

# Specificity of the Effects of the Comfort Letter in Financial-Banking Relations

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## **Abstract**

*This study aims to analyse the specificity of the effects of the comfort letter in financial-banking relations. A first research objective will aim to observe the notion, the characteristic features and the effects of the comfort letter. The second research objective will aim to observe, at a jurisprudential level, the effects that the comfort letter produces within the framework of legal relations of a financial-banking nature. In preparing the study, specialized works on the subject, updated incidental legislation and relevant jurisprudence on the subject will be consulted.*

**Keywords:** *comfort letter, jurisprudence, effects, financial-banking relations, characteristic features.*

**JEL Classification:** K15, K22

## **1. Introductory considerations**

Given the complex development of society in all aspects and especially in economic relations, the need for the existence of guaranteed mechanisms have become an important objective nowadays. Starting from this aspect, which is not negligible, we can firmly state that the existence of guarantee mechanisms in the financial-banking field can only have beneficial effects for society and, equally, do nothing but increase the chances of accessing complex projects for the development of the community and beyond. Moreover, the use of a guarantee mechanism, such as a comfort letter, in most cases also involves financial and banking institutions, as part of the conventions to be guaranteed.

Regarding the regulation of the comfort letter, the seat of the matter is found in the Civil Code at art. 2322. Thus, the comfort letter is defined as "that irrevocable and autonomous commitment by which the issuer assumes an obligation to do or not to do, in order to support another person, called the debtor, in order to fulfil his obligations towards a creditor<sup>2</sup>".

## **2. Features and effects of the comfort letter**

As a legal nature, the letter of comfort is an autonomous guarantee<sup>3</sup>. In the

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<sup>2</sup> Flavius Baias, Rodica Constantinovici, Eugen Chelaru, Ioan Macovei (Coord.), *The New Civil Code. Commentary on articles*. 2<sup>nd</sup> revised and added edition, C.H. Beck Publishing House, Bucharest, 2014, p. 2410.

<sup>3</sup> At the time of 2011, there was no general regulation applicable to guarantees at the European Union level. The existing legal regulations only concern bank guarantees, containing provisions intended to prevent and counteract risks arising from the exposure of credit institutions by assuming them, given their nature as

specialized doctrine, autonomous guarantees have been defined as "*those personal guarantees by which, beyond and independently of the obligations established between the creditor and the debtor, the issuer undertakes to the creditor (principal) to pay a sum of money at the request of a third party or to assume an obligation to do or not to do, in order to determine the debtor to perform his obligation*"<sup>4</sup>. Thus, as can be seen, autonomous guarantees have as their main characteristic autonomy from the main obligation that they are to guarantee<sup>5</sup>. And the Civil Code classifies autonomous guarantees in the category of personal guarantees, such as a suretyship or other guarantees provided by law<sup>6</sup>.

Regarding the object of the letter of comfort, the issuer will assume an obligation to do or not to do and not an obligation to give, as in the case of a bank letter of guarantee. As defined in the specialized literature, the obligation to do refers to the obligation to perform a work, to provide a service or to deliver a thing<sup>7</sup> and the obligation not to do refers to the duty of the passive subject to refrain from certain actions or inactions<sup>8</sup>. *Per a contrario*, in the case of the obligation to give, this involves the transmission or establishment of a real right<sup>9</sup>.

As we have seen, the letter of comfort is characterized by the fact that it is a unilateral convention because the issuer is the one who assumes the obligation to do/not do towards the creditor, so we are talking about a unilateral contract unlike the letter of guarantee or surety<sup>10</sup>. Then, the letter of comfort has an autonomous character<sup>11</sup>, given

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"credit by signature". From this perspective, Directive 2006/48/EC of the European Parliament and of the Council on access to and pursuit of the status of credit institution and Directive 2006/49/EC of the European Parliament and of the Council on capital adequacy are important. See also, Rada Postolache, *Some considerations in relation to autonomous guarantees according to the New Civil Code*, published in "Revista Dreptul", no. 11/2011. The article can be consulted in its entirety at: <https://sintact.ro/#/publication/151030109?keyword=garan%C8%9Biile%20autonome&cm=SREST>

<sup>4</sup> Nora Daghe, *Autonomous guarantees in the Civil Code. Comparative analysis*, published in "Revista Dreptul", no. 3/2024. The article can be consulted in its entirety at: <https://sintact.ro/#/publication/151030255?keyword=garan%C8%9Biile%20autonome&cm=SREST>.

<sup>5</sup> Edmond Veress, *Civil Law. General Theory of Obligations*, 5<sup>th</sup> edition, C.H. Beck Publishing House, Bucharest, 2020, pp. 367-369.

<sup>6</sup> See also Cristina Elena Zamșa, *Civil Law. General Theory of Obligations. 2nd Edition revised and added*, Hamangiu Publishing House, Bucharest, 2024, p. 437.

<sup>7</sup> Gabriel Boroi, Carla Anghelescu, *Civil Law Course. General Part. 3rd revised and added edition*, Hamangiu Publishing House, Bucharest, 2021, p. 77.

<sup>8</sup> Carmen Tamara Ungureanu, Ionuț-Alexandru Toader, *Civil Law. General Part. Persons*. 5<sup>th</sup> edition revised and added, Hamangiu Publishing House, Bucharest, 2022, pp. 144-146.

<sup>9</sup> In the category of real rights, we will include the right of ownership and its dismemberments. See, Valeriu Stoica, *Civil law. Main real rights. 3rd edition*, C.H. Beck Publishing House, Bucharest, 2017, pp. 31-33.

<sup>10</sup> Paul Vasilescu, *Civil Law. Obligations*, Hamangiu Publishing House, Bucharest, 2012, p. 137.

<sup>11</sup> In one case, it was held that the letter of comfort, as judiciously held by the trial judge, does not represent an accessory guarantee to the credit contracts, but an autonomous commitment assumed by R. From this perspective, the respondent shows that it did not undertake to execute the obligation of the main debtor under the credit contracts on his behalf if there will be no execution on his part. The appeal is unfounded, the respondent claims, from the perspective of the fact that the obligations assumed by R through the letter of comfort are ones of diligence, and not of result. The essential difference between the two types of obligations is that in the case of a bank letter of guarantee the issuer is always bound to fulfil an obligation of result, consisting of making payment in place of the main debtor, while in the case of a letter of comfort the obligations assumed by the issuer are of means, the latter undertaking to take due care to support the debtor in order to pay the debt. Bucharest Court of Appeal, *decision no. 1993/2021*. The decision can be consulted in full at: <https://sintact.ro/#/jurisprudence/535957215/1/decizie-nr-1993-2021-din-09-dec-2021-curtea-de>

the specificity of the obligation assumed by the issuer, who does not oblige himself to execute the debtor's obligation but only obliges himself to do or not to do something to support the debtor in executing his obligation<sup>12</sup>. At the same time, the comfort letter is also irrevocable<sup>13</sup>, in the sense that the issuer cannot unilaterally withdraw its commitment to the creditor<sup>14</sup>. At the same time, the comfort letter is a consensual convention, given that it is concluded because of the agreement of will between the issuer and the creditor, in written form (*ad probationem*)<sup>15</sup>. As a rule, the contract that has as its object a comfort letter is concluded in a standard form, established by internal rules of the banks and for a determined period (6-12 months) with the possibility of extending the commitment.

In the specialized literature, two types of comfort letters are recognized, information comfort letter and guarantee comfort letters. In the case of the information letter, it differs from the guarantee one in that the issuer only wants to strengthen the beneficiary's conviction of the execution of the obligation assumed by the debtor, without directly assuming the execution of the obligation<sup>16</sup>.

As for the effects of the comfort letter, as we have observed, it arises through the agreement of wills between the issuer and the creditor. Thus, as follows from the provisions of art. 2322 paragraph (2) of the Civil Code, in the event that the debtor does not perform his obligation, the issuer of the comfort letter may only be obliged to pay damages to the creditor, and only if the latter proves that the issuer of the comfort letter did not fulfill the obligation assumed by the comfort letter. Therefore, as previously stated, the issuer is not obliged to execute the obligation assumed by the debtor through

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<sup>12</sup> Liviu Pop, *Civil Law Course. Obligations*, Univ. Juridic Publishing House, Bucharest, 2015, p. 596.

<sup>13</sup> In another case, it was held that the letter of comfort is an irrevocable and unconditional legal act [paragraph (1)]: the issuer cannot withdraw the guarantee within the validity period and cannot assume the commitment under any condition. The guaranteed obligation arises on the date of issuance of the letter of guarantee - paragraph (7). It has an autonomous character. Autonomy refers to the primary obligation, between the creditor and the debtor, for the proper execution of which the bank guarantees. It is the essential feature that distinguishes autonomous guarantees from personal guarantees: while the suretyship is "pursued" by its accessory character to the main obligation, the autonomous guarantee, once constituted by the issuance of the letter of guarantee, has an existence of its own, independent of the obligation it guarantees. Even if autonomy from the guaranteed legal relationship is the essence of the autonomous guarantee as it has developed as an instrument of international banking practice, we believe that it would have been necessary to expressly mention, by direct reference, the relationships between the creditor and the debtor, as in the case of the comfort letter - art. 2322 paragraph (1) sentence 1 of the Civil Code. Publication 758 specifies, in turn, in art. 5 letter a), that a guarantee (within the meaning defined in art. 2) is by its nature independent "of the basic relationship and the issuance request, and the guarantor is in no way involved or obligated by this relationship. (...) A guarantor's commitment to pay under the guarantee cannot be the subject of claims or contestations resulting from any relationships other than the relationship between the guarantor and the beneficiary". Bucharest Court of Appeal, *decision no. 374/2021*. The decision can be consulted in full at: <https://sintact.ro/#!/jurisprudence/535181925/1/decizie-nr-374-2021-din-02-mar-2021-curtea-de-apel-bucuresti-pretentii-litigii-cu-profesionistii?cm=URELATIONS>.

<sup>14</sup> Roxana Adam, *Civil Law. General Theory of Obligations*, C.H. Beck Publishing House, Bucharest, 2017, pp. 532-533.

<sup>15</sup> Ion Dogaru, Pompil Drăghici, *Civil Law. General Theory of Obligations. 3rd Edition revised and added*, C.H. Beck Publishing House, Bucharest, 2019, p.757.

<sup>16</sup> Alexandra Oprea, *Considerations regarding letters of comfort*, published in the "Romanian Journal of Private Law, no. 1/2014. The article can be consulted in its entirety at: <https://sintact.ro/#!/publication/151008936?keyword=oprea%20considera%C8%9Bii&cm=SREST>.

the main legal relationship that was the basis for issuing the comfort letter (given its autonomous character, in relation to this causal legal relationship) but will only be obliged to pay damages<sup>17</sup> to the creditor, under the condition that the creditor proves that the issuer has not fulfilled its obligation established by the comfort letter contract, an obligation which, as previously stated, is one of doing or not doing<sup>18</sup>.

In judicial practice, it was held that *"through its passivity, the plaintiff accepted the finality of the failure to fulfill the objectives of the contract, calling for the contractor and its supporters to be held liable. Consequently, the plaintiff cannot prove the existence of any damage, especially since it was caused by the action (inaction) of the company. The plaintiff does not explain the nature of the damage allegedly caused, what income it could have obtained and how it would have obtained this income if the work had been performed on time. It shows that in accordance with the provisions of art. 2322 paragraph 2 of the Civil Code, if the debtor does not fulfill its obligation, the issuer of the comfort letter can only be obliged to pay damages to the creditor and only if the latter proves that the issuer of the comfort letter did not fulfill its obligation through the comfort letter."* Therefore, the plaintiff cannot prove the failure to fulfill the obligations we assumed through the Commitment in 22.09.2014 so that its action is unfounded and our request for summons to court will be rejected<sup>19</sup>.

If the issuer is held liable and obliged to pay damages, it does not have the possibility to oppose to the creditor any defence or exception based on the main relationship pre-existing at the time of the conclusion of the comfort letter. This characteristic derives from the autonomous and independent nature of the two legal relationships.

In judicial practice, it was held that *"the letter of comfort is a contractual commitment by which the issuer assumes an obligation to act towards the creditor. In the event of failure to fulfill the obligation to act, the creditor may claim damages from the issuer. Consequently, the defendants owe damages under the terms of contractual civil liability. The plaintiff also claims that in this case the cumulative conditions for granting damages to the plaintiff are met, namely all the requirements necessary to attract the contractual civil liability of the Defendants are met according to art. 1073-1075 et seq. Civil Code 1864, in conjunction with art. 969 Civil Code 1864. Regarding the damage suffered by the defendants' failure to comply with the obligations assumed, the plaintiff argues that this is represented by the amounts remaining unpaid because of the revolving credit facility agreement for working capital no. 8/14.02.2006. In view of the very clear*

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<sup>17</sup> We will distinguish between compensatory damages, which are the compensation paid to the creditor to repair the damage caused by the total, partial or improper non-performance of obligations. In short, it is any compensation granted to repair any damage caused by non-performance, except for that caused by delay. These replace the performance in kind. They are not cumulative with the performance in kind, that is, the debtor will not be obliged to pay compensatory damages and to perform in kind. The second category is the category of default damages, these represent the monetary compensation that represents the equivalent of the damage caused to the creditor by the delay in the performance of the obligation. Default damages are always cumulative with the performance in kind or even cumulative with compensatory damages.

<sup>18</sup> Mădălin Afrăsinei, Mona-Lisa Belu-Magdo, Alexandru Bleoanca and the collective (Coord.), *The New Civil Code. Comments, doctrine and jurisprudence. Vol. II. Art. 1650-2664*, Hamangiu Publishing House, Bucharest, 2012, pp. 717-718.

<sup>19</sup> Craiova Court of Appeal, *Decision no. 3116/2018*. The decision can be consulted in full at: <https://sintact.ro/#/jurisprudence/532117727/1/decizie-nr-3116-2018-din-20-sept-2018-curtea-de-apel-craiova-litigiu-pri-vind-achizitiile-publice...?cm=URELATIONS>.

normative content of point 5 of the Comfort Letter, it is obvious that the defendants were obliged to take all necessary measures to ensure the level of liquidity necessary to meet all Oltchim's obligations when due. The proper fulfilment of this obligation made it impossible to open insolvency proceedings. According to art. 1084-1086 Civil Code 1864, the damage suffered by the creditor consists equally of the loss suffered (*damnum emergens*) and the unrealized benefit (*lucrum cessans*). Mainly, taking into account that according to the Credit Agreement a penalty interest was established entitled according to clause 2.5 "Increased interest", we request that you oblige the Defendants to pay the penalty interest calculated according to clause 2.5 of the Agreement, as amended by Additional Act no. 10/31.10.2008, starting with the date of filing the lawsuit and until the date of full execution of the payment obligation. In the alternative, according to Government Ordinance no. 13/2011 regarding the legal remunerative and penalty interest for monetary obligations, as well as for the regulation of certain financial and fiscal measures in the banking field<sup>20</sup>".

### 3. Conclusions

Regarding the relationship between the issuer of the letter and the debtor of the obligation in the main legal relationship pre-existing on the date of conclusion of the comfort letter, as follows from the content of art. 2322 para. (3) from the Civil Code, the issuer of the comfort letter who has fallen into claims against the creditor has the right of recourse against the debtor<sup>21</sup>, in this case the right of recourse will be based either on a contractual basis or on unjust enrichment<sup>22</sup>.

Regarding the termination of the comfort letter, given that we are in the presence of a contract, the main way of termination is through its execution, primarily and not accessorially, by extinguishing the main obligation. In the case where the comfort letter was established for a certain period, upon reaching the term, the contract between the parties to the comfort letter will also be extinguished.

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<sup>20</sup> Bucharest Court, *Decision no. 7865/2016*; The full judgment can be consulted at <https://sintact.ro/#/juri-sprudence/530602350/1/sentinta-nr-7865-2016-din-12-dec-2016-tribunalul-bucuresti-pretentii-litigii-cu-profesionistii?cm=URELATIONS>.

<sup>21</sup> Claudiu Galu, *The Right of Recourse. Recourse in Business Law*, C.H. Beck Publishing House, Bucharest, 2020, pp. 248-249.

<sup>22</sup> Gabriel Emil Bălan, *Brief considerations on the letter of comfort*, published in the "Romanian Journal of Business Law", no. 1/2024. The article can be consulted in its entirety at: <https://sintact.ro/#/publication/151031385?keyword=drept%20regres%20%20scrisoare%20de%20confort&cm=SREST>.

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