III. INTERNATIONAL PAYMENTS*

A. Negotiable instruments

1. *Unification of the law of bills of exchange and cheques: note by the Secretary-General and preliminary report by the International Institute for the Unification of Private Law (UNIDROIT)***

1. The United Nations Commission on International Trade Law (UNCITRAL), at its first session, decided to include in its work programme, as a priority topic, the law of international payments. The Commission selected, as one of the items falling within the scope of international payments, the harmonization and unification of law relating to negotiable instruments.[1] In view of the work done by the International Institute for the Unification of Private Law (UNIDROIT) on this subject, the Commission considered it appropriate to request the Secretary-General to consult with UNIDROIT as to whether that Organization would be prepared to make a study of the measures that could be adopted in order to promote the harmonization and unification of the law relating to negotiable instruments, in so far as transactions involving different countries are concerned. The Commission especially requested:

(*a*) Examination of the question of the convenience of promoting a wider acceptance of the following Geneva Convention on negotiable instruments: (i) Convention providing a Uniform Law for Bills of Exchange and Promissory Notes of 1930; (ii) Convention for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes of 1930; (iii) Convention providing a Uniform Law for Cheques of 1931; and (iv) Convention for the Settlement of Certain Conflicts of Laws in connection with Cheques of 1931.

(*b*) A study of the possible means of giving reciprocal international recognition and protection to negotiable instruments under the Common Law and to the instruments recognized under the Geneva Conventions; and

(*c*) Consideration of the creation of a new international negotiable instrument for international payments.[2]

2. In accordance with the Commission's request, the Secretary-General consulted with UNIDROIT as to whether it would be prepared to carry out a study along the lines indicated by the Commission. UNIDROIT agreed to prepare such a study, and submitted a "Preliminary report on the possibilities of extending the unification of the law of bills of exchange and cheques", which is reproduced in the annex below.

[1] Report of the Commission on the work of its first session, para. 25.

[2] *Ibid.*, para. 26.

ANNEX

The possibilities of extending the unification of the law of bills of exchange and cheques

REPORT SUBMITTED TO THE UNITED NATIONS BY THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT)

I. This report does not, of course, profess to give a definitive answer on this subject, but merely formulates suggestions concerning the course to be followed, and in particular the methods of work that will in any case have to be adopted before a definitive view is expressed. As will be seen, the report refers particularly to the points mentioned under (*a*) and (*c*) above, since the problem of reciprocal recognition of negotiable instruments under the common law and under the Geneva Conventions should be taken up after a decision has been reached on whether to promote a wider acceptance of the Geneva Coventions or to create a new negotiable instrument applicable only to international payments. In addition, the term "negotiable instruments under the common law" calls for further clarification; for after all, as will be seen below, in the common-law countries, as elsewhere, negotiable instruments are regulated by written laws (statutes) which may differ, sometimes quite considerably. Hence, the problem of reciprocal recognition of negotiable instruments will have to be assessed in relation to each of the statutes in force in each common-law country.

II. *Methodological criteria to be applied to a study aimed at promoting unification and/or harmonization in respect of negotiable instruments*

Any study attempting to assess either the possibility of subsequent unifications of laws relating to negotiable instruments or the desirability of creating a special negotiable instrument to be used in international commercial transactions involves considerable difficulties, and it should therefore be envisaged that it will take quite a long time.

There are a number of reasons for this, which may be summarized as follows:

A. Before any research of a strictly legal nature is undertaken, a careful survey must be carried out in those circles which would be affected by a change in the existing state of the law, namely, governmental banking and commercial circles, at both the national and the international level.

* For action by the Commission with respect to this subject, see part two, section II, A, report of the Commission on the work of its second session (1969), para. 63–100. See also part two, section III, A, report of the Commission on the work of its third session (1970) para. 103–145.

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Rigorously scientific methods should be used in the survey, which should be carried out through interviews, questionnaires and exhaustive consultation with associations, organs, institutes and bodies representing the circles mentioned above.

The survey, which would lead to the preparation of a substantial body of documentation, should cover the following questions:

(1) Is there or is there not a continuing need to amend the existing rules of law relating to bills of exchange, especially with regard to the problem of international payments?

(2) Is there a feeling that the uniform legislation now existing could be amended, particularly in view of the parallel unification process which has taken place in the civil-law countries on the one hand (the Geneva Conventions) and in the common-law countries on the other (the Negotiable Instruments Act and Uniform Commercial Code in the United States, and the Bills of Exchange Act in England)? In other words, can one envisage at the outset any possibility of success for an effort aimed at extending the Geneva Conventions to the common-law countries by reopening discussion on a number of rules of law which those countries might find it very hard to accept in present circumstances?

It would also be necessary, as a preliminary step, to analyse the extent of uniformity really achieved in the United States through the aforementioned Act; for, in the common-law countries, statutes must always be interpreted in the light of the pre-existing common law, so that the interpretation of so-called uniform laws often differs quite widely in areas falling within the jurisdiction of the individual states.

In England, too, the judges have more than once imposed limits on the uniformity introduced by a written law by using the wide discretionary powers characteristic of this legal system, which allows them to invoke a body of law consisting of the precedents established by the courts.

However, these problems can only be touched upon in a preliminary report. Furthermore, the interpretation of the Geneva Uniform Laws in the countries which have accepted them has not been free from differences.[1]

Generally speaking, the differences of interpretation which have occurred, even with regard to the Geneva Uniform Laws, may be attributed to the fact that the nucleus of the legal codes relating to bills of exchange in force in the countries of continental Europe is the French and Germanic systems, which in turn influenced all the other systems to a greater or lesser degree and which show differences that are often very substantial.

In the Germanic system the bill of exchange is a formal, abstract instrument, the validity of which depends primarily on its form. Furthermore, the obligation arising out of the instrument is entirely independent of the basic or underlying juridical relationship on which the issuance or negotiation of the instrument itself is based.

In the French system, on the other hand, the conditions relating to form are less strict. The bill of exchange is the means by which the drawer disposes of the consideration, *(provision)* — that is, his own claim on the drawee — in order to satisfy, through the drawee, the payee's claim on him (the drawer).

The rules peculair to the French and Germanic systems are based on these fundamental criteria. However, although the differences between these two systems cannot be analysed here in greater detail, it should be noted that they affect a limited number of cases, particularly those connected with the *provision* system. Nevertheless, it was necessary to mention those differences in order to permit a realistic evaluation of the legislative uniformity which already exists.

Clearly, however, the basic problem in the present context is still that of unification encompassing the two main groups of laws, belonging to the spheres of influence of the common law and the civil law respectively.

(3) Would it not be preferable merely to draw up a new uniform law to regulate a special negotiable instrument, which will be used in international trade transactions? This instrument should be such that it could be used either as a bill of exchange or as a bank cheque. The rules relating to the new international negotiable instrument should be optional, in the sense that the parties concerned could choose freely between the new instrument and the instruments now in use, which would continue to be regulated by the applicable municipal law.

(*b*) Certain statistical data, not all of which are available in existing publications, are essential before a view can be expressed on the extremely delicate and controversial problems which exist with respect to bills of exchange. These include, for example, the problem of forgery of the drawer's signature, the fictitious payee situation, and successive forged endorsements.

The problem usually referred to in very general terms as "forged endorsement" very often includes situations which could more accurately be placed in more specific categories, such as those mentioned above.

It should be noted that the question is not purely theoretical, since the practical solutions, provided especially by Anglo-American juridical practice, vary radically, according as the case involves the forgeing of the drawer's signature (cf. *Price v. Neal*), the fictitious payee situation, or an actual forged endorsement.

These difficulties should be most carefully borne in mind when undertaking, with a view to unification, an analysis of the various rules relating to bills of exchange, with particular reference to the Geneva Uniform Laws and the Anglo-American statutes. It will not be sufficient to consider the solutions indicated in the various articles of the laws (comparing them by what could be described as "parallel tables"); it will be essential to consider the substance of the real problem — in other words, to determine whether the articles considered *a priori* to be analogous do in fact regulate analogous cases.

Before expressing a general view concerning the difference or similarity of the various laws relating to bills of exchange, it will therefore be necessary to determine what kinds of forged signatures occur most often in practice on bills of exchange. This research work will be very arduous but very necessary.

The assertion that there are modest possibilities of unifying the laws of the civil-law countries and of the common-law countries relating to bills of exchange should in any case be qualified when considering specific cases (forgery of the drawer's signature, the fictitious payee situation), which are dealt with in a substantially similar manner in the judicial practice of the civil-law and common-law countries, despite a fairly marked contrast between the basic principles embodied in the legislation relating to forged endorsements.[2]

A limited comparison of the texts of the laws will be meaningless and may be completely misleading if no attempt is made to carry out what has been referred to as a "statistical study" of the various kinds of forgery of bills of exchange, as the basis for subsequent qualification of the various hypotheses in the light of the criteria established by judicial practice,

[1] These differences of interpretation are clearly indicated in the Uniform Law Cases published by UNIDROIT.

[2] On this problem see Bernini, *The Acceptance of the Bill of Exchange and the Theory of Negotiability in Civil Law and Common Law Countries*, Milan, 1961, pp. 61 *et seq.*

which may deviate, sometimes quite radically, from the general principles laid down in the texts themselves.

In this connexion, it is also very useful to stress the need for a study of the criteria established by judicial practice concerning the diligence to be exercised by the drawee in verifying that the instrument is properly drawn and in making payment. Differences in the evaluation of such diligence under the various systems may lead to the curious conclusion that, although the two systems apply different principles to bills of exchange, they actually resolve specific cases in the same way.

III. The observations made thus far suffice to indicate the only type of study which can serve as the basis for a serious effort to achieve wider unification of the laws relating to negotiable instruments.

Once the survey envisaged in section II A above has been completed, the strictly juridical analysis should be undertaken, with the following precautions:

(*a*) Special attention should be paid to commercial custom, banking practice and judicial precedents, an attempt being made to define the substance of "law action" in relation to the codified rules and the theoretical speculations of legal writers.

(*b*) It should be remembered that the law relating to bills of exchange does not lend itself to a study which ignores the law of contracts of which it is the expression. It follows that the specific solutions adopted in respect of bills of exchange must be evaluated as the expression of a given system of private law in force in the various countries.

(*c*) A comparison of the laws relating to bills of exchange in force in the civil-law and common-law systems respectively is particularly difficult, owing to the basic differences between the two systems. In considering common-law systems, constant and careful reference must be made to judicial practice.

Although these observations have been somewhat brief, they clearly lead to the conclusion already mentioned at the beginning of this report.

A study of the law of bills of exchange with a view to subsequent unification requires, as a first step, a good deal of organizational machinery for the collection and critical evaluation of essential information. The statistical research envisaged in section II will be equally arduous and will involve not only the examination of many judgements but also contacts with banking circles.

Consequently, in order to carry out a study which conforms to the aforementioned criteria, provision must be made for adequate funds, the formation of a work team and a working period of certainly not less than two years.

IV. *Opinion already expressed in UNIDROIT regarding the possibility of subsequent unification of the law relating to negotiable instruments. Desirability of proposing the creation of a new negotiable instrument for international transactions*

Subject to the considerations mentioned in the preceding paragraph with regard to the desirability of consulting the circles concerned before making a final choice, it would seem desirable to mention an opinion which was expressed in the course of the work carried out in UNIDROIT.

This work was done by a Sub-Commission appointed by the Governing Council at its thirty-third session (Nice, April 1953), on the proposal of Professor E. Yntema, whose specific task was to study means of expanding the international unification which already existed with regard to bills of exchange and cheques.

In taking this decision, the Governing Council was seeking to implement a wish expressed by the International Congress on Private Law, convened by the Institute at Rome in July 1950, after having taken note of an outstanding report by the late Professor Ascarelli and of the fruitful discussions on that report.[3]

The second session of the Sub-Commission (Rome, 14-15 April 1955) was attended by Professor Hamel, Professor Yntema, Professor Ascarelli and Lord Chorley (members) and Professor Tito Ravà (representative of the Institute).

The Sub-Commission's conclusions were summarized as follows in a final report adopted at the end of the discussion:

"1. It is very difficult to draw up a uniform law which would be applied as municipal law in the common-law countries.

"2. It is very difficult, in international transactions, to persuade the common-law countries to accept the full text of the Geneva law.

"3. An effort must therefore be made to establish a body of rules aimed at solving the most urgent problems in the field of international negotiable instruments.

"4. These rules would be less numerous than those of the laws now in force. They would regulate a strictly international negotiable instrument which might serve at the same time as a bill of exchange and as a cheque, the regulation of promissory notes being set aside for the present.

"5. The rules thus established would be purely optional, the parties concerned being free to adopt the new international instrument or the instruments now in use, which would continue to be regulated by the applicable municipal law."

The foregoing conclusions, and in particular the way in which the Sub-Commission arrived at them, deserve more detailed comment.

The problem of international unification with respect to negotiable instruments was approached in a very realistic manner at the Sub-Commission's meetings.

Any hope of persuading the common-law countries to adopt the Geneva Uniform Law, even as an optional law applicable only to international instruments, was set aside. That was a foregone conclusion, in view of all the past experience in connexion with unification in that field.

In point of fact, the international unification in question raised not only a legal problem but also a very delicate political problem, both internationally and domestically, firstly, because every State is always somewhat reluctant to sign agreements which may limit the sphere of validity of its national laws, and, secondly, because the reaction of the circles concerned (banks, merchants, industrialists) exercises a very strong influence for or against movements towards international unification, especially in the case of a subject such as bills of exchange. It is a widely recognized fact that the Anglo-American circles concerned have never been particularly sympathetic towards the Geneva Uniform Law, for they consider it too detailed and complicated, as Professor Yntema and Lord Chorley observed during the debate in the Sub-Commission. On the other hand, the countries which have adopted the Geneva Uniform Laws cannot be expected to favour any amendment of them, which

[3] Tullio Ascarelli, *"L'unification de la loi uniforme de Genève sur la lettre de change et le billet à ordre et du système américain"*, in *Actes du Congrès international de droit privé*, L'unification du droit, vol. II, UNIDROIT, Rome, 1951.

The wish was expressed in the following terms: "The Congress, convinced of the desirability and feasibility of international unification of the rules relating to bills of exchange, especially in international transactions, expresses the wish that the International Institute for the Unification of Private Law should undertake, as soon as possible, in collaboration with other qualified organizations, preparatory studies concerning the unification of international bills of exchange and promissory notes and international bank cheques."

would inevitably have repercussions on banking and commercial practice.

Consequently, as all the members of the Sub-Commission observed, the problem of unification consists essentially of defining the limits of unification with regard to the content of the uniform law to be drawn up. As stated in the Sub-Commission's final report, this law should be simple and contain as few rules as possible.

The more specifically technical and juridical problem of the practical solutions to be adopted in each case does not seem to be insoluble. In that connexion, primarily for purposes of demonstration, the Sub-Commission examined four laws relating to negotiable instruments — the English Bills of Exchange Act, the United States Negotiable Instruments Act, the United States Uniform Commercial Code, and the Geneva Uniform Law. This examination, although somewhat superficial, showed that the really essential differences came down to two specific points: the regulation of protest, and forged endorsement.

In the case of protest, however, the opposite tendencies do not really seem irreconcilable; for, although under the English and American laws protest is generally not necessary for recourse, it is necessary in the case of foreign bills of exchange (cf., Bills of Exchange Act, sect. 51, and Negotiable Instruments Act, sect. 152). Since the instrument the creation of which is proposed would by definition be international, it may be hoped that this difference could easily be resolved.

The contrast between the common-law and civil-law systems is more marked in the case of the problem of forged endorsements. Both the Bills of Exchange Act (sect. 24) and the Negotiable Instruments Act (sect. 23) provide that a forged endorsement is inoperative, and that consequently no rights can be acquired through or under that endorsement. The Geneva Uniform Law, on the other hand, accepts the opposite principle (article 16).

However, section 60 of the Bills of Exchange Act, relating to cheques, provides for an exception to the general principle adopted in section 24 and adopts the same solution as the Geneva law.

Consequently, the members of the Sub-Commission proposed that the exception provided for in the aforementioned section 60 should be adopted as the general rule.

The results of the examination carried out by the Sub-Commission acquire special value when one considers the very nature of the laws examined, which exemplify the tendencies expressed in the principal legislations of the world relating to negotiable instruments. It may be recalled that the Bills of Exchange Act of 1882 has been adopted without major changes throughout the British Commonwealth; that the Negotiable Instruments Act of 1896 has been adopted not only in all the states of the American Union, but also in Colombia and Panama; that the Uniform Commercial Code has also been adopted in nearly all the states of the American Union; that the Uniform Commercial Code represents an extremely important effort by the American Law Institute to codify the whole body of commercial law in a uniform manner for all the states of the American Union; and that the Geneva Uniform Law, despite the amendments incorporated in it by the national legislators on the basis of authorized reservations, has undoubtedly made a powerful contribution to the unification of the law of negotiable instruments in the countries which follow the tradition of Roman law.

The Sub-Commission took pains to state very clearly in its final report that "this first formal examination showed that solutions satisfactory to all the interests involved could probably be found". In this connexion, attention should be drawn to a question mentioned in section II above: in the sphere of the law of negotiable instruments, differences relating to concepts and even methods have been created which have helped to widen the gap between the systems by relegating to the background which should have constituted the real criterion in the matter, namely, the practical solution of the various problems, which in many cases is not so radically different.

The existence of such differences which may be termed prejudicial and which are quite other than and independent of those relating to the solution of specific problems, was clearly seen in the course of the Sub-Commission's work, and the members of the Sub-Commission quite rightly drew attention to it. In seeking to overcome the obstacles created by these differences, useful guidance might be derived from the decision taken at that time, namely, to look towards the creation of an international instrument which could be used both as a bill of exchange and as a cheque and the uniform regulation of which would be guaranteed by a series of simple rules acceptable both in the countries now governed by the Geneva laws and in those where the subject is regulated on the basis of the common law.

Clearly, the uniform interpretation and application by courts in the various countries of a series of rules of the kind outlined above would give rise to less serious difficulties than might be encountered in the case of a comprehensive and would-be systematic law — a law which, as such, it would be much more difficult to divorce from the juridical environment and traditions in which it originated.

There are, however, other aspects from which the solution proposed by the Sub-Commission seems to offer more certain guarantees of future success.

In the first place, the optional character of the uniform regulation which is envisaged, while permitting the parties concerned to continue applying their own municipal law with regard to the instruments already in use, would leave them a wide sphere of action even where the new international instrument was concerned, on points not covered by the uniform rules, which would merely regulate the really basic questions. It cannot be denied that this optional character, and the correlative fact that the proposed uniform law would in no way purport to be comprehensive and, indeed, would deliberately avoid being so, might help to alleviate the difficulties mentioned previously with regard to what may be termed the political problem inherent in any attempt at international unification.

Furthermore, the fact that the proposed international instrument could be used both as a bill of exchange and as a cheque would dispose of another question which confronted the Sub-Commission from the beginning of its work, namely, whether the best point of departure for unification would be the concept of the bill of exchange or concept of the cheque.

At the Sub-Commission's first meeting it was noted — and a consensus was reached on this point — that nowadays not all international commercial transactions are effected by means of bills of exchange. It was for that reason that Professor Ascarelli and Professor Hamel clearly expressed their conviction that the cheque should be the point of departure, even before the other members of the Sub-Commission had stated that they favoured the creation of an instrument which could be used both as a bill of exchange and as a cheque. Lord Chorley, too, observed that nowadays bills of exchange are used in only about half the cases (of international transactions).

It may also be useful to recall that, at the same session, Lord Chorley also drew the Sub-Commission's attention to the desirability of carrying out a study on documentary credits. This idea is mentioned here in case it should be decided to include it in whatever plan of work is drawn up.

In conclusion, it is felt that the course indicated by the Sub-Commission in question deserves to be followed today, with good prospects of success, as part of the efforts to unify international trade law now envisaged by the United Nations, which has inherited from the League of Nations the Conventions drawn up under the latter's auspices, providing Uniform Laws for bills of exchange and for cheques.