

# The anticipatory and partial payment of the promissory note in international commerce

Laurențiu NOVAC-DIACONU

“George Bacovia” University, Bacau, Romania

laurentiunovac@yahoo.com

***Abstract:** The drawee can pay in anticipation in the international commerce only with the agreement of the possessor of the promissory note. Because payment before the due date is not governed by the rules of the Promissory Note Law, the drawee pays at his own risk. The partial payment at the due date from the promissory Law is a waiver from the principle of common law according to which the creditor can refuse the partial payment. There is considered in the Promissory Law the situation of the debtors in regress, whose assurance to the rest of the unpaid sum is restrained after the partial payment.*

***Keywords:** payment; anticipatory; partial; promissory note.*

## Introduction

The payment is a way of extinguishing the obligations that is different from others, because it is a normal way on which there are drawn the creditor's and the debtor's attention, the execution of the obligation: the debtor satisfies the creditor by fulfilling his obligation. It has been insisted upon this duality of the payment, in the same time extinguishing and execution. This can be resumed through a contraction: the payment is the extinguishing of the obligation through its execution.

The payment does not mean only the voluntary execution of the obligation, but it can be considered a judicial document, a convention between the one that executes and the one that receives it. It is an judicial document animo solvendi, made with the intention to execute (pay) an obligation.

## 1. The payment in advance

In article 40 from the Convention comprising the homogeneous law on the promissory notes and the bills of exchange, Geneva 1930 stipulates that the possessor of the promissory note cannot be coerced to accept its payment before the date of payment.

The drawee that pays before the date of payment makes it at his own risk. The one that pays at the date of payment is validly freed, except the situation when he made a fraud or a serious error. He is obliged to check the regularity of the series of endorsements, but not the signatures of the endorsers.

The possessor of the promissory note is not obliged to receive the payment before the date of payment [1].

The drawee can pay in anticipation only with the agreement from the possessor of the promissory note. Because payment before the date of payment is not governed by the rules of the Promissory law, the drawee pays at his own risk.

The possessor of the title legitimates in front of the debtor through the uninterrupted succession of the endorsements. But the payment being made in advance the debtor has to check the authenticity of the signatures and the capacity of the possessor [2].

The payment in advance in international commerce is made with the consent of the possessor of the promissory note. On the basis of the Roman promissory law the possessor of the promissory note is not kept from receiving the payment before the date of payment. The drawee that pays before the date of payment makes it at his own risk and peril. In the case of the payment in advance, the risk of the drawee is that he might be coerced to make a new payment in the favor of the one that proves to be, at the date of payment of the title, the rightful possessor of the promissory note [3].

The possessor has to present the promissory note to payment at the date of payment stipulated by the law.

The presentation before the date of payment has no other effect than the one to let the acceptant know that the promissory title is in his possession and to let him know of the date of payment. So the possessor will have to present the effect, in the term stipulated by art 41 of the Romanian promissory law.

If the acceptant, with the occasion of the presentation in advance declares to the possessor that he understands to pay at the date of payment or he determines the day on which he will pay the sum from the promissory note, this declaration obliges the possessor to present the title on that day and thus in case of non presentation the possessor will be responsible for the damages and will bear the effects of insolvability of the acceptant, if it is proven that he, in the day settled for the payment, kept at the disposition of the possessor, the sum from the promissory note.

The presentation of the promissory note before the date of payment is contrary to the law and thus it does not produce judicial/legal effects; as such the offer of payment of the debtor and the refusal of the possessor does not allow the debtor to deposit the sum at the date of payment, with freeing effect for him, this deposit can only take place in a valid manner after the passing of the term stipulated by art 41 from Law 58/1934 [4].

The payment in advance of the promissory note cannot be demanded by the possessor of the promissory note, and he cannot be coerced to accept it. The stipulation from art 41 paragraph 1 of the Romanian promissory law considers that the date of payment of the promissory note is established in the interest of the creditor and also in the interest of the debtor, not only in the interest of the latter.

This rule of non-obligatorily of the payment in advance knows some exceptions in the case of the exercise of the right of regress.

It is stipulated that the drawee that pays before the date of payment makes it on his own risk and peril - art 44, paragraph 2 from Law 58/1934 on the promissory note and the bill of exchange. He can expose himself to a new payment if at the date of payment it is proven that the real creditor is another person than the one that received the payment in advance, as well as in situations in which, if the debtor holds clues or probative elements, that he should have refused the payment. This is the case in which the possessor of the promissory note, even if he is the real creditor that was paid in anticipation, until the date of payment is declared in a situation of bankruptcy.

Although art 44 paragraph 2 refers exclusively to the drawee, we see no judicial impediment that regress obligators can make a payment in advance, taking the respective risks, if the possessor of the promissory note agrees. It is in the interest of the commercial credit that the debtors of regress, in their quality of bailers, can pay before the date of payment, voluntary, even before the pretest for non-payment is made and before the regress action is brought to court [5].

In principle, there is admitted the partial payment, and the payment in advance. The partial payment is admitted, except the one made by the debtors of regress (endorsers) or the persons that guarantees the payment [6].

Thus the rightful possessor can refuse the payment in advance, but he can also accept it. But the payment made before the date of payment, even with the agreement of the creditor, does not have the same effects as the payment at the date of payment.

The payment in advance in international commerce can be made in the same conditions by the debtor of regress [7] because there is no judicial or practical reason that limits the application of art 44 only to the drawee. We imagine the hypothesis in which the drawee is insolvent or there exists the certainty that he is not going to pay. The regress indebted has the interest, even if the title did not arrive on the date of payment, to make the payment in order to avoid the exertion of the regress action against him. The payment in advance invests the debtor with the rights of the possessor, even the one to protest the title at the date of payment and to exert the regress against the endorsers prior to him.

Art 44 paragraph 2 from Law 58/1934 stipulates that the drawee that pays in advance does it at his own risk and danger [8]. In order to understand the signification of this stipulation we must have in view the principle that the payment is not valid unless it is made by the real creditor, meaning the real title holder of the right that comes from the title, to the one that is able to receives it [9].

The payment before the date of payment that is accepted by the possessor does not dispense the debtor from conforming to this rule that means the active legitimation to the subject bearing of the title from the moment of the date of payment. Or, in the moment of the date of payment, the rightful owner of the title can be another person than the one that was paid in advance and the debtor is exposed to repeating the payment. Or we can imagine the situation in which the drawer revokes the payment order given to the drawee, after the payment in advance, but before the date of payment. In this case the payment of the drawee will not be valid, because he does not have the passive legitimation anymore.

The payer cannot discard the demands of the real title holder of the right by invoking that he holds the title with the mention of his acquittal because the real owner (actively legitimated) can raise a claim at the title.

The express text of the promissory law is very clear: the payment in advance is made at the risk and danger of the debtor that will bear the consequences of his reckless behavior. The promissory rule is derogatory [10].

In international relationships the promissory notes that are payable in a certain currency ad at a determined date of payment can be acquired by an importer to make the payments that he has to make in that currency at the date corresponding to the date of payment for the bought goods, thus protecting himself from the fluctuations of the currency.

Also it is possible that the possessor tends to profit from the variations of the exchange rate until the date of payment in the case in which the promissory note is payable in a foreign currency, thus making a profiteering operation.

A keeping of the effect until the date of payment from his part is imposed then.

Thus, as the debtor cannot be forced to pay before the date of payment, he cannot enjoy the right of making it with anticipation [11].

A payment in advance can constitute a violation of the order of payment of the drawer that established a certain date of payment.

Thus only at the date of payment it can be given and received legitimate manner.

This is stipulated in an express manner through art 44 of the Romanian promissory law.

From the legal stipulation results that the possessor of the title can refuse a payment in advance. This refusal does not have as a consequence of being considered as being delayed. The regress debtors cannot claim that he was forced to receive payment.

The payoff in advance. The possessor of the promissory note can receive a payment in advance. It can be made only with the consent of the creditor. He is sovereign if he receives it or not.

The payment made before the date of payment, even with the agreement of the possessor of the title, is not equal from a legal point of view to the consequences that the payoff at the date of payment has.

This difference in treatment results from art 44 of the Romanian promissory law.

The payment at the risk and danger of the debtor. Based on paragraph 2 of this article the drawee that pays before the date of payment does so on his own risk and danger.

He is subjected to another judicial regime than the one that is created for the drawee that pays at the date of payment and that we have analyzed.

The formula seems to be taken from the Swiss law that uses it in art 760 from Federal Code of Bonds.

The principle was regulated by other laws, but its formulation and conditions were different.

According to the judicial regime adopted for a payment before the date, it is not valid unless it is made to the real holder of the right that comes from the title that is capable of receiving it. In this case, without a doubt, it produces a freeing effect.

The debtor is not protected as the one that pays at the date of payment through a special legal disposition as the one that the payment is valid only if it is made to the rightful owner with the exception of making a serious crime or fraud from his part.

From these differences of judicial treatment derive a series of consequences.

Thus if the debtor pays to the holder of the title, that apparently was the legitimate possessor based on a blank endorsement and on an uninterrupted row of endorsements until him, but it wasn't in reality the holder of the right, he is not liberated.

If the promissory note is stolen or lost, the debtor will be forced to pay it again at the date of payment to the real holder of the promissory rights, that obtains the restitution of the title through the claiming action based on art 81 paragraph 1 from Law 58/1934 on the promissory note and the bill of exchange or its amortization through the putting in motion of the dispositions comprised in art 89 and following.

He cannot prevail of the stipulation from art 18 paragraph 1 claiming that he paid in good faith the legitimate possessor and thus he is freed, because this stipulation does not apply if the payment was not made at the date of payment.

Also the payment made before the date of payment to the legatee of the legitimate possessor of the title or to the legitimate possessor of the title based on a collection endorsement or warranty is not valid if the real title holder revokes the empowerment, the endorsement for cashing or pays the debt for which the promissory note was given as guarantee before the date of payment. He has the right to claim another payment at the date of payment.

In the same situation there is the debtor that paid the title before the date of payment, title that was emitted in blank and it was filled in an abusive manner or based on a false promissory note or on a forged one.

Thus he is forced to enquire, with the occasion of a payment in advance, the authenticity of the endorsements and the material legitimating of the possessor of the title, besides the formal one.

If the debtor pays at the date of payment he is forced to examine the capacity of the receiver of the promissory sum, moreover he has to act as such when we are talking about a payment in advance. This is claimed also by the ones that adopt another solution regarding the establishing of the capacity when the payment is made at the date of payment.

That is why if he pays in advance to a person that is incapable in the moment when it is made, the payoff does not free him and the legal representative of the incapable can pretend another payment at the date of payment.

What happens when the possessor is capable at the moment of payment but becomes incapable at the date of payment?

After some authors in this hypothesis the payment should be considered non-valid because its making lacked the third parties (the tutor or the creditors) of the rights that they could have exerted on the sum at the date of payment and caused them a damage that he must repair.

This solution cannot be accepted because it is contrary to the law principles and regulations.

The payment made cannot bring anyone prejudice. The tutor is not a third party because he is a representative of the incapable. If he claims the payment again it would mean that the paying off of the promissory note would be made twice to the same person.

It did not bring any prejudice to the one that became incapable, or to his creditors, because the sum entered in the patrimony of the legitimate possessor of the title, their debtor.

The payment thus remains validly made because there were fulfilled the conditions of formal and material legitimating outside the hypothesis in which the creditors would exert the pauliana action.

The not accepted drawee. The risk can belong to the not accepted drawee as well and to have the repercussion on the extra-promissory relationships that exist between him and the drawer.

The payment in advance of the not accepted drawee is not valid if the drawer gives a counter-order, meaning that he revokes the first given order.

In this case the drawee will not be considered as being discharged regarding the drawer, if he was his obliged, or he will not have any action against him for the restitution of the paid sum, if he paid off the title as his mandatory.

The risk is born by the drawee when the possessor of the title is paid before the date of payment without him having the necessary provision and then the drawer is declared bankrupt at the date of payment.

He will come into contest with the other creditors of the bankrupt and he will not pay damages more than the bankrupt interest.

So in the case of the payment in advance the debtor is exposed, in principle, to payment once again except the hypothesis in which the received sum was given by the receiver to the real holder of the title.

Not only he is freed, but also the person in whose account the payment was made by the promissory obligation, but also the other debtors of regress.

He cannot discard this obligation under the pretense that he holds the paid title that bears the mention of paid off on it, as such the debtor would not be obliged to pay the second time to the possessor of good faith unless he claimed the restitution of the title when it was first paid off.

This opinion is not admissible, because on the one hand the presentation of the title is not necessary to the one that holds it, and on the other hand for the exertion of the regress rights, if he did not befall from them, the real holder of the rights can pretend the restitution of the document.

This different treatment between the payment in advance and the payment made at the date of payment is very logical and equitable.

The debtor that pays off the title before the date of payment is not forced to make the payment under the sanction of application the promissory rigors.

He makes a voluntary act and he can enjoy by the entire time interval that is necessary to make the useful research to establish if the legitimate possessor of the title from the formal point of view is also the material one, by verifying the authenticity of signatures, the right of cashing, the capacity of the presenter etc.

The circulation of the title does not suffer at all in this case because the possessor of the title knows that the payment cannot be made until the date of payment. He does not have the right to complain about the investigations made by the debtor, and he cannot enjoy the disposition of favour stipulated by the law in the benefit of the one that pays at the date of payment [12].

On the contrary this circulation is even more assured by observing the liabilities that devolve with the occasion of making the payment, because there are assured the interests of the real holder of the promissory rights that could be prejudiced through the payment in anticipation, because they remain intact without any flaws through the making of the payment in an unexpected manner.

But couldn't the debtor escape this legal liability by making that the promissory note is given to him through endorsement with the occasion of the payment in advance?

Nothing can stop a promissory note from being transmitted through endorsement in the benefit of the drawee, no matter if he is acceptant or not, of the drawer or any other obliged and that they endorse the promissory note again - art 13 from Law 58/1934 on the promissory note and the bill of exchange.

This transmission through endorsement gives the right, in principle, to the possessor of the title to prevail from the stipulations of art 18 from Law 58/1934 on the promissory note and the bill of exchange, even if the one that transmitted it was not in reality the holder of the promissory rights.

But if the debtor used this endorsement to discharge himself of the responsibility that falls upon him because of the payment in advance he will not be able to prevail himself of the stipulations of art. 18, but it is applied to him the guidelines of art. 40 from Law 58/1934 on the promissory note and the bill of exchange and he will be forced to pay again [13].

## **2. Partial payment**

The partial payment in international commerce can be made by the drawee, that is a resident and by the person that guarantees the payment. The promissory law stipulates that the possessor cannot refuse a partial payment. In the case of a partial payment the drawee can ask that a mention is made on the promissory note about that payment and to be given a receipt [14].

Unlike common law, according to which (unless a contrary stipulation) the payment cannot be divided and thus the creditor cannot be forced to receive a partial payment, in the promissory law, for reasons that are characteristic to the promissory law, partial payment is admitted. In this field the payment does not interest only the possessor of the title, but also the other signatories, that are held joint with the payment and that have as interest, at least a partial one, to be discharged. This argument leads to the consequence that, although the text of the law seems to refer only to the payment made by the drawee, the partial payment is admissible when it is made by the other debtors, others than the drawee. But the text is explained through the fact that, normally, the drawee is the one that makes the payment. Otherwise the

person that guarantees the payment of the drawee and the resident make the payment in the name and on the account of the drawee.

The partial payment cannot be made by the debtors of regress or the persons that guarantees the payment.. (unless the last ones vouched only for a part of the sum).

The partial payment cannot be made until the date of payment but it can be made before drawing up the protest or at the expiration of the term for its making [15]

If the common law consecrates the principle of the indivisibility of payment, in the promissory law a partial payment is admitted, except the one that is made by the debtors of regress or the persons that guarantees the payment. The partial payment cannot be made before the date of payment [16].

The principle that is consecrated in the civil code, according to which the creditor cannot be forced to receive a partial payment, even if the debt is divisible, is not received in the promissory law that consecrates the opposite solution – art 42 paragraph 2 from Law 58/1934 on the promissory law and the bill of exchange. They had in view the interest of the regress obliged, whose joint obligation is reduced with the paid sum. The refusal of the possessor to receive a partial payment brings the declension from the regress action for the offered and not received sum and for its accessories [17].

The above rule is applied to the payment made by the drawee, either as acceptant or not, by the issuer (in the bills of exchange) or by the persons that guarantees the payment. The possessor is not forced to receive a partial payment from the regress debtors – art 43 from Law 58/1934 on the promissory law and the bill of exchange.

The acceptant through intervention, assuming the position of the drawee and being able to accept partially, just like the drawee, can make a partial payment, but the payer through intervention cannot, because the law stipulates that the payment through intervention must comprise the whole amount that has to be paid by the one in the favour of whom the intervention is made (art 78 paragraph 2 from the Promissory law).

The receiving of the partial payment is compulsory only at the date of payment or after it, but before drawing up the protest or the expiration of the term for its drawing up. After these dates the non payment gives the possessor the right to start prosecution and it cannot be removed unless the whole sum is paid off.

The partial payment, and the refusal of a partial payment, must be determined through the protest [18].

The promissory signatories are held responsible in a joint manner, and any reduction of the sum of payment represents an advantage. Because of the interest of the debtors, the promissory law consecrates the partial payment [19].

Unlike the common law the possessor of the title cannot refuse payment. In case of a refusal, the possessor of the title is raffish from the regress action for the offered sum and its accessories.

The partial payment can be made by the drawee, the resident and the person that guarantees the payment of the drawee. Although it is admitted, the regress debtor and the intervenient cannot pay partially.

The partial payment is made at the date of payment, but before drawing up the protest for non-payment or before the expiration of the term for drawing up the protest [20].

According to the law, the partial payment is valid and it cannot be refused – art 43 paragraph 2 from Law 58/1934 on the promissory law and the bill of exchange. In case of refusal of a partial payment, the possessor of the promissory note is raffish from the regress action for the offered and non received sum and for its accessories.

If a partial payment is made the drawee can ask the paid possessor to make on the promissory note a mention of this payment and to be given a receipt [21].

It is stipulated the right of the main debtor to make a partial payment of the sum, payment that the possessor of the promissory note cannot refuse – art 43 paragraph 2 from Law 58/1934 on the promissory note and the bill of exchange.

The partial payment at the date of payment from the promissory law is a waiver from the principle of common law, according to which the creditor can refuse the partial payment. We have in view in the promissory law the situation of the debtors of regress, whose guarantee at the rest of the unpaid sum is limited after the partial payment.

In the case of partial payment the main debtor can ask to be given a receipt and to be made a mention on the promissory title about the paid sum. He cannot claim the giving of the promissory note, because it is necessary for it to be presented for the protest because only after the fulfillment of this formality the rest of the unpaid sum can be asked to the regress debtors. The same right has the acceptant through intervention, but not the payer through intervention, like the designated at need or the intervener for honor, that must pay the full amount.

The law of the state where the promissory note is payable establishes if the acceptance can be limited to a part of the sum, as well as if the possessor of the title is forced or not to receive a partial payment [22].

The partial payment cannot be considered an elusion of the principle of the indivisibility of the promissory note, because this principle works the whole time of the circulation through endorsement and does not have its reason when the promissory note comes to the date of payment, when it becomes an executor title [23].

It is specified in the Roman law that the possessor cannot refuse a partial payment – art 43 paragraph 2 Law 58/1934 on the promissory note and the bill of exchange. Such a stipulation, as shown above, is an exception from the general principle that exists in fulfilling the obligations after which the creditor is not held to accept the partial fulfillment of the obligation.

The justification of this derogation we find in the will to favor the regress obliged; if the main debtor fulfills only in part his obligation, the regress obliged will remain debtors only for the amount that is not paid, if the possessor refuses the partial payment the regress debtors will remain obliged for the same sum.

Its regulation represents a special solution through which the law solves in a special manner the conflict of interests between the creditor (that want a unitary payment, at the date of payment) and the debtors of the promissory report (that are interested in being responsible for as less as possible). We consider that a partial payment has been made in the situation, in which the whole sum written on the title was not paid, plus the interests and the necessary expenses.

If the possessor refuses a partial payment the debtors of regress are discharged by the guarantee of paying off the offered sum and its accessories. So they can be prosecuted only for the difference. The acceptant drawee and the intervener through acceptance that can be prosecuted for the whole amount cannot be considered as being in delay for the offered sum and nobody can claim interests and expenses for what they have offered [24].

The partial payment can be made by the drawee, resident or the person that guarantees the payment. The promissory law stipulates that “the possessor cannot refuse a partial payment” – art 43 paragraph 2, Law 58/1934 on the promissory note and the bill of exchange. In the case of a partial

payment the drawee can ask to be made on the promissory note a mention about this payment and to be given a receipt.

According to the law the one that pays at the date of payment is validly freed, only if from his part there wasn't any fraud or serious error [25].

The partial payment cannot be made in anticipation before the date of payment. The whole payment can be made before the date of payment, but with the consent of the creditor [26].

The possessor is forced to receive any partial payment that is given to him, as long as the promissory note is not protested, in order to relieve the task of the promissory debtors of regress that can be prosecuted only for the rest of the payment. The possessor that received a partial payment loses the right to the regress action for this sum.

In the case in which the creditor (possessor) claims a partial payment, the promissory debtors can force him to receive the payment in full, by making a real offer for payment.

In the case of the partial payment, the possessor, in order to keep his right to the regress action, must protest the promissory note for the rest of the unpaid sum, because only in this way he can turn against the previous endorsers and the drawee.

The debtor that pays at the date of payment is validly freed by the promissory obligation, except the cases in which the payment is a fraud or a serious error.

By fraud we understand the case in which the drawee pays although he knows or he could have found out, by depositing a reasonable diligence, the fact that the person to whom he presents the title of payment received it in bad-faith.

The debtor that pays at the date of payment is forced to check only the regular succession of the endorsements, but not the authenticity of the signatures of the endorsers. Although the debtor is not forced to check the authenticity of the endorsements, he also has to check if the identity of the person that presents the title at payment corresponds to the identity of the last endorser that is stipulated by the title.

The drawee that makes the payment before the date of payment makes it at his own risk and danger, because he might be coerced to make a new payment in favor of the one that proves, at the date of payment, to be the legitimate possessor of the promissory note.

In the case in which the promissory note comprises an express clause through which it is payable at the residence of a third party, it is considered that the payment will be made by the third party.

The residence of the third party can be in the same locality where is the residence of the drawee, or in another locality.

In the situation in which the promissory note is payable at the residence of the drawee, with the occasion of the acceptance, he can indicate another address from the same locality without having the right to change the locality.

The clause of residence can be inserted in the title by the drawer, upon the emission of the title, or by the drawee, upon the acceptance of the promissory note, so that the promissory note is not demanded at his residence. The residence made by the endorser will be considered by the banking societies as unwritten [27].

In the promissory matter usually there are multiple joint obliged at payment that are subjected to be prosecuted at the date of payment by the possessor of the title, according to the legal guidelines, in case of non-payment from the part of the main debtor.

A partial payment from his part would make the situation easier for them, because they would remain responsible just for the difference that was not paid.

So in promissory matter the decision that will be made does not interest only the legitimate possessor of the title, but also the other signatories of it.

The decision of the legitimate possessor of the promissory note, creditor of the sum that is stipulated in the title, not to receive a partial payment would prejudice them, because they would be exposed to being prosecuted for the whole amount, and in their turn, when they prosecute the drawee, they would not receive any sum that is offered to the possessor of the title.

The stipulation from art 43 paragraph 2 from Law 58/1934 on the promissory note and the bill of exchange lead to some discussions regarding its application because of the laconism of its content.

Paragraph 2 of this article does not specify who can make a partial payment.

The other two paragraphs, the first and the third, the legislator deals with the drawee.

From this we can deduce, without any doubt, that the drawee, acceptant or not, can make a partial payment.

The drawee has the right to make a partial payment even if he accepted the entire amount. It is understood that he enjoys "a fortiori" this right when his acceptance was performed for only part of the sum.

A partial payment can be made by the the person that guarantees the payment of the drawee, because they, by ensuring the obligation of the drawee, find themselves in the same judicial situation as the drawee, and based on art 33 paragraph 1 from Law 58/1934 on the promissory note and the bill of exchange they can perform the surety just for part of the money, or at the domiciliatar, that can make the payment only in the name and account of the drawee.

In exchange a partial payment cannot be made by the debtors of regress or the persons that guarantees the payment– unless the latter ones ensured just a part of the sum according to art. 33 paragraph 1 from Law 58/1934 on the promissory note and the bill of exchange.

The possessor of the title, being paid at the date of payment by the drawee and prosecuting the other debtors based on the drawn up protest their obligation to pay in full the promissory note, because the right of regress appeared against them, it being in suffering. For the extinguishing of this right the whole sum that is owed must be paid. This emerges from art. 55 from Law 58/1934 on the promissory note and the bill of exchange according to which any obliged against who it is exerted or it can be exerted the right of regress, can ask in exchange for the payment, so of the full payment, the handing over of the promissory note with the protest and a return account that is paid off.

An acceptant or a payer through intervention enjoys such a right?

Regarding the acceptant through intervention the difference in solution is that in the old judicial regime between the Italic-Romanian doctrine and the German one continues to exist.

The first gives this right to the acceptant through intervention based on the fact that he can partially accept just like the drawee, and the second one refuses based on the fact that the disposition from art 43 paragraph 2 does not consecrate a principle that can be generally applied in the promissory matter, just a restriction that must be applied restrictively.

The situation is different in the case of the payer through intervention.

Through art 78 it was stipulated that the payment through intervention that must be made at the latest in the day that follows the last day that is admitted for the making of the protest for non payment must comprise the whole amount, that will be paid the one for which the intervention was made.

In this way it was solved the controversy that existed under the commerce code [28].

The partial payment can be made only at the date of payment, but before drawing up the protest or the expiration of the term for its making.

It is true that it was supported the idea contrary to the nowadays law, on the basis that these partial payments made by the acceptant after the protest or at the expiration of the term of drawing up serve to the interests of the regress debtors, because they are liberated with the sum paid by the drawee, and the possessor of the title has no reason to refuse it.

Art 55 from Law 58/1934 on the promissory note and the bill of exchange, that stipulates a full payment after the protest, deals only with the regress debtors but not the acceptant.

If the possessor of the title does not receive this partial payment and the acceptant does not deposit the sum according to art 46 from Law 58/1934 on the promissory note and the bill of exchange, after some authors his right to prosecute the regress debtors remains untouched and the bidder of the partial payment cannot be considered as being late regarding the offered sum.

Without any doubt the possessor of the promissory note has the right to receive a partial payment any time and nobody can complain about his attitude, especially not the regress debtors that are freed for a part of their debt.

It is considered as partial payment the case in which the whole amount that is mentioned in the title is not paid off plus the accessories with interests, expenses, and the difference in the exchange rate, even if on the title it is stipulated the payment in a foreign currency, or it is detained an unjustified commission, or when it is paid only the sum for which the acceptance was given or a sum smaller than it.

If the possessor refuses to receive the partial payment the regress debtors and the persons that guarantees the payment are discharged by the warranty to pay off the offered and un-received sum and its accessories, without any doubt in the hypothesis in which the right of regress was kept through the fulfillment of the necessary legal formalities.

Thus they can be prosecuted just for the difference. The other promissory signatories like the acceptant drawee and his persons that guarantees the payment or the intervener for acceptance, although they can be prosecuted for the whole amount, they cannot be considered as being late with the payment, so they cannot be demanded to pay interests and expenses if the sum was deposited according to art 46 from Law 58/1934 on the promissory note and the bill of exchange and even without the fulfillment of this condition, after some authors. We find ourselves in front of a putting in delay of the creditor “*mora creditoris*”, and the debtor enjoys the right to deposit the sum according to art 46 from Law 58/1934 on the promissory note and the bill of exchange.

## **Conclusions**

The presentation of the promissory note in international commerce before the date of payment is contrary to the law and it does not produce judicial effects; the debtor's offer of payment and the refusal of the possessor does not allow the debtor to deposit the sum at the date of payment, with a freeing effect for him.

The drawee can pay in advance only with the approval of the possessor of the promissory note. Because the payment before the date of payment is not governed by the rules of the promissory law, the drawee pays at his risk.

The partial payment at the date of payment from the promissory law is derogation from the principle of common law according to which the creditor can refuse the partial payment. It is had in view in the promissory law the situation of the debtors of regress, to whom the warranty to the rest of the unpaid sum is restricted after the partial payment.

In case of partial payment the main debtor can ask to be given a receipt and a mention to be made on the title about the paid sum. He cannot claim the giving of the promissory note, because it is necessary for it to be presented for protest, because only after the fulfillment of this formality the rest of the unpaid sum can be asked to the regress debtors. The same right it has the acceptant through intervention, but not the payer through intervention, like the designated at need or the intervener for honor, that must pay the entire amount.

## References

- [1] See art 40, paragraph 1 and art 44 paragraph (1) from the Romanian Promissory Note Law.
- [2] I. Macovei, *International Commerce Law*, vol II, C.H. Beck Publishing House, Bucharest, 2009, p. 206.
- [3] D. Mazilu, *International Commercial Law, Special Part, Edition VII*, Lumina Lex Publishing House, Bucharest, 2008, p. 350
- [4] E. Cristoforeanu, *Treaty of promissory law*, vol. II, Judicial Courier Publishing House, Bucharest, 1936, p. 16-17.
- [5] R. Economu, *Practical Manual of Promissory Law*, Lumina Lex Publishing House, Bucharest, 1996, p. 112.
- [6] S. Angheni, M. Volonciu, C. Stoica, *Commercial Law*, edition 4, C.H. Beck Publishing House, Bucharest, 2008, p. 396
- [7] E. Cristoforeanu, *op. cit.*, p. 46.
- [8] V. Luha, *Credit titles - The promissory note*, Lumina Lex Publishing House, Bucharest, 1998, p. 165.
- [9] M.N. Costin, *Great institutions of Roman civil law*, vol. III, Cluj-Napoca, 1993, p. 173.
- [10] V. Luha, *op. cit.*, p. 166.
- [11] D. Galasescu-Pyk, *The promissory note and the bill of exchange*, vol II, Tiparul Romanesc Publishing House, Bucharest, 1947, p. 286.
- [12] D. Galasescu-Pyk, *op. cit.*, p. 292.
- [13] See D. Galasescu-Pyk, *op. cit.*, p. 293.
- [14] D. Mazilu, *op. cit.*, p. 350.
- [15] T.R. Popescu, *International commercial law*, Second edition, Editura Didactica si Pedagogica, Bucharest, 1983, p. 323-324.
- [16] L. Sauleanu, L. Smarandache, A. Dodocioiu, *Bank law*, Judicial Universe Publishing House, Bucharest, 2009, p. 277.
- [17] P. Patrascanu, O. Sachelarie, *Credit titles in international commerce*, Editura Scrisul Romanesc, Craiova, 1975, p. 180.
- [18] P. Patrascanu, O. Sachelarie, *op. cit.*, p. 181.
- [19] See art 39 paragraph 2 from the homogenous Promissory law; art 43 paragraph 2 from Romanian Promissory law.
- [20] I. Macovei, *op. cit.*, p. 206.
- [21] S.D. Carpenaru, *op. cit.*, p. 593.
- [22] Art 2.653 of the New Civil Code.
- [23] R. Economu, *op. cit.*, p. 111.
- [24] V. Luha, *op. cit.*, p. 161.
- [25] D. Mazilu, *op. cit.*, p. 350.
- [26] S. Angheni, M. Volonciu, C. Stoica, *op. cit.*, p. 396.
- [27] I. Mihai, *Collection and payment operations*, III Edition, revised and enlarged, Ed. Of the Foundation Tomorrow's Romania, Bucharest, 2007, p. 32.
- [28] D. Galasescu-Pyk, *op. cit.*, p. 298.