

Legal aspects of receivables embodied in bills of exchange

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Introduction

Having previously focused on the transfer of receivables that are not embodied in security papers, as this applies to most Swiss-law-governed receivables in general (for further details please see "[Legal considerations of assignment of receivables under Swiss international private law](#)"), it is nevertheless worthwhile highlighting certain fundamental Swiss legal principles applicable to security papers – namely, bills of exchange pursuant to Article 991 *et seq* of the Code of Obligations. Specifically, this is of practical relevance to internationally well-known draft purchase programmes.

Security papers

Pursuant to the legal definition contained in Article 965 of the Code of Obligations, a 'security paper' is an instrument to which a right attaches in such a manner that it may neither be exercised nor transferred without the presentation or transfer, as applicable, of the instrument. Security papers are subject to specific legal regulations and are not primarily subject to the laws applicable on receivables. In the context of trade and finance-related transactions, so-called security papers of public credence are of particular relevance. This type of security paper is tailored by law to accommodate the needs for reliance and legal certainty in commercial transactions on both the debtors' and the creditors' side. This serves the purpose of, among other things, the preclusion of certain exceptions of the respective debtor against the payment obligation embodied in the instrument as well as the protection of a good faith acquisition of such instrument. The latter is a fundamental deviation from the legal concept governing the acquisition of receivables in general.

Legal qualification and characteristics of bill of exchange pursuant to substantive law

In general, by law, a bill of exchange qualifies as an instrument payable to order and is thus a security paper of public credence unless downgraded by a respective declaration of the issuer or another party entitled to do so.

In terms of form and contents, bills of exchange must comply with the legal requirements set out in Article 991 *et seq* of the Code of Obligations. In particular, the respective documents must be named as a bill of exchange in the text of the instrument and in the language in which it is issued and must contain:

- the unconditional instruction to pay a certain sum of money;
- the name of the person who is to pay (drawee);
- the date and place of payment;
- the name of the person to whom or to whose order payment is to be made;
- the date and the place of issue; and
- the issuer's signature.

Failure to comply with these requirements will mean that the bill of exchange will be invalid. However, the law provides for certain fallback provisions safeguarding the qualification of a document as a bill of exchange in certain cases.

Strict liability concept, preclusion of exceptions

Commercially, it is important that in general, not only the drawee but especially also the issuer and

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any endorser are liable for payment of the obligation embodied in the bill of exchange. In addition, in order to ascertain the fitness for circulation, objections against payment obligations that are based on the direct relationship of an obligated party with the issuer or a former holder may not be pleaded unless the current holder intentionally acted to the detriment of such obligated party when acquiring the bill of exchange.

Enforcement

With respect to debtors that may be subject to bankruptcy proceedings, enforcement of the obligation embodied in a bill of exchange is subject to a specific regime set out in Article 177 *et seq* of the Debt Enforcement and Bankruptcy Act, which allows for quick access to debtor assets.

Transfer of title in bill of exchange pursuant to security law principles

Pursuant to applicable Swiss law principles, the transfer of title in a bill of exchange requires a valid transaction imposing a legal obligation for the contemplated transfer (eg, a legally valid and binding sales contract). Otherwise, legal ownership will not pass to the transferee.

Based on the legal obligation, possession over bills of exchange will be transferred from the transferor to the transferee, either physically or by means of an appropriate substitute. Swiss law imposes rather strict requirements on the transfer of possession (being the means by which factual control over the instrument is exercised) compared with other European jurisdictions. In addition, bills of exchange must be properly endorsed. The formal correctness and completeness of the endorsement chain must be checked by the acquirer of the bill of exchange. In the affirmative, the transfer of the bill of exchange will be valid even if the transferor was not entitled to dispose of the bill of exchange, always absent of:

- gross negligence or wilful misconduct on the side of the transferee; or
- the existence of any exceptions with absolute effect.

Under Swiss law, the rights embodied in a bill of exchange may be transferred by a separate declaration of assignment instead of an endorsement on the bill of exchange. However, in such case, the legal benefits of security papers of public credence, in particular the concept of preclusion of certain exceptions and the protection of the acquisition in good faith, will not be available to the respective acquirer. In addition, it must be borne in mind that the obligated party is obliged to fulfil the obligations embodied in a bill of exchange only on presentation of the original bill of exchange.

Comment

Bills of exchange are subject to strict regulations governing their formal and substantive aspects. However, the position of the beneficiary of a bill of exchange is much stronger than the legal position of the contractual assignee of a receivable not embodied in such an instrument. Thus, from a Swiss perspective, it is worthwhile considering a draft purchase structure, particularly in case of a high value of the single receivables that will be subject to the transaction.

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