

- (c) *Note by the Secretariat: uniform rules applicable to international cheques (A/CN.9/WG.IV/WP.23); annex: note by the observer of the Hague Conference on Private International Law\**

## ANNEX

### Note by the observer of the Hague Conference on Private International Law intended for the Working Group on International Negotiable Instruments

#### *Gaps in the treaties and conflicts of internal laws*

At the tenth session of the Working Group on International Negotiable Instruments held at Vienna from 5 to 16 January 1981, a number of issues relating to cheques were deliberately left to national law and are therefore not dealt with in the new Convention under preparation (such as, it will be recalled: the effect of the death or incapacity of the drawer, the obligation of the bank to honour a cheque, the legal consequences of accepting a cheque etc.). Leaving certain issues outside a treaty for the unification of law naturally poses the question of which law is to govern these issues, and this is the main point which will be studied in this note.

A more delicate problem arises in the context of the Convention on International Cheques currently under preparation. The Convention is not intended to replace, in the State ratifying it, the internal rules on cheques already existing in that State, but rather to coexist with them, leaving the parties free to choose whether their relations are to be governed by the new treaty rules or by the old system. It is, therefore, possible for different internal laws applicable to the gaps in the new Convention to exist within the same State. This is the main issue, for which a solution is proposed in this note.

It should be pointed out that the problem arises not only in the context of the new article 74 *quater*, as would seem to be suggested in the Report of the Working Group on its tenth session (A/CN.9/196, pp. 26-27),\*\* but in relation to *all* issues not dealt with in the Convention on International Cheques. Moreover, the same problem arises in the context of the draft Convention on International Bills of Exchange and International Promissory Notes, so that the solution proposed herein will consequently be valid for both draft Conventions.

#### A. *Gaps in the treaties*

It is common practice for an international convention to leave certain issues to "national law", either expressly or by leaving gaps in the text of the convention. Leaving issues to national law in this way merely indicates the limits of the process of unification of the laws of different member States; whatever is not unified is left to the jurisdiction of "national" law, i.e. to internal, non-treaty law. Most frequently such "national" law will be the internal law of the State, party to the unifying convention, whose law is found to be applicable under the rules of conflict of the forum. However, when the international convention itself limits its own scope of application in a specific way, without regard to the rules of conflict of laws (see, for example, the United Nations Convention on Contracts for the International Sale of Goods, article 1, paragraph (1) (a),\*\*\* the court must then determine which law should govern issues which have not been dealt with under the unifying treaty.

\* 16 June 1981. In the course of its deliberations on the draft uniform rules applicable to international cheques, the Working Group decided that certain issues not be dealt with in the draft text but left to national law. Such a decision was, for example, taken at its tenth session with regard to the question whether the drawee was or was not obliged to pay a cheque upon notice of the death of the drawer (A/CN.9/196, para. 144) (Yearbook . . . 1981, part two, II, A). On this occasion, the observer of the Hague Conference on Private International Law indicated his willingness to prepare a short study on the conflicts aspects of this issue. This study by Mr. Michel Pelichet, Deputy Secretary-General of the Hague Conference on Private International Law, is reproduced in the annex.

\*\* Yearbook . . . 1981, part two, II, A.

\*\*\* Yearbook . . . 1980, part three, I, B.

During preparation of the United Nations Convention on Contracts for the International Sale of Goods, adopted at Vienna on 11 April 1980, this question was discussed at length and delegates finally adopted the rule by which gaps in the Convention were to be governed by the law determined under the rules of private international law (article 7, paragraph (2)).\*

This solution seems to be entirely satisfactory in that it covers both cases where the unifying Convention will apply, i.e.:

(a) The unifying Convention applies by operation of the conflicts rule of the forum, so that the express or implicit reference to national law is to be understood as being to the internal, non-treaty law of the State party to the Convention;

(b) The Convention applies by virtue of a provision limiting its own scope of application and the law applicable to gaps, which will not therefore necessarily be the internal law of the State party to the Convention, must be subsequently determined by applying the rules of private international law of the forum.

For this reason the observer of the Hague Conference proposes to the Working Group on International Negotiable Instruments that a new article should be adopted on the lines of article 7, paragraph (2), of the United Nations Convention on Contracts for the International Sale of Goods,\*\* which might read as follows:

#### *"Article X*

"Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the law applicable by virtue of the rules of private international law."

It should be pointed out that article 7 of the United Nations Convention provides that gaps in the Convention should be governed above all "in conformity with the general principles on which it is based". This reference to general principles may be justifiable in a general convention on the international sale of goods, a field in which unification has proved difficult because of the multiplicity of laws and the existence of commercial customs and practices, but in the opinion of the observer of the Hague Conference, such a reference cannot be justified in conventions on negotiable instruments. The question of negotiable instruments is extremely technical and structured and it is difficult to see to which principles such a reference would refer. To have gaps in the Convention governed solely by the law applicable in conformity with the rules of private international law seems sufficient to cover all cases.

#### B. *Conflicts of internal laws*

Once it has been determined which State's law is to govern the questions not dealt with in the unifying Convention, there is the problem of which internal provisions of that State the court should apply. As has been mentioned above, since the new conventions on negotiable instruments are not intended to replace the internal laws of the States which ratify them, there will exist within these States alongside the new treaty law, another parallel law dealing with the same issue. Moreover, the general rules of law of these States may also be referred to in issues not dealt with by the conventions under preparation. Therefore, in order to deal with issues not covered by the conventions, a court may have to choose between the parallel law specific to the question and the general rules of law of a State.

A particularly topical example, referred to at the last session of the Working Group, will serve to illustrate the problem faced by the court: following long discussions on article 74 *quater* of the draft Convention on International Cheques,\*\*\* as a result of irreconcilable differences of views on this point among the members of the Working Group, it was decided that it should be left to

\* Yearbook . . . 1980, part three, I, B.

\*\* Yearbook . . . 1980, part three, I, B.

\*\*\* Yearbook . . . 1981, part two, II, A.

national laws to determine the effect of the death or incapacity of the drawer of a cheque. There are many States which in their general law of contracts have a rule under which the death, incapacity or bankruptcy of the principal (in this case the drawer) automatically puts an end to the agent's mandate (For example, the French Civil Code, article 2003; the Swiss Code of Obligations, article 405; etc.). Some of these States have acceded to the Geneva Convention Providing a Uniform Law for Cheques of 19 March 1931, whose article 33 states:

"Neither the death of the drawer or his incapacity taking place after the issue of the cheque should have any effect as regards the cheque."

Let us suppose that one of these States accedes to the new Convention on International Cheques being prepared by UNCITRAL. Since the question of the death or incapacity of the drawer is not dealt with in the Convention, the court, after application of its conflicts rule, will not know whether it should apply the general rules of the State whose law has been declared applicable, in which case the death of the drawer would oblige the drawee not to honour the cheque, or whether the question should be governed by article 33 of the Geneva Convention, in which case the drawee must honour the cheque notwithstanding the death or incapacity of the drawer. It can be seen from this example that the problem is a delicate one. There are three solutions for dealing with it:

(a) To omit any mention in the new Convention and leave the solution of the problem to the discretion of the court. In the opinion of the observer of the Hague Conference, this is not a good solution since it will leave not only the court, but the parties themselves in a state of considerable uncertainty. In countries which have such dual sets of rules, the drawee will not know, in the event of the death or incapacity of the drawer, whether or not to honour the cheque. Moreover, it may destroy the uniformity among those States which have the same general rule concerning agency and which have acceded to the Geneva Convention: in one State the court will be of the opinion that it must apply the general rule, whereas in another it will apply the Geneva Convention provision, all of which, it must be admitted, hardly contributes to unification in this field;

(b) To have the questions not dealt with in the new Convention expressly governed by the general laws of the State whose law is declared applicable. This does not seem to be a very satisfactory solution either, since it would destroy the harmony already existing between States having acceded to a given system (Geneva Convention, Bills of Exchange Act, etc.), while, in States which have acceded to the Geneva Convention, but which have as a general rule the termination of the mandate in case of the death or incapacity of the principal, there would be two different rules for cheques depending on whether the cheques were governed by the Geneva Convention or by the new instrument under preparation;

(d) *Note by the Secretariat: draft Convention on International Bills of Exchange and International Promissory Notes: text of draft articles 1-45 as revised by the Drafting Group (A/CN.9/WG.IV/WP.24)\**

### Article 1

(1) This Convention applies to international bills of exchange and to international promissory notes.

\* 30 July 1981. It should be noted that this Working Paper is supplemented and in part superseded by its addenda 1 and 2. The same applies to Working Paper 25 and its addendum 1. As indicated in the report of the Working Group, A/CN.9/210, at paras. 237 and 240 (reproduced in this volume, part two, II, A, 1), the Drafting Group, which began its consideration of the draft Convention on International Bills of Exchange and International Promissory Notes and of the draft Convention on International Cheques during the week prior to the session of the Working Group, continued its work until the last but one day of the session of the Working Group. As a result, some of the articles as originally presented by the Draft-

(c) To adopt in the Convention under preparation a provision whereby gaps in the Convention would be governed by the specific provisions on the subject of the State whose law is declared applicable. This solution appears to be by far the best as it would not create two different systems for cheques in States which have special rules in this field, nor would it destroy the unification already achieved by different groups of States through the Geneva Convention, the Bills of Exchange Act or the Uniform Commercial Code.

For this reason the observer of the Hague Conference proposes to the Working Group on International Negotiable Instruments that article X suggested above should be complemented by a second paragraph as follows:

"If the State, the law of which is found to be applicable under the rules of private international law has, independently of its general rules of law, provisions which are specific [to cheques] [to bills of exchange or promissory notes] for the settlement of the questions referred to in the preceding paragraph, these provisions will be applied with priority over those general rules."

It will be noted that this article is drafted in a very general manner. It is intended to apply not only in the example just considered concerning the death or incapacity of the drawer, but also to any gaps left in either of the conventions currently under preparation within UNCITRAL. The aim of this article is in all cases to have the gaps in either Convention governed in priority by the specific provisions in the field rather than by general rules of law.

### C. Conclusion

In conclusion, the observer of the Hague Conference proposes to the Working Group on International Negotiable Instruments that it might adopt, in both the Convention on Bills of Exchange and Promissory Notes and the Convention on International Cheques, an article X which might be placed in the chapter on General Provisions, and which would read as follows:

#### "Article X"

"Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the law applicable by virtue of the rules of private international law.

"If the State, the law of which is found to be applicable under the rules of private international law, has, independently of its general rules of law, provisions which are specific [to cheques] [to bills of exchange and promissory notes] for the settlement of the questions referred to in the preceding paragraph, these provisions will be applied with priority over those general rules."

(2) An international bill of exchange is a written instrument which:

(a) Contains, in the text thereof, the words "international bill of exchange [Convention of . . .]";\*

ing Group were subsequently modified by it in the light of deliberations in the Working Group. Also, lack of time prevented the Drafting Group from establishing the texts in complete and final form. The complete texts, compiled by the Secretariat upon request by the Working Group, are to be found in A/CN.9/211 (draft Convention on International Bills of Exchange and International Promissory Notes) and A/CN.9/212 (draft Convention on International Cheques), reproduced in this volume, part two, II, A, 3 and 5.

\* Brackets indicate matters which have been reserved for further consideration at a later date. (Footnote in original).