, either as a money deposit, or as a loan;
- The cheque can be issued only within the limit of the amount constituted as a reserve;
- In the case of the cheque, the drawee can only be a bank;

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<sup>1</sup> In this respect, see (Capatina & Stefanescu, 1987, p. 94).

- The cheque has fewer compulsory requirements; it lacks: the name of the beneficiary (this element is optional in the case of the cheque; in the case of the bill of exchange, the law does not allow the bill of exchange payable to bearer, accepting that the name of the beneficiary may not be indicated upon issuing but later, only the blank bill of exchange), and the due date (because the cheque is payable, without exception, "at sight", and because of this, it is considered to be only a payment instrument, not a loan instrument);
- The cheque cannot be drawn upon the drawer himself, unlike the bill of exchange;
- While the bill of exchange usually is accepted by the drawee (except for the bill of exchange "at sight"), the cheque cannot be accepted, even if an acceptance may be mentioned upon the instrument, this is considered to be not written;

While the holder of the bill of exchange can take action as he wishes, either against the acceptant and his avalists, or against the regress debtors, the beneficiary of the cheque only has the action of regress against the endorsers, the drawer and the others from the same category.

The cheque is incompatible with the direct action (against the acceptant) because the drawee (the bank) does not have the obligation of acceptance, it does not have the capacity of a bill of exchange debtor.

#### **4. Conclusions: Advantages of the Debt Instruments**

Major advantages:

- Since there is a debt, the payment is postponed until the due date;
- Several debts can be paid through one payment;
- Since they are public documents, it is more certain that they exist and circulate;
- They can be quickly executed through a special procedure;
- There are several manners to execute it: through a bill of exchange (direct, regress), or through another manner (causal action and unjust enrichment).

Solidarity of the payment; the more signatories, the more secured the loan.

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