

Research Article

**THE LIABILITY OF ENDORSERS OF PROMISSORY NOTE
(JOINT AND SEVERAL LIABILITY OF SUBSCRIBERS IN
COMMERCIAL DOCUMENTS)**

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ABSTRACT

The economic growths, development of trade and business and domestic and international commercial transactions and necessity of speed and ease in commercial affairs and the role that movement of capital and amount of trade has in country economic and politic destiny make governments to establish certain regulations and laws for guarantying peace of mind of businessmen and traders in their commercial relations. In Iran trade law and other related regulations the commercial documents are not defined and Iran commercial law doctrine for commercial documents believes in two public and particular concepts. The document in the trade is withdrawn from civil law frame and one can consider a new entity system for it. It is withdrawn from paper form that is as approval tool and this document that has no independence in civil law framework, obtains abstract description in commercial law and it take some advantages for itself and it separate that from simple description of ordinary documents in civil law. Endorsement of promissory notes is turned into a legal action such as property transfer, debt, bail, rent, appeal and so on. One of sources of joint and several liability is joint intention of both parties, where this intention should be explicit. In other term the content of contract should be written in such manner that is in accordance with clause 1 of article 166 of commercial law stating that joint and several companies is a corporation that is constituted for commercial affair between two or more persons with joint and several liability. The result of current research shows that in general regarding article 245 of commercial law that is related to negotiable instrument but according to article 309 of the mentioned law this should be observed for promissory note as well and someone signs the promissory note and the endorsers have joint and several liability toward owner of promissory note. Owner of promissory note in case of failure of payment and protest can refer to each one of them individually or to two or more of them collectively. The same right is kept for each one of endorsers to issuer of promissory note and previous endorsers.

Keyword: *Commercial Documents, Document, Promissory Note, Joint and Several Liabilities*

INTRODUCTION

One of fundamental pillars of country economic is the trade. The trade has pivotal role in formation of internal and international relationships. This relation is associated with rights and resources of all member of society. Not only the businessmen and commercial firms should perform their commercial operation according to trade law regulations and criteria and contribute in prosperity of country, but also every single member of people should be aware about trade law, in other word all people whether man or woman deal with the trade issues (Madani, 2012).

The economic growths, development of trade and business and domestic and international commercial transactions and necessity of speed and ease in commercial affairs and the role that movement of capital and amount of trade plays in country economic and politic destiny make governments to establish certain regulations and laws for guarantying peace of mind of businessmen and traders in their commercial relations. Documents such as promissory note and check and negotiable instrument with certain and special feature and functions in addition to the inevitable effects that they have on country economy, nowadays are considered as most important trade tool. There is no merchant that does not deal with these documents in an everyday basis. From other side the merchant need to peace of mind and legal support

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with two components of speed and ease. This is not applicable using ordinary methods in civil law system. Thus, in internal and international legal system some special principles are governing on negotiable instruments trades that usually civil documents have not such principle, therefore, prominent part of issues about commercial documents is regarding principles governing on them. Regarding great amount of complaints about commercial documents, studying these principles is inevitable for legal society. In Iran commercial law and other related regulations the commercial documents are not defined precisely and doctrine of Iran commercial law for commercial documents believe in two concept of public and particular. In general and public concept any document or paper that have application in commercial affairs can be considered as commercial document such as negotiable instrument, promissory note, check, bonds, stock paper, marine waybill, air waybill, documental credits, warehouse bill, bank warranty, commercial inventory, insurance bill and so on. From other hand commercial documents in particular concept includes three document of negotiable instrument, promissory note and check, and due to concentration of description of commercial documents in these three latter documents and having complete commercial features and description and enjoying complete support of commercial legislator, one consider them as particular commercial documents (Massoudi, 2002).

Particular concept of commercial documents is emerged due to certain commercial transaction needs over a relatively long period of time and its objective is preventing probable risks of metal and paper currency transaction and necessity of heavy payments and possibility of transferring some cashes from one place to another or forms a country to another. These documents are emerged for facilitating movement of wealth and accelerating to tasks and dispensing businessmen from wasting time.

With a few attentions to above documents one can figure out that these documents are classified by their main application. Some of them are used in money payment and transaction such as: check, promissory notes. Negotiable instruments, documentary credits. Of course among them the negotiable instrument and promissory notes are tools of promised payment, check is as cash payment tool and finally letter of credit are as international payment tool. Some of them define commitments arising from commercial sale such as commercial inventory and some of them are commitment document of unconditional payment of cash amount by bailman (bank) to creditor (for debtor) such as bank warranty bill, some document are ownership of merchandize sum as bill of lading, document of warehousing and some other suggest persons partnership in capital of commercial corporates such as stock and bonds.

In commercial law for facilitating and accelerating movement of these documents an establishment is anticipated under title of endorsement that make it possible for mentioned documents with mere signature on the back of the documents the rights inserted in that without need to other formalities would transfer to someone else.

Although previously there was more attention and emphasis to corporeal properties (mobile or immobile) but with ever-increasing development of commercial documents as credit properties, a few capital emerged in the society and payments instrument was considered as trade mediatory and criteria of measurement and holder of objects and service value, in such manner that now in many country the amount of persons' corporeal properties is not real criteria of their capital, but amount and type of commercial documents such as bonds play this role and their resulting gain in some cases is greater than corporeal properties and thus the issue of bailing them, their legal nature and situation is posed and discussed and it goes beyond realm of countries internal rights and reflects in international regulations.

For the same reason objective of current research is examining liability of endorsers of promissory note (joint and several liability of subscribers of commercial documents).

Research Review

In a research examining joint and several partnership in commercial documents argues that one of features of commercial documents in particular meaning (negotiable instrument, promissory note, check) is the principle of joint and several liability of subscribers of these documents. The trade law approved in 1933 about negotiable instrument in article 249 states that all subscribers of commercial document shave joint and several liability toward its owner (interested party). In addition to negotiable instrument about

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two other comprisal documents namely promissory note and check regarding article 309 and 314 of trade law that suggests the unity principle of sentences of promissory note and check with negotiable instruments and stipulates the support of right of owner of these commercial documents. The same situation is held by legislator in article 19 of law of issuing check approved in 1976. In this article it is attempted to examine nature and resources of developing joint and several liability as a principle governing the mentioned documents as well as to clarify the joint and several liability in commercial documents and then the realm of the liability of each one of subscriber of these documents is specified among which the most important one is negotiable instruments (Ahmadi, 2002).

In a research titled as "the signature of third party in endorse of commercial document emerge as warrant" has attempted to responded to the question that if there is a signature in endorse of commercial documents and there is no evidence that the signature belong to a certain endorser, what should one do? In this case there is disagreement between lawyers. Their opinion is discussed and according to Iran trade law and law approved in 1951 and 1952 about negotiable instruments and promissory note and check it is proved that it should be accepted that the subscriber is contributed in the documents as an endorser (Fakharri, 2003).

Hassanzadeh, (2008) in its article under title " endorsement as agency in commercial documents " argue that Iran laws in despite of lack of legal explicit text about possibility of endorsement with agency in commercial document, but the endorsement with agency is allowable and if the representative has the permission of endorsement and stipulates the identity of principal person and its own in the documents, it has no liability toward the owner of document and merely the principal person is the liable. In uniform laws of Geneva there is nothing inserted about negotiable instrument and promissory note and check precisely but one can deduce the sentence is the same that is inserted in Iran laws. In England laws contrary to Iran laws and Geneva uniform laws there is not explicitly inserted the possibility of endorsement of representative but about the manner and condition of liability of principal and representative one can deduce that the manner of liability is the same that is mentioned in Iran laws. In English laws contrary to Iran and Geneva uniform laws the possibility of endorsement to agency and the liability of original person and representative is stipulated and if the representative sign with the name of the principal person and the principal person is determined in the document, so the representative has had some authorities, in this case the representative has no liability toward the documents and the principal person is the only liable. In England laws contrary to Iran laws one shows complete support to the third party with goodwill (Hassanzadeh, 2008).

in a comparative study of agency in signature of commercial documents (negotiable instrument, promissory note and check) addressed that regarding article 227 of commercial law and 19 of law of issuing check about possibility of granting agency in issuing negotiable instrument and check this question is already posed firstly whether the mentioned agency can merely sign the document within the issuing time or can sign within other stages such as endorsement and collateral too. Secondly is the possibility arising from the document signature is directed always to principal person or in some cases the document subscriber representative is liable and committed of payment? Despite lack of explicit regulation in commercial law one can deduce by other legal regulations especially commercial law about commercial documents as well as Geneva international contract regulation and laws of some countries such as England and USA that firstly the agency is not merely confined in the state of document issuing and include titles such as endorsement and guarantee. Secondly the mentioned agency is not confined to negotiable instruments and check but include the agency of promissory note signature. Thirdly the general rule in agency suggest the principal person liability unless in some cases that the representative lack agency or outreach its authorities or despite having sufficient authority at the time of signature did not stipulated its own agency in the document and did not revealed its identity (Nikfarjam, 2013).

The Concept and Nature of Joint and Several Liability and its Effects on Commercial Documents

This term in lexical meaning means participation in liability and developing commitment from two or more persons. Speaking of the legal nature and situation of joint and several liability, the public jurisprudence has two beliefs. Some scholars believe that in this liability there is one debt but numerous

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liable undertake the commitment of paying that. There is a debt for the indebted and by developing the joint and several liability its legal nature does not change. The essence of joint and several liability is numerous commitments for payment of one debt. Some other scholar theorizes that the joint and several liability leads in multiplicity of debt. It means that the main debt is commitment of indebted person and new debt and debts fall in commitment of debtors (Jafari Langeroudi, 1973). The second belief was not addressed too much and the legal system did not accept that. Therefore, one can say: "the joint and several liability is a one debt with numerous liable that thereby the creditor can demands the single debt from the principal debtors as well as sureties so that with payment of the debt from each one of liable other obligor persons become exempt (Ahmadi Sajjadi, 2002).

Sources of Joints and Several Liability

One of sources of producing joint and several liability is the joint intention of both parties and this intension must be explicit. According to article 116 of trade law a joint and several corporations is a company that under particular custom is formed for commercial affairs between two or more persons with joint and several liability. If the asset of companies not sufficient for payment of all debts, each one of partners are liable for paying all debts of company.

Article 403 and 404 of trade law consider explicitly the private contract as one of sources of developing joint and several liability, whether the joint and several liability is longitudinal or latitudinal. The article 403 state as:

"In all cases that according to laws or private contract the collateral is joint and several type, the creditor can refer to collateral or the main debtor collectively or after reference to one of them and failure in collecting receivable claim can refer to other for all or rest of the receivable claim".

It does not seem that the mentioned sentence is particular for commercial contract. Because the mention article has accepted contractual joint and several liability beside the liability emanating from the law and numerous commitments for payment of one single debt does not encounter with no common sense obstacle.

In addition to private agreement of individuals sometimes the base of developing joint and several liability is sentence of legislator, article 403 and 404 of commercial law stipulate this issue. The legislator has accepted the principle of joint and several liability of subsidiaries in article 249 of commercial law but in the form of latitudinal liability for authenticating more the particular commercial documents (negotiable instrument, promissory note, and check) and for support of owners of these documents. The sentence inserted in mentioned article relying on article 309 and 314 of commercial law in promissory note and check is enforceable too. According to this principle, each one of subscriber is surety of vindication of right of creditor (owner of commercial document). And it is possible for creditors to refer to all subscribers and distribution of joint and several liability among them. All subscribers of these documents have mutual surety on the behalf of its owner and the creditor rights are guaranteed by legislator in an effective manner (Ahmadi Sajjadi, 2002).

Joint and Several Liability in Commercial Documents

a) Reference Right for Receiving Claim

One of most important effects of joint and several liability is the possibility of owner to refer to all subscribers whether the issuer, receiver of negotiable instrument or endorser/s. relying on principle of independence of signature as soon as the commercial document is signed it finds an abstract feature and its obligors are independently liable toward its owner (creditor). The objective of enacting article 249 of commercial law is guarantying the owner's right of these documents so that the creditor can take private bail for receiving its own claims and the owner can receive the amount inserted in these documents devoid of any kind of personal objection and easily by referring to all obligors. One can seek the reason of this referring to principle of subject unification and multiplicity of legal relations that is particular feature of joint and several liability. Because the subject of all these document is a single debt that is the commitment of payment of determined amount of cash that its payments by subscribers is in a joint and several manner. And for the same reason payment of debt from any one of obligors lead in exemption of

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all other obligors. And referring the surety to debtor as well as the right of referring of any endorser to its previous endorser as well as to issuer and distribution of liability among each other according to the mentioned principle is admissible (Elyass, 1993).

b) Creditor Sue Right to Both Parties of Each Liable

The owner of commercial document for receiving its claim sum has the right to sue against all subscribers. The owner of negotiable instruments or promissory note and check can relying sentence of article 249 of commercial law sue each one of obligors singly or collectively. Suing against one or more liable does not lead in losing the right to refer to other liable and even if a claim is relied on real security, having the real security is not obstacle of owner to refer subscribers.

c) Bankruptcy Effect on Each One of Subscribers

The legislator does not impose the effect of bankruptcy of each one of subscriber of these documents on other liable for supporting the owner of commercial document. Then when one or more liable of promissory note, negotiable instrument and check sustain bankruptcy other subscribers undertake its share and thus, no harm is exposed to right of owner of document (creditor) (article 251 of commercial law). These articles is superior to principle of equity of bankruptcy rights and grant more right to owner of commercial document in receiving its claim than ordinary creditor and it can receive all amount inserted in commercial document from managers that are surrogate of bankrupted merchant (Saghari, 2010).

d) Debt Payment by Any Other Subscriber Exempt the Others at the Same Amount

As it is said before the nature of joint and several liability is multiple obligation for payment of debt. In other word it is a single one debt that multiple liable undertake its payment and this debt is commitment of paying determined amount of cash at due date. Therefore, payment commitment from each one of subscribers exempts other obligator and subscribers with the same amount of debt payment (Ahmadi, 2002).

Joint and Several Liability in Iran Law and its Responsibility

In our law the subject of joint and several commitments have not fixed situation. Though one of reasons of this issue is technically lack of a pivotal discussion about commitment rights or commitment public theory, but the main reason is impairment of principle of joint and several liability in our legal history. Joint and several liability is one of the most important tool that legislator considered in different legal systems for guarantying executing obligation or compensation of damages. A tool with almost least value of formalities produces high level of security in financial relationships (Joneidi, 1996).

Relying on content of article 698 of civil law if the guarantee is stipulated in the document, after that the surety is realized properly the creditor has not the right to refer to debtor and for receiving its claim should just refer to bailman while regulations of article 249 of trade law and regarding article 209 and 314 of the same law explicitly the owner of negotiable instrument, promissory note and check in condition of observing regulations of ninth and tenth chapters of fourth part of trade law can refer to each one of endorsers of paper and claim the amount inserted in the document with other related damages. Referring the owner of negotiable instrument to each one of endorsers does not inhibit referring to others and each endorser has the same right to other previous endorsers and issuer of papers. In article 8 of decree of establishing public warehouses, joint and several liability of endorsers of bail paper is anticipated toward its owner. And if the gain of sales of goods is not sufficient for paying claim of owner of bail the owner can refer to each one of endorsers for the rest of its claim.

Discussion and conclusion

Some documents such as promissory note and negotiable instrument and check with particular feature and functions in addition to inevitable influence on country economy are considered nowadays as the most important commercial tools tool. These paper cause that transferring cash amount takes places less and are regarded as a tool for immediate payment of amount as well as supply and foster of credit for merchant (whether natural or legal entity).

One of important subject that influence on development of trade and commercial transactions is the speed in action and supply and foster of credit for merchants. Thus, the legislator has anticipated for such

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documents and operations particular sentences and regulation that observing the regulation in an accurate manner entails significant privileges for the interested party.

The important problem that some part of commercial documents regulation is assigned to it is endorsement. This action is the ordinary and regular way for transferring documents that take place by signature of owner on endorse of the paper.

The endorsement is related to the promissory note and the endorsement brings about a new owner for the promissory note that is owner of all right and advantages that belongs to it for example it can transfer it to other person with endorsement or it can refer to the endorser or the previous endorsers or issuer for receiving it or by the joint and several liability that they undertake the payment of amount of the promissory note it can sue against them for receiving them.

In order that the owner of promissory note can use the advantages of commercial law it should claim at due time the amount of promissory note, if it is not paid it should claim the amount within ten day from the due time, if again it is not paid it should protest within ten days from the due time, and if the tenth day is a holiday the protest would take place the next day.

The commercial law does not necessitate the date and even stipulating the name of the person to which the promissory note is transferred but it remind that if the endorser stipulate a prior date it is considered as hypocrite. The same term shows that the endorser should endorse in such manner that is would be obvious that its endorsement is not sooner than the previous endorsement. Writing the correct date usually together with signature shows the correctness of endorser measure.

The commercial documents are when transferal endorsable with privileges inserted in commercial law that the word "to transfer out" is not scratched that this term suggest the possibility of transfer and endorsement or the endorser does not inhibit the new owner of document from its endorsement otherwise the endorsement like transfer of claim follows the conditions of civil law and thus the joint and several liability of subscribers fails.

Joint and several liability is one of most important tools that the legislator has taken into account for guarantee the enforcing the obligation or compensating a damage. A tool with almost least formalities brings about high level of security in financial relations. One of source of bringing about joint and several liability is the joint intention of both party where this intention should be explicit. In other word the content of contract should be written so that satisfy the article 116 of commercial law that stipulate that a joint and several company is a company that is constituted under a particular custom for commercial affairs between two or more person with joint and several liability.

Regarding the article 245 of commercial law associated to negotiable instruments but relying on article 309 or mentioned law about promissory note should be observed too, someone who signs the promissory note and the endorsers have joint and several liability toward the owner of promissory note. The owner of promissory note in case of failure in payment and protest can refer to each one of them individually or to two or more of them collectively. The same right is held for each one of endorsers toward the issuer of promissory note and the previous endorsers.

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