Survey for the Creation of a New International Negotiable Instrument

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By

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Introduction

In accordance with the resolution 2250 adopted at the 21st Session of General Assembly of the United Nations, in December 1966, the First Session of the United Nations Commission on International Trade Law (UNCITRAL) was held in New York in January 1968.[1] Among its works, the UNCITRAL considered the promotion of unification and harmonization of the law of international payments, the methods of which were:

a) Securing a wider acceptance of Geneva Conventions on Bills of Exchange and Cheques of 1930 and 1931

b) Revising the Geneva Conventions with a view to making them more acceptable to countries following the Anglo-American system, and

c) Creating a new negotiable instrument solely for International Trade

For various reasons, the UNCITRAL concluded that the method "a" would not offer a sufficient chance of success, that the method "b" would not be an effective means of securing international uniformity in the areas where such uniformity was desirable, i.e., international transactions, and that the method most likely to produce tangible results was the creation of a new international negotiable instrument (method "c").[2]

In reaching that conclusion, it was generally recognized that, in view of

(1) See "The Kobe GAIDAI RONSO" Vol.XIX, No.4, p.63~65.

(2) See "The Kobe GAIDAI RONSO" Vol.XX, Nos.3 and 4, p.43~44.

certain problems in international transactions arising out of the existence of different systems of law on negotiable instruments in the context of international payments, a solution might lie in the creation of a new negotiable instrument to be used in such transactions.

In this connection, Secretary General of the United Nations drew up a questionnaire for the purpose of securing the views and suggestions of governments, and banking institutions of all countries, and requested that the replies, and an analysis of them, be available to the sessions of the UNCITRAL.[3]

I. A criterion for defining "International Payment"

At the Third Session of UNCITRAL held in New York, April 1970, it was decided that further study of the subject of "International Payments by means of Negotiable Instruments" should focus on a convention setting forth the rules that would be applicable to a special negotiable instrument for optional use in international transactions, and that to this end further consultation should be held with interested international organizations.

At the meeting of the Ad hoc Working Party of the UNCITRAL held in London, July 1970, it was held that the first need was to establish a criterion for defining "International Payment". The basic thinking was that the criterion should be :-

a) that payment is intended to pass from a debtor (drawee) in one country to a creditor (drawer) in another country,

b) that this criterion should not be affected by either the currency in which payment is to be made (bearing in mind that in practice this may be either the currency of the debtor's country, or the creditor's country, or that of a third party country), or by the place at which payment is to be made.

(3) UN. Doc. A/cN. 9138

c) that this criterion should be evident in the negotiable instrument itself, which would therefore be one in which drawer and drawee would appear to be residents of different countries, regardless of the place of payment and of the currency in which payment is to be made.

With the above criterion in mind it was felt that the new negotiable instrument should be expressed as an unconditional order to pay, and that the formal requisites should be :

1) the name and place of residence of the drawer,
2) the name and place of residence of the drawee,
3) the name and place of residence of the bank with which domiciled,
4) the name of the recipient (payee),
5) the amount and type of currency in which to be paid,
6) the date of issue,
7) the tenor, i.e., payable at sight or on demand, or payable at a stated period of time after sight or after date, or payable at a fixed future date,
8) signature of the drawer.

It was also considered that the inclusion of an interest clause should be permissible and that the rate of interest should be specified in that clause, but that the rules should provide for a legal rate to apply if the interest clause failed to mention the applicable rate.

Since the position varies from country to country, it was felt that whilst it might be desirable to insist upon a manuscript signature by commercial parties, mechanical signature should be permitted for bank endorsements.

It was felt that the new negotiable instrument should not be capable of use both as a bill of exchange and as a promissory note, since the bill of exchange is a three party instrument of payment drawn by the creditor, whereas the promissory note is a two party instrument of credit made by debtor. It was therefore agreed to concentrate on a new international

negotiable instrument corresponding to the bill of exchange.[4]

The London meeting concurred with the view that it might help to bridge the gap between civil and common law regarding any forged endorcements if it were provided that there should be not more than one non-bank endorcement, that is to say, that after the payee's endorcement all subsequent endorcements should normally be those of banks for purposes of collection, or of banks acquiring an interest in the instrument by discounting it.

In respect of domicile, it was agreed that this should be stated to be desirable, but made optional, not mandatory.

It was felt that a simple declaration of dishonour, whether by non-acceptance or non-payment, placed on the bill of exchange by either the collecting, or the paying bank, or both, could be the best way of achieving the simplicity which seemed to be generally desired.

It was generally felt that rights and liabilities should be on the negotiable instrument itself, i.e., independent of the underlying contract, for example, sale and purchase contract.

II. Questionaire of the United Nations and the Reply from Japanese Bankers

The use of negotiable instruments (bills of exchange) in Japan in effecting payment for international transactions is as follows;[5]

Questionnaire	Reply
1. FORM Are such bills of exchange normally drawn showing:	

(4) It was also agreed to consider the bill of exchange both with and without the inclusion of cheques in the Anglo-American sense.

(5) The author elicited replies from some of leading banks at the request of Federation of Bankers Association of Japan.

a) the place of drawing, i.e. the place of residence of the drawer? Yes.

b) the place of acceptance/payment, i.e. the place of residence of the drawee? Yes.

2. "WITHOUT RECOURSE"

To what extent are such bills of exchange

a) drawn "without recourse"? Very rarely.

b) endorsed "without recourse"? Almost non-existent.

Are there any objections to this practice, and if so, what are they? Yes. There is objection from the viewpoint that there may be possibility to impede negotiability of a bill.

Do you consider that:

a) the banks would prefer that the rules governing the proposed international negotiable instrument should:

a) permit
or
b) not permit
this practice, and why? Most of Japanese bankers consider that the banks would prefer that the rules should not permit this practice. Because they fear the possibility of being abused.

3. ENDORSEMENTS

In respect of the proposed international negotiable instrument, would there be any practical disadvantages or objections in requiring that apart from the endorsement of the payee all endorsements should be endorsements of banks, whether as principals having an interest in the bill, or as agents for the purpose of collection only? Yes.

If so, what are these disadvantages or objections?

There may be some disadvantage in discounting a bill in the market, all members of which are not necessarily the banks.

Can you suggest any method of avoiding difficulties in determining, on the face of it, whether an endorsement required as above is that of a bank, or not?

No.

4. ACCEPTANCE

In the case of a tenor bill of exchange is it

a) essential
b) customary

to present the bill of exchange for acceptance?

Yes, it is essential.

If so, is this

a) for the purpose of establishing the liability of the drawee on the instrument itself?
b) for the purpose of determining the due date?
c) for any other purpose(s), and if so, what?

It is done for the purpose of a) which accompany the purpose of b).

5. FORMAT

Would you favour attempts to standardise the layout of the proposed international negotiable instrument?

Yes.

If so, have you any specific suggestions?

Non.

6. TYPE OF TRANSACTION

To what extent is a bill of exchange used for the purpose of making an

international payment where, from the face of the bill, the drawer and the drawee appear to be residents of the same country, and, either from the face of the bill or from endorcements thereon, the payee appears to be a resident of another country?

Hardly any.

When such a bill of exchange is used do any particular problems or difficulties arise, and if so, what are they?

Non.

7. EVIDENCE OF DISHONOUR

A) On the assumption that the proposed international negotiable instrument should provide by domiciliation, for payment at a specified bank, do you consider that the present methods of evidencing dishonour by non-acceptance or by non-payment (for example, noting or protest) could be effectively replaced by a statement made on the bill of exchange itself evidencing such dishonour and the date thereof, given:

a) by the paying bank,
or
b) by the collecting bank,
or
c) by both banks.
If so, which do you think preferable?

It is preferable that either a) or b) will do.
On the assumption that the banks with whom a bill domiciled should called a paying bank, no, we don't see. It arises to some extent.

B) Do you see a possibility or problems arising under the above procedure in cases where a bank is required to act both as the paying bank and the collecting bank?

No.

To what extent, in your experience does

this position arises, i.e. of a bank having to act as both the paying and the collecting bank, and do you consider that this position would arise more frequently if it were a requirement of the proposed international negotiable instrument that it must be domiciled with a bank.

Yes, we do.

8. FORCED ENDORSEMENT

To what extent do banks require parties from whom they take bills of exchange, or on whose behalf they handle them for collection, to warrant the genuineness of prior endorsements, and to what extent do banks, in turn, give a similar warranty for the genuineness of all prior endorsements.

No.

9. SIGNATURE

What is the customary acceptable form of signature of

a) the drawer
b) the drawee (as acceptor)
c) the non-bank endorser
d) bank endorsers,

e.g. handwritten, impressed by rubber stamp, facsimile, perforation, etc.

In Japan, all signatures made on bills of exchange are confined to be handwritten, impressed by rubber stamp with seal or facsimile with seal such as "Hanko".

10. PLEDGE

In the event of a bank wishing to acquire rights in a bill of exchange by way of security, is this achieved by:

a) an "endorsement in pledge"
b) any other form of endorsement and if so, what?

Yes.

c) some means divorced from the instrument itself?

It is achieved by a), or b). In case of which by ordinary endorsement supported by a separate contract of security.

III Present Methods and Practice for Making and Receiving International payments

The July 1970 meeting in London drew up a questionnaire to be used in a survey of the banking institutions involved in international trade. The survey elicited replies from some 30 institutions to the 10 questions covered.[6]

The following are the six items of the ten questions:

a) To what extent are bills of exchange drawn or endorsed "without recourse"?

It emerged that this possibility also exists in the framework of the member States of the Geneva Convention.

b) To what extent is a draft presented for acceptance?

The survey revealed that although practice in this connection varies widely, it is considered desirable to present the draft for acceptance for the purpose of establishing the liability of the drawee.

c) Standardization of the layout is generally recommended. Several replies emphasise the need to adopt standardization to the machines used to issue documents.

d) Where bank endorsement is involved, it has become the custom to use facsimile signatures. Yet it is curious to note that no one raised the question of the payee's right to protest when the endorsing party

(6) On this basis, it has been possible to clarify the situation, without any further discussion needed, as to six out of those 10 questions, relating to both the legal aspect–the essential of which were already known to the experts–and the practical aspect.

is a banker and his endorsement consists, therefore, of a facsimile signature. Under English and American law, the use of facsimile signatures appears to be regulated by the bye-laws of the company.

e) The "endorsement in pledge" is not customary. The usual practice is to use an ordinary endorsement or an endorsement for collection, combined with a special agreement.

f) It is generally felt that evidence of dishonour by non-accpetance or non-payment can be administered by a statement made on the bill of exchange itself. The idea that the paying bank can be the collecting bank at the same time is also generally accepted; it is, however, pointed out that both payment and protest require a certain lapse of time. Furthermore, the obligation to notify the failure to pay was also mentioned. This brought to light the fact that under the Geneva system[7], the payee runs the risk of receiving a claim for damages or for unjust enrichment, on the basis of the applicable national law, and which can therefore vary from one country to another.

The replies as to the other four questions were not always unanimous, but a three-point summary of the essential conclusions can be made as follows:

a) Use of such a negotiable instrument should be and should remain optional. The document would be identified by a specific "label". The international nature of the transaction should be obvious from the indications appearing on the document.

The "residence" criterion was abondoned and replaced by that of the address of the drawer, drawee or recipient (payee) appearing on the document. Thus the principal of outward appearances was established. This could lead to consequences in terms of national legistration in respect of civil or criminal law, or of foreign exchange

(7) Article 45(6) of Geneva Connection on Bill of Exchange 1930.

control. But the varidity of the instrument should not be affected thereby. An instrument is held to be international when, in addition to the "label" (designation0, at least two of the above-mentioned addresses are situated in different states.

least two of the above-mentioned addresses are situated in different states.

b) These problems are linked to that of a forged endorsement. The first aspect considered was that of the risk involved, under the Geneva system and under the English-American system. Under the former, the risk of a forged endorsement was borne by the beneficiary, whereas under English and American law, it is borne by the party having taken the forger's draft. But it then emerged that in practice, the banks' general conditions enable them, in the event of a forged endorsement, to debit the account of the previous holder. Consequently, the banking practice has combined the two systems to some extent. Lastly, a combination was envisaged which would make it possible to apply English-American law up until the time of the beneficiary's signature, whereupon the subsequent chain of signatures would come under the Geneva system.

c) The discussion on the preceding problem also led to an exchange of views on the problem of limitation of endorsements. It appeared that the form taken by such limitation was not favourably received everywhere. But the replies indicate that the importance of that limitation is not always fully realized. It is, in fact, in the light of the problem of the forged endorsement that this solution is always reverted to, so as to reserve this instrument to banking activity.