

INVESTING FORMULA ENFORCEABLE BILL OF EXCHANGE, PROMISSORY NOTES AND CHECK

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Abstract

Right bills constituted a proper, solemn and formal training both bills of exchange, promissory notes or checks, but also in terms of bills receivable realization and autonomy is manifested in the sphere of application, and in priority and exclusivity of its incidence from common law, namely the Civil Procedure Code. Legal rules relating to bills of rights realization is a perfect rigorous regime. The special regime, derogating governing procedure execution quality bills is justified and bills of exchange, promissory note and check to be instruments of scriptural money, qualified as a legal system requires great rigor. The procedural and enforcement proceedings taken by the legislature to ensure fulfillment of trade are much stricter in the right bills to go faster and safer way to realization of rights emerge. Debt securities notes (bills of exchange, promissory notes and check), by their specificity, have boosted the feature of incorporating the right way, so the title itself forms a unit with built right, subject as such forms and rules special, simple operation, formation, movement and recovery, and their binding force is a substantial, not procedural, as the essence of such securities, as their constitution and other necessary items.

Key words: bill of exchange, promissory notes, checks, appended to the binding, securities.

General considerations

According to article 374 of the Civil Procedure Code, “the judicial decision or any another title is executed only if it is invested with executory clause stipulated by article 269 paragraph 1, except the provisional executory closures and other decisions or documents which are executed without executory clause.”¹

The investiture of the decisions with executory clause is made by the court of justice.

The consent of the forced execution in Romania of the decisions pronounced in foreign countries is done according to the special law.”

It can be thus noticed that the text has the significance of specifying that the formality of the investiture with executory clause is required for any title that is executed, whether it is a court order or another document ascertaining the claim.

But, as it can be seen, certain exceptions were established from this rule relating to the executory closures, interim executory orders, as well as other decisions or documents specified by law.

As a consequence of their executory character set by law, these documents are executed without investiture with executory clause.

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¹ Article 269 of the Civil Procedure Code

Court orders will be invested with executory clause, if the law does not provide otherwise. The executory clause has the following content:

“We, the President of Romania”

(Here is the wording of the decision).

“We authorize and order the execution bodies to implement this decision. We order the public force officials to support the execution of this decision, and the prosecutors to insist on carrying it, according to the law. To faith, this decision was signed by (Followed by the signatures of the President and of the clerk of court).”

The decision invested will be given only to the party who won or to his/her representative.

Under the provisions of article 376 of the Civil Procedure Code, “the decisions which remained definitive or became irrevocable, as well as any other decisions or documents are invested with the executory clause stipulated by article 269 paragraph 1 so that they become executory in cases specifically provided by law.”²

The documents authenticated by a diplomatic or consular representation of Romania will be invested with executory clause by the court of justice of the residence of one of the parties taking part to the authentic document.

If none of the parties has the known residence in the country, the investiture with executory clause is done at the District III Court of justice of Romanian’s capital city.”

At the same time, these legal provisions should be corroborated with the ones in article 374¹, where the legislator expressly stipulates that: “the documents to which the law recognizes the character of writ of execution are executed without the investiture with executory clause.”

This text establishes that all documents to which the law gives the character of writ of execution are fructified without further imposing the formality of the investiture with executory clause.

Concerning the interpretation and application of the provisions of article 374¹ of the Civil Procedure Code, according to which, the documents to which the law recognizes the character of writ of execution are executed without the investiture with executory clause, reported to the provisions of article 61 of Law no. 58/1934 on the bill of exchange and the promissory note, and of article 53 of Law no. 59/1934 on the cheque, on the investiture with executory clause of the bill of exchange, the promissory note and the cheque.³ Both laws have largely taken over the solutions adopted by the Geneva Convention of June 7, 1930 on the Uniform Law on bills of exchange and promissory notes and the Geneva Convention of March 10, 1931 on the Uniform Law on cheques.⁴

Thus, according to article 61 paragraph 1 of Law no. 58/1934 on the bill of exchange and the promissory note, “the bill of exchange has the writ of execution for the capital and accessories, established according to article 53, 54 and 57.”

According to article 53 of Law no. 58/1934, the holder may ask on grounds on non-payment:

[C:\Documents and Settings\Dan\Local Settings\Sintact 2.0\cache\Legislatie\temp\00000002.HTML - #1.](#) The amount shown in the unsupported or unpaid bill of exchange, with the interest, if it has been stipulated.

[C:\Documents and Settings\Dan\Local Settings\Sintact 2.0\cache\Legislatie\temp\00000002.HTML - #2.](#) The legal interest calculated starting with maturity.

3. The protest expenses, those of the notifications made, as well as other justified expenses.

If the non-payment (regression) is exercised before maturity, a discount will be deducted from the amount shown on the bill of exchange. This discount will be calculated according to the National Bank discount rate in force at the time of the non-payment, at the owner’s residence.

The person who has paid the bill of exchange by regression may require from his endorsers:

- [C:\Documents and Settings\Dan\Local Settings\Sintact 2.0\cache\Legislatie\temp\00000002.HTML - #](#)The total amount paid.

² V.M.Ciobanu, G.Boroi – Drept procesual civil (Civil procedural law), Ed.All Beck, 2005. p. 513.

³ Law no.58/1934 on the bill of exchange and the promissory note, published in the Official Gazette no.100/01.05.1934, amended by GO no.39/2008 published in the Official Gazette no.284/11.04.2008.

Law no.59/1934 on the cheque, published in the Official Gazette no.100/01.05.1934, amended by GO no. 38/2008 published in the Official Gazette no.284/11.04.2008.

⁴ O.Căpălină – Legislația cambială (Bills legislation), Ed.Lumina Lex, București, 1994, p.75-111.

- [C:\Documents and Settings\Dan\Local Settings\Sintact 2.0\cache\Legislatie\temp\00000002.HTML](#) - #The legal interest on this amount, calculated effect from the day he paid the sum.

- [C:\Documents and Settings\Dan\Local Settings\Sintact 2.0\cache\Legislatie\temp\00000002.HTML](#) - #The costs.

Any person, being entitled to exercise the non-payment, maybe if not otherwise stipulated, to compensate oneself through a new bill of exchange (a counter bill of exchange) drawn at sight on to one of his endorser and payable at his residence.

The counter bill of exchange comprises, in addition to the amounts shown in articles 53 and 54, as a right to brokerage and stamp duty for it.

If the counter bill of exchange is drawn by the owner, the amount is fixed by the course of a sight bill, drawn from the place where the original bill is payable on the place of residence of the endorser. If the counter bill of exchange is drawn by an endorser, the amount is fixed by the course of a sight bill, drawn from the place where the drawer of the counter bill of exchange resides on the place of residence of the endorser.

At the same time, through article 106 from this normative act, this character is attributed equally to the promissory note, to which the stipulations relating to the bill of exchange are applicable to the extent that they are not incompatible with its nature.

Therefore, article 61 paragraph 1 of Law no. 58/1934 recognizes the character of writ of execution of both the bill of exchange and the promissory note.

At the same time, the character of writ of execution is recognized for the cheque through article 53 paragraph 1 of Law no. 59/1934, as further amended, which states that: "The cheque has value of writ of execution for the capital and accessories, established according to articles 48 and 49."

The stipulations of article 320 letter a from the Framework rule no. 6 / 1994 are similar concerning the trade made by the banking companies and other crediting companies, with bills of exchange and promissory notes, based on Law no. 58/1934 on the bill of exchange and the promissory note, according to which "The bill of exchange has value of writ of execution for the amount of money written on the writ together with the interest (if it was stipulated), for the legal interest calculated starting with the maturity for the expenses of protest and the notification costs, as well as for other justified expenses".⁵

The Code of Civil Procedure through article 376 no longer lists among decisions the documents subject to the investiture with executory clause, since, by ascertaining certain and liquid claims they have the power of a writ of execution on their chargeability, so that these writs do not have to be invested with executory clause.⁶

⁵ BNR (NBR) – FRAMEWORK RULES no. 6 from 8 March 1994 on trade made by the banking companies and other crediting companies, with bills of exchange and promissory notes, based on Law no.58/1934 on the bill of exchange and the promissory note, as amended by GO No.11/1993, approved and amended by Law no.83/1994, published in the Official Gazette no.119 bis/14.06.1995.

The rule no.11/2008 to amend the Framework-rules no.6/1994 on trade made by banking companies and the other crediting companies, with bills of exchange and promissory notes.

Rule no.7/2008 for the amendment and completion of the Framework rules of the National Bank of Romania (BNR) no. 6/1994 on trade made by the banking companies and the other crediting companies, with bills of exchange and promissory notes, based on Law no. 58/1934 on the bill of exchange and the promissory note, amended by GO no. 11/1993, approved and amended by Law no. 83/1994.

Rule no.2/2009 on the completion of the rule of the National Bank of Romania no. 7/2008 for the amendment and completion of the Rule of NBR no. 6/1994 on trade made by the crediting institutions with bills of exchange and promissory notes.

⁶ Article 66 of Law no.36/1995of public notaries and the notarial activity, published in the Official Gazette no.92/16.05.1995.

Therefore, the documents listed, which ascertain a definite, liquid and claimable monetary obligation, are executed by force by the request directly addressed to the bailiff, without being necessary to undergo the non-contentious judicial procedure of investiture with executory clause.

Nevertheless, in practice of the courts of law it has been ascertained that there is no unitary viewpoint concerning the interpretation and application of the stipulations of article 374¹ of the Civil Procedure Code compared to the stipulations of article 61 of Law no. 58/1934 on the bill of exchange and the promissory note, and of article 53 of Law no. 59/1934 on the cheque, concerning the investiture with executory clause of the bill of exchange, promissory note and cheque.

Thus, some courts of justice have considered unnecessary the investiture with executory clause of the bill of exchange, promissory note and cheque, on the ground that article 374¹ of the Civil Procedure Code specifically stipulates that “the documents to which the law recognizes their character of writ of execution are executed without investiture with executory clause.”

Other courts of justice, on the contrary, have pronounced in the sense that in order to be executed, these instruments of payment, even if the law recognizes their nature of writs of execution, must be invested with the executory clause stipulated by article 269 paragraph 1 of the Civil Procedure Code.

The motivating this solution it was noted that executing the securities from the category to which the bill of exchange, the promissory note and the cheque belong is governed by special rules, which, by waiver from the provisions of article 374¹ of the Civil Procedure Code require their investiture with executory clause.

The issue of law that was required to be settled by appeal in the interest of the law by the High Court of Cassation and Justice, aims at interpreting the above-mentioned stipulations, in the meaning or the applicability or non-applicability of the stipulations of article 374¹ of the Civil Procedure Code, to the bill, promissory note and cheque which have value of writ of execution for the capital and accessories, according to article 61 paragraph 1 of Law no. 58/1934, respectively article 53 paragraph 1 of Law no. 59/1934, and it discusses the relationship between the general rule and the special rule in the field of bills execution.

In accordance with the stipulations of article 374¹ of the Civil Procedure Code, “the documents to which the law recognizes the nature of writ of execution are executed without the investiture with executory clause”.⁷

According to article 61 paragraph 1 of Law no. 58/1934 with the subsequent amendments, “the bill of exchange has the value of writ of execution for the capital and the accessories established according to articles 53, 54 and 57,” and by paragraph 3 of the same article the court of justice is assigned the competence to invest the bill of exchange with executory clause.

Article 106 paragraph 1 of the same Law stipulates that “the dispositions relating to the bill of exchange are applicable to the promissory note, to the extent to which they are not incompatible with the nature of this writ.”

Regarding the cheque, in article 53 paragraph 1 of Law no. 59/1934, it is stated that it “has the value of writ of execution for the capital and the accessories established according to articles 48 and 49,” and according to paragraph 3 of the same article “the court of justice has jurisdiction to invest the cheque with executory clause.”

The procedure of bills execution, established by laws no. 58/1934 and no. 59/1934, imposed a precondition for investing the bill of exchange, the promissory note or the cheque with executory clause, also maintained by the regulations currently applicable.

The act authenticated by the public notary, which ascertains a certain and liquid claim has power of writ of execution on its chargeability. In the absence of the original act, the writ of execution may be constituted by the duplicate or legal copy of the copy from the public notary's archive.

⁷ Mihaela Tăbărcă – Drept procesual civil (Civil procedural law), Ed. Universul Juridic, 2008, p.724-727.

The legislator has considered useful the investiture of the bill of exchange, promissory note or cheque with executory clause, although these bill-related documents have value of writs of execution, to enable the judge to examine the fulfilment of the formal conditions of their validity.

Only by the investiture with executory clause the bill of exchange, the promissory note and the cheque actually become writs of execution for the amount stated on them and for the accessories determined according to the legal provisions that have been mentioned.

Thus, although the law recognizes the value of writ of execution to the respective payment instruments, their execution is conditioned by the application of the executory clause.

To think this way is to ignore the will of the legislator who, in the same text (article 61 of Law no. 58/1934 and article 53 of Law no. 59/1934) establishes the value of writ of execution of the bill of exchange, promissory note, and cheque, but at the same time it also refers to the request of investiture with executory clause of these debt securities by the competent court of justice.

It results that the investiture with executory clause of the bill of exchange, promissory note or cheque, forming the object of regulation of some specific rules, cannot be subject to the regulation contained in the general rule, represented by article 374¹ of the Civil Procedure Code, since it is a stage in the procedure of the bill-related execution which must be seen as a whole, being impossible that this stage be subject to the rules of common law, and the remaining of the stages of this procedure to be performed according to the special regulations contained in the above-mentioned laws.

The exclusive character, derogatory and special of the bill-related law towards common law, namely article 374¹ of the Civil Procedure Code, requires the application of the “specialia generalibus derogant” principle, taking into consideration that the priority of the incidence of the bill-related law is strictly subject to the fulfilment of some specific formalities for the fructification of the securities and that the bills execution is a unitary executory system, proper to the bill-related law, the investiture with executory clause in the court of law figuring among its conditions and formalities.

The High Court of Cassation and Justice has held that the provisions of article 374¹ of the Civil Procedure Code related to article 61 of Law no. 58/1934, and respectively to article 53 of Law no. 59/1934, shall be construed in the sense that the promissory note, the bill of exchange and the cheque are invested with executory clause in order to be executed.⁸

In the requests that stem from a bill of exchange, cheque or promissory note on the grounds of article 10 item 3 of the Civil Procedure Code, the jurisdiction is alternative between the court from the defendant's residence and the court from the place of payment.

When the investing entity has chosen the investiture with executory clause of the promissory note, according to the stipulations of article 10 item 3 in favour of the court from the place of payment, stipulated in the promissory note, this court of law was bound to observe the principle of availability found in the option right of the crediting company.⁹

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Legislation:

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⁸ ÎCCJ (HCCJ) United departments, Decision no.4/2009 published in the Official Gazette no.381/04.06.2009

⁹ ÎCCJ (HCCJ) Civil and intellectual property department, Decision no.1301/27.02.2008.

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