CHAPTER 62

Payment and Recourse

I. PAYMENT

PAYMENT here means the fulfillment of the primary cambial debt, by the drawee or maker. The law applicable to this relationship is primarily concerned with the obligation of a maker or an acceptor to a holder, but also includes such incidents as the offer of partial payment and certain other questions, the scope of which is sometimes much enlarged.

1. The Applicable Law

Matters respecting payment are commonly controlled by the law of the place where the bill is payable. Thus, the Geneva Rules (article 4, paragraph 1) state that

"The effects of the obligations of the acceptor of a bill of exchange or maker of a promissory note are determined by the law of the place where the instrument is payable."

This rule contrasts with the effect given in the Geneva Rules to the law of the place of signature in the case of other parties.[1]

Story and the weight of American judicial authority [2] agree with this rule.

The former German doctrine, true to the principle of the law of the place of performance, tended rather to the

[1] This contrast, notwithstanding some variance as to the exact point of reference (*infra* n. 3) was stated early in Germany: 1 ROHG. E. 289; 14 *id.* 258; 1 RGZ. 125; 6 *id.* 24; 7 *id.* 22; 107 *id.* 46; STAUB-STRANZ, art. 93 n. 6; see also Swiss BG. (Jan. 24, 1878) 5 BGE. 19.

[2] STORY 478 § 333; Heller v. Goslin (1900) 65 N.Y.S. 232; Midland Steel Co. v. Citizens Natl. Bank (1904) 72 N.E. 290; Egley v. Bennett (Ind. 1923) 139 N.E. 385; Montana v. Worthington (1912) 162 Mo. 508, 142 S.W. 1082.

place which, as a subsidiary rule, was identified with the domicil of the debtor.[3] The same contact or the place where the acceptance is made, have also been urged on the ground of general theories.[4] Also, the English Bills of Exchange Act, section 72(2), submits "interpretation" of acceptance, like that of other acts, to the law of the place "where such contract is made." This embarrasses the modern commentators,[5] and has been expressly rejected in the United States;[6] the place of payment may be or may not be that where acceptance occurs.[7]

Place of payment named ("domiciled draft"). Where a place of payment, different from the domicil of the drawee, is named in the bill, this has always been regarded as the surest expression of the intention that the law of this place should govern the obligation of the acceptor.[8] The place for performing the duties as a guarantor, of course, is not affected by this consideration.

Absence of Place of Payment. Where there is no ascertainable place of payment, as in the case of a bill payable to bearer or in blank, a substitute is needed. The place of issue may serve for the obligation of the maker and that of the drawee's domicil for his duty.[9] But cer-

[3] 2 RGZ. 13; 6 *id.* 24; 7 *id.* 21; etc. 107 *id.* 44, 46.

[4] E.g., STORY 478 § 333.

[5] CHALMERS, Bills of Exchange, thought that the mistake could be corrected; WESTLAKE § 229 ignored the provision; DICEY (ed. 6) 690 doubts whether the law can be helped.

The Act of India, s. 134, a year older, has a different rule, likewise unsatisfactory in the opinion of an Indian comment, see DICEY, *l.c.*

[6] By an ancient decision, Grimshaw v. Bender (1809) 6 Mass. 157. The place of acceptance was used, e.g., in Briggs v. Latham (1887) 36 Kansas 255, 13 Pac. 393.

[7] Rouquette v. Overman (1875) L.R. 10 Q.B. 525: place of acceptance or place named for payment; Hall v. Cordell (1891) 142 U.S. 116; etc.

[8] United States: Brown v. Gates (1903) 97 N.W. 221, 98 N.W. 205: a very persuasive evidence of the intention of the parties.

[9] Geneva Convention on Bills, art. 2 (3) (4), on Checks art. 2 (2)-(4) and reservation 3 (allowing the place of creation, used in Italy and Greece).

tainty is achieved by the laws prescribing that the place of payment be indicated in the bill.[10]

2. The Scope of the Law of Payment

(a) *Modalities of payment.* The normal application of the law of the place of performance is natural also here. The law of the place of payment, in such capacity, determines the means of payment:[11] local or foreign currency; meaning of "pounds" or "francs," [12] or of money in the old days of markets and fairs; holidays and hours to be observed;[13] the days of grace;[14] and anticipation or deferment of the payment.[15]

(b) *Time of maturity.* The periphery of "modalities" has been gradually stretched, which in this field corresponds to the special needs. The Geneva Convention, article 37, to end much controversy, expressly prefers the calendar at the place of payment to that of the place of issue. The English Act covers this solution broadly with respect to the "due date," [16] and other statutes agree.[17] The *lex loci solutionis* is commonly preferred to the *lex loci contractus.*[18]

[10] Hague Uniform Law, art. 1 no. 5; Geneva Conv., art 1 no. 5.

[11] Caras v. Thalmann (1910) 138 App. Div. 297, 123 N.Y.S. 97; Geneva Conv., art. 41 par. 2 (usages of the place of payment); Montevideo Treaty Com. Terr. (1940) art. 30 par. 3.

[12] 2 BAR 164; 1 FIORE 223; 2 ROLIN 543; LORENZEN 163 n. 371; Adelaide Electric Supply Co. Ltd. v. Prudential Assurance Co. Ltd. [1934] A.C. 122, 151, per Lord Wright, *supra* Vol. II, p. 464; but see Bonython v. Commonwealth of Australia [1950] 66 T.L.R., Pt. 2, 969, 978.

[13] LORENZEN 144, n. 291, citing the international literature.

[14] United States: Cockburn v. Kinsley (1913) 25 Colo. App. 89, 135 Pac. 1112; Second Natl. Bank of Richmond v. Smith (1903) 118 Wis. 18, 94 N.W. 664; other cases: STUMBERG 264. LORENZEN 144 n. 292, with many citations of Continental authors.

[15] England: Rouquette v. Overmann (1875) L.R. 10 Q.B. 525 (moratory).

[16] Sec. 72 (5).

[17] Switzerland: C.Obl. art. 1092.

[18] France: ARMINJON, DIP. Com. 348 n. 1 citing opponents, cited 347 n. 1; *cf.* ARMINJON ET CARRY 517 § 548 on the French controversy.

Germany: STAUB-STRANZ art. 93 n. 8.

Italy: FIORE § 328; DIENA, 3 Trattato § 233.

Illustration. Are "three months after date" calendar months or ninety days? The Portuguese law of the place of payment decides.[19] "Thirty days after date" in a seller's draft, drawn in the United States and accepted in England, the steamer with the goods arriving earlier than foreseen: English law applies.[20]

(c) *Part payment.* Although the Anglo-American acts allow the holder an option to receive or refuse partial acceptance by the drawee or partial payment,[21] the Geneva Convention states that the holder must receive it.[22] The Geneva Rules, article 7, apply the law of the place of payment to this question.[23]

The same must be true of a conditional acceptance.[24] If the laws of the place of indorsement were applied, an American could be made liable by a holder having refused part payment but would not be able to sue his Italian indorser.

(d) *Amortization.* In conformity with the universal view,[25] the Geneva Rules add to the scope of the *lex loci solutionis* the "measures to be taken in case of loss or theft of a bill of exchange or promissory note." "Loss" includes destruction [26] and the "measures" include restitution following such measures.[27]

(e) *Excuses and discharge.* Finally, the same law determines the excuses for delaying or not performing pay-

[19] OLG. Hamburg (May 28, 1895) 5 Z. int. R. 570, Clunet 1897, 386, aff'd. RG. (Dec. 11, 1895) 36 RGZ. 126, 6 Z. int. R. 166, 429, Clunet 1897, 827.

[20] Hammond, Snyder & Co. v. American Express (1908) 107 Md. 295, 68 Atl. 496.

[21] BEA s. 44 (1); NIL s. 142;—a bad rule, HUDSON AND FELLER, 44 Harv. L. Rev. (1931) at 357.

[22] Geneva Conv., art. 39.

[23] Likewise LORENZEN 163 f.

[24] ARMINJON ET CARRY 498 § 438.
Treaty of Montevideo, Com. Terr., art. 30 par. 4.

[25] VEITH 526.

[26] Comptes rendus, 157 § 203 i.f.

[27] *Id.* 366.

ment.[28] And as the law of the place of payment predicates what amount is due on the bill, it also decides whether the entire bill is discharged by payment, release, setoff, or other event,[29] and therefore also whether an acceptor is discharged by payment on a forged instrument or has to pay again to satisfy the bill (not his underlying relationship to the drawer).[30]

3. Enlargements of Scope

(a) The British Act, Section 72(2), subjecting all "interpretation" of any cambial act to the law of the place of payment, however this vague provision may be construed, by far exceeds the reasonable scope of this law.

(b) In the United States, many decisions sound as if the law of the place of payment governed the total obligation of the maker of a promissory note. It is said to govern "execution, construction, and validity." However, there is no reason why the *validity* of issue should be judged from the viewpoint of the place of performance.[31] More thoughtful courts have restricted the scope of this law to the incidents of performance itself.[32] Also the obligation created by the issue of a check must not be determined by that law,[33] as the Geneva Rules on Checks correctly state.[34] In the present system, it is unavoidable that validity of drawing and making be subject to the law of the place where signature and delivery to the payee occur.

[28] For U.S. see STUMBERG 263.

[29] BEA secs. 59, 60. DICEY (ed. 6) 694 f.

[30] E.g., Casper v. Kühne (1913) 159 App. Div. 389, 144 N.Y.S. 501, Austrian law of the drawee bank.

[31] This criticism seems to be shared in 11 Am. Jur. (1938) 437. Most decisions allege "intention," in a purely fictitious manner.

[32] Brabston v. Gibson (1850) 9 How. (U.S.) 263; Bank of U.S. v. Daniel (1838) 12 Pet. (U.S.) 32.

[33] *Contra:* Moulis v. Owen [1907] 1 K.B. 746- C.A.

[34] Geneva Rules concerning checks, art. 2 par. 2.

Acceptance, it is true, is "independent" of issue. Its place has been identified either with the locality of the declaration of acceptance, or, as in the United States, simply with the place where payment is due.[35]

II. The Steps to Preserve Recourse

1. Survey of Theories

(a) *Controversy.* Are presentment of the bill, protest, and notice of default to be governed by the law of the first issue as the basic law of the bill? Or by the law of every single indorsement, in virtue of the principle of independence? Or by the law of the place of payment as a unitary law in matters not directly connected with issue?

There have been controversies on these questions for a long time in various countries.[36] The European discussion originated in connection with the French moratory law of 1870, which under the pressure of war postponed the maturity of bills and the time for presentment and protest. Brilliant expert opinions brought no agreement on the international effect of the French law.[37] Very comprehensive debates in the preparation of the Hague and the Geneva conflicts rules were no more fortunate. Neither are the rules reasonably settled, nor even the problems completely envisaged.

The ideas underlying the substantive rules requiring the holder to take certain measures are approximately uniform, with just one exception. In the Anglo-American laws, the holder is expected to exercise *diligence;* negligence in per-

[35] *Supra* Ch. 59.

[36] We owe an excellent report to Lorenzen 158 ff. An almost forgotten but historically important and profound contribution was made by von Salpius, "Anwendung ausländischen Rechtes auf den Wechselregress," 19 Z. Handels R. (1874) 1.

[37] See *infra* 219.

forming this duty deprives him of his recourse. Continental laws agree in the main but usually add the consideration that the holder loses his right by force of law. Thus, it seems that Anglo-American lawyers base the duty on the contract between the holder and his indorser, whereas Continental doctrines, though also emphasizing contractual aspects, at the same time have in mind a legal effect of inaction equivalent to estoppel,[38] operating without any fault of the holder. This contract is now mitigated by the fact that the Geneva Convention concedes the excuse of *vis major*. Nevertheless, the principles are sufficiently different to have inspired different points of view in the conflicts field.

In the United States, the principle of independence, fostered by isolated contractual privity, dominates in surprising strength.[39] In the Continental doctrine, the same powerful current [40] encounters opposite tendencies with such uncertain results that the comments on the Geneva rules still hesitate where to draw the line between the principle of independence sanctioned in article 4 and the law of the place of payment invoked in article 8.[41]

In general, the law of the place of payment has an unchallenged role in certain parts of the matter and a controversial one respecting other incidents.

(b) *Statutes*. The only statutes apparently attempting a comprehensive conflicts rule have given enigmatic directives.

The British Bills of Exchange Act, section 72(3), following some leading precedents,[42] subjects all duties of the

[38] Very instructive: HUPKA 149; ULMER 187.

[39] See the cases in 2 WHARTON § 452b; 1 DANIEL (ed. 6) § 909; LORENZEN 148 n. 317; RAISER 40 n. 3.

[40] 2 MEYER 373 for documentation.

[41] *Infra*.

[42] Rothschild v. Currie (1841) 1 Q.B. 43; Hirschfield v. Smith (1866) L.R. 1 C.P. 340, quoted by LORENZEN 152-154.

holder to "the law of the place where the act is done or the bill is dishonoured." Since the text only mentions the place where the act is *done,* without adding "or to be done," the courts have refused to apply the provision to the question whether, e.g., an act of presentment is required at all.[43] Among many other doubts, it is even queried whether the law includes other indorsees than the last holder.[44]

In the Geneva Rules, article 8 speaks of the form of protest and other necessary acts, submitting it to the law of the place of acting (*infra* 3), but the text fails to say what law decides whether an act is necessary for the conservation of rights. No help is afforded by the preparatory materials.

We shall first discuss a problem that is quite commonly treated as an incident of the independent laws, viz. the necessity of the various measures in question; thereafter the problems generally considered subject to the law of the place of performance—time and manner of these measures; and finally the problems of doubtful classification.

2. Necessity of Preserving Steps

Not only the vastly dominating American practice,[45]

[43] Bank Polski v. Mulder & Co. [1941] 2 K.B. 266, [1941] 2 All E.R. 647, per Tucker J.; Cornelius v. Banque Franco-Serbe [1941] 2 All E.R. 728, 732 per Stable J.; on the reasoning see the critical comment by MANN, 5 Mod. L. Rev. (1941/42) 251, and CHESHIRE (ed. 4) 254.

[44] WESTLAKE § 232: no; *contra:* DICEY (ed. 6) 698.

[45] 11 Am. Jur. 444 n. 2; Aymar v. Sheldon (N.Y. 1834) 12 Wend. 439, 27 Am. Dec. 137; Musson v. Lake (1845) 4 How. (U.S.) 262. Among more recent decisions, see, e.g.:

Liability of drawer: Casper v. Kuhne (1913) 79 Misc. 411, 140 N.Y.S. 86, aff'd. 144 N.Y.S. 502; Ellenbogen v. State Bank (1922) 119 Misc. 711, 197 N.Y.S. 278; Mazukiewicz v. Hanover Nat. Bank of City of New York (1925) 240 N.Y. 317, 148 N.E. 535; Bank of Nova Scotia v. San Miguel (C.C.A. 1st 1952) 106 F. (2d) 950.

Liability of indorser: Briggs v. Latham (1887) 36 Kan. 255, 13 Pac. 393; Guernsey v. Imperial Bank of Canada (C.C.A. 8th 1911) 188 Fed. 300.

but also the majority of Continental courts [46] and the writers [47] profess that "necessity" and "sufficiency" of presentment, protest, and notice are subject to the several independent laws. The justification of this rule is sought in "logic"; where the obligation of the indorsers is made dependent on a protest, this is a condition precedent of the guaranty to be governed by the law controlling this obligagation.

A contrary opinion, however, objects that no valid reason exists for compelling the holder to observe the laws under which the *previous* engagements occurred.[48] The result is application of the law of the place of payment, quite as the British Bills of Exchange Act, section 72(3) predicates.

A related rule has been introduced into the Uniform Commercial Code, section 4-102, but only for actions taken by a bank in the course of collection. The place of the bank, however, though a better contact than the place of the indorser, is not of such practicability as that of the place of payment.

The commentators on the Geneva Rules split into the

[46] France: Trib. Com. Seine (April 6, 1875) Clunet 1876, 103.
Germany: 9 ROHGE. 203; RG. (May 27, 1913) Leipz. Z. 1913, 674.
Italy: Cass. Firenze (Apr. 8, 1895) S. 1896.4.7.

[47] 2 MEYER 373; RAISER 20 n. 2, 3; 72 n. 3; VEITH 517 f.
England: WESTLAKE § 232.
U.S.: STORY § 360; 2 WHARTON 986 § 452 b, d.; LORENZEN 148-150; DANIEL (ed. 6) § 909.
Austria: BETTELHEIM 157 f., 162 f.; 2 GRÜNHUT 581; CANSTEIN 182.
France: DESPAGNET 994 § 345; VALÉRY 1288; SURVILLE § 497; WEISS, 2 Traité 444; AUDINET 618, 620.
Germany: 2 BAR § 306; 2 GRÜNHUT 581; 19 ROHG. 203; 9 RGZ. 430; STAUB-STRANZ (ed. 10) art. 86, n. 9; KGJW. 1932, 754.
Italy: DIENA, 3 Tratt. 169, 2 Principii 327; OTTOLENGHI 366; BOSCO, Rivista 1928, 97, 106.
Switzerland: 2 MEILI 347 § 192.

[48] England: FOOTE (ed. 5) 460; DICEY (ed. 6) 698; CHESHIRE (ed. 4) 253.
Germany: 2 FRANKENSTEIN 434; NUSSBAUM 324 f.
Italy: SRAFFA, Riv. Dir. Com. 1927, 1. 255; CAVAGLIERI, Dir. Int. Com. 392 f.; App. Napoli (May 2, 1924) Rivista 1925, 101 (promissory note).

same two views. Either they trust the broad language of article 4, stating the principle of independence,[49] or they construe article 8, establishing the law of the place of payment, extensively.[50]

A third view looking to the place of issue [51] has no attraction. The consequences may be illustrated:

(i) A bill issued and payable in the United States (or England) to P is indorsed in the United States (or England) to A and by A in Germany to B. Since under German law protest is a condition of recourse, B omitting the levy of protest loses his right against A. This is still true under the Geneva Convention, article 44, paragraph 3, for bills payable on a fixed day or in a fixed period after date or sight and otherwise, where the protest is not made within a year (article 34). However, under American (or English or Mexican) law concerning an inland bill which does not need to be protested,[52] A has, without protest, recourse against P and P against the drawer.[53]

(ii) A commercial order was drawn in New York on a firm in Vienna, Austria, to the order of plaintiff. Protest in Vienna was omitted as unnecessary because the instrument was not a true check. Under New York law, however, it was a foreign bill and protest was required. The liability of the drawer is denied,—correctly under the law of the drawer, wrongly under that of the place of payment.

If it may be allowed to doubt whether the issue warrants an exception to the several laws principle—as Lorenzen did—the presence of both conflicts rules in the same world is one disadvantage too many.

The decision in favor of the *lex loci contractus* is ordinarily believed easier with respect to notification. The duty

[49] HUPKA 256 f.
[50] ARMINJON, DIP. Com. 359 § 193.
[51] Institute of International Law, 8 Annuaire 122, resolution IV.
[52] BEA sec. 51 (2); NIL sec. 152; Mexico: Ley de Titulos, art. 145.
[53] RABEL, 6 Z. ausl. PR. 325, 332; KESSLER 151, 157; HUPKA 257 n. 1.

of the holder is now regulated with less difference but not quite similarly by the Anglo-American Acts which prescribe notices to the drawer and every indorser, and the Hague and Geneva Conventions requiring notice to the drawer and the precedent indorser who has to communicate with his own indorser.[54] The writers think that with good reason an American indorser may expect notice from the last holder.[55]

Illustration. A indorsed in England a bill payable in Spain, and B indorsed in Spain to C where no notice was required. C gave notice to B twelve days after dishonor, B at once to A. The English court allowed recourse by B against A;[56] indeed, B could not act earlier.[57]

It is difficult to see why even in such questions a world law could not provide unity.

3. Form and Time

(a) *Form.* The Geneva Rules, article 8, expressly state that

"the form . . . of protest as well as the form of the other measures necessary for the exercise or preservation of rights concerning bills of exchange or promissory notes, are regulated by the laws of the country in which the protest must be drawn up or the measures in question taken."

The same rule is established for all "duties" of the holder in the British Act, section 72(3),[58] for the duty of levying protest in the laws of the German group before the Geneva

[54] BEA sec. 48; NIL sec. 89; Hague Unif. Law art. 44; Geneva Conv. art. 45.

[55] To this effect recently ARMINJON, DIP. Com. 361.

[56] Horne v. Rouquette (1878) 3 Q.B.D. 514-C.A.

[57] "How could the English indorsee have given what would have been timely notice from the point of view of English domestic law, if his own knowledge of the dishonour depended on the compliance with Spanish law?" DICEY's editors (ed. 6) 698 ask.

[58] DICEY (ed. 6) 698.

Rules,[59] in the Latin-American codes and treaties,[60] and is familiar to the literature.[61] A prominent American decision [62] shares this view, speaking of the "days of grace, the manner of making the protest and the person by whom protest should be made," as equally subject to the law of the place of payment. We may take it that the former contrary opinions respecting time and form of notification are to be regarded as obsolete.[63] The law or custom of the place where the bill is payable governs, as it is often said.

What is "form"? Agreement seems to exist that here, once more, form is a broad term, really a misleading name, including external expression of presentment, protest, or notification or "noting," but also the officers, manner, time of day, and locality involved. The British Act happily avoids this term. It appears that even such questions as follows are included in the "mode of presentment":[64]

Whether a mere possessor who is not the owner of the bill may present it and levy protest in his own name;[65]

Whether upon a presentment for acceptance the drawee

[59] 1 MEYER 659. Germany: former WO. art. 86; 2 GRÜNHUT 577.

[60] Montevideo Treaty Com. art. 26.

Cód. Bustamante, art. 270.

Chile: C. C. art. 17 par. 2, involving "effects" of an instrument, applied by Sup. Ct in Bco. Germanico de la America del Sur v. Lizarralde (Aug. 18, 1928) 26 Rev. Der. Jur. y Ciencias Soc. 1929 I, 474, 481, to the form of protest in Buenos Aires; it was a bill of exchange, indorsed in Chile upon a person domiciled in Argentina.

Mexico: Ley de titulos 1, (1932) art. 256, calls this law *lex fori*.

[61] STUMBERG, 253; PILLET, 2 Traité 841, 848.

[62] Amsinck v. Rogers (1907) 189 N.Y. 252, 82 N.E. 134; Wooley v. Lyon (1886) 117 Ill. 244, 6 N.E. 885; *cf.* Gleason v. Thayer (1913) 87 Conn. 248, 87 Atl. 790.

[63] See LORENZEN 151 n. 329; add Sec. Natl. Bank of Richmond v. Smith (1903) 118 Wis. 18, 94 N.W. 664.

[64] LORENZEN 148, par. 1.

[65] He may, according to Geneva Conv. art. 16 if he shows an uninterrupted series of indorsements.

may revoke his acceptance written on the bill, as the Geneva Convention allows him until he returns the bill.[66]

"Sufficiency of notice" is an ambiguous term occurring in American decisions, to be located between "necessity" and "manner." If the holder has given a reasonable notice to the defendant according to the law of his contract, it would seem that any other possible requirement regards either "time" or "mode," both of which belong to the place of payment.

Renvoi. One American case applying the law of the place of payment is known as admitting renvoi.[67] A promissory note was made and indorsed in Illinois and payable in Canada. It was dishonored, and the notice complied with the Canadian but not with Illinois law. Judge Sanborn, directly adducing the Canadian law of the place of payment to "time and manner of giving notice," argued *ad abundantiam* that even though Illinois law were to apply, it would refer to Canadian law. This decision has unnecessarily been criticized with the usual arguments against renvoi.[68]

(b) *Time.* In the United States, the time for presentment and protest is by prevailing authority determined under the law of the place of payment.[69] For the time and manner of giving notice some old decisions applied the independent laws of the several contracts,[70] but more recently the single law of the place of payment obtains.[71]

In agreement with the universal view,[72] article 8 of the Geneva Rules also follows the law of the place of pay-

[66] Geneva Conv. art. 29.
[67] Guernsey v. Imperial Bank of Canada (1911) 188 Fed. 300, 301.
[68] LORENZEN 175 f.; *cf.* RAISER 39.
[69] 10 C.J.S. 498 § 66 n. 59.
[70] 10 C.J.S. 499 n. 64, 65. For the old cases on presentment, *cf.* RAISER 72.
[71] Guernsey v. Imperial Bank of Canada (1911) 188 Fed. 300, 305.
[72] LORENZEN 154.

ment for protest. The time for presentment and particularly notice continues as a subject of controversy.[73]

The several laws doctrine produces a disorderly chain of recourse in which an indorsee may be liable to his creditor and unable to recover from his debtor.[74] Under the Geneva Rules the extensive interpretation of article 8, to cover presentment and notification, has been urged, not only as a requirement of harmony[75] but also because the local law of the place of payment is the only one known to the persons charged with cashing the bill.[76]

At least, respecting the time for presentment, all courts should follow this argument, especially, but not only, where the basic bill indicates a certain date for presentment or maturity.[77] The place of payment is also here preferable to that where presentment is due.[78]

Reasonable time. The Anglo-American Acts prescribe a reasonable time: for acceptance of a bill payable after sight (the time running from the issue) (NIL § 144); for presentment and protest of a bill payable at demand (from the issue or the last negotiation) (NIL §§ 71, 155); and for the liability of the drawer of a check (from the issue of the check) (NIL § 186).[79] Moreover, an old practice is frequently continued whereby a check must be sent for presentment the day after receipt. These are

[73] VEITH 500.

[74] Despite a Yugoslavian proposal and a monitum by the Northern states, see HUPKA 255 n. 3.

[75] RABEL *l.c.;* RAISER 74, 78; VEITH 518; HUPKA 256.

[76] KESSLER 156; but the dominant opinion takes, with regret, the independence principle as prescribed; see RAISER 80; QUASSOWSKI-ALBRECHT art. 97, n. 6; HUPKA 256, all following former rules; *cf.* RENAULT, Actes, Second Hague Conference on Bills of Exchange, 1912, I 150.

[77] ARMINJON-CARRY, §§ 436, 462.

[78] STAUB-STRANZ art. 97 n. 9 advocates the place of presentment. But this is too subtle; presentment may also be considered a modality of payment.

[79] BEA sec. 40 (1), 45 (2), 86 (1); 51 (4); 74.

contradictory principles which cannot be reconciled.[80] However, they may be corrected; only one decision has taken section 71 literally.[81] Commonly in case of a check, the reasonable time is simply understood to mean that each holder, to preserve the liability of his immediate indorsers, must present a check on the next following working day. Yet a bank issuing a check is deemed to put the instrument into circulation for a certain time.[82]

The interesting point here is, how foreign courts the laws of which do not know the criterion of "reasonable time," should apply this measure.

The main principle to be observed by a foreign court defining the duty of presentment is contained in § 193 NIL (sec. 40 (3), 45 (3), 86 (2) BEA):

"In determining what is 'reasonable time' or an 'unreasonable time,' regard is had to the nature of the instrument, the usage of trade or business (if any) with respect to such instrument and the facts of the particular case."

Foreign courts, applying American law as that of the place of payment, sometimes have failed to understand that this period must be estimated from case to case, and that drawer and indorser are on a different footing. The date of receiving a check, sending it to a bank for collection, dispatch to a correspondent bank and to the drawee must be ascertained; the holder must prove diligence in a severe examination.

No matter whether the Anglo-American "reasonable" time applies abroad as an incident of the indorser-indorsee

[80] Insofar (not respecting his own theory) I agree with BIGELOW-LILE, Bills, Notes and Checks (ed. 3, 1928) §§ 223, 351-355 against the authors who try vainly to harmonize the rules, with varying results. *Cf.* 6 Z. ausl. PR. 327 f.

[81] Columbian Banking Co. v. Bowen (1908) 134 Wis. 218, 114 N.W. 451.

[82] 2 DANIEL (ed. 6) 1789 f.

relation or as the unitary rule of the place of payment, this concept must be used in its original meaning.[83]

4. Exemptions from the Duties.

It is a difficult question whether excuses for delaying or omitting protests or other measures fall into the category of the independence principle or of the law of the place of payment.

The older authors either accorded to each signer discharge as provided by his own laws,[84] or likened temporary obstacles to the days of grace, subject to the law of the place of payment.[85] Lorenzen, declaring for the first principle, nevertheless on grounds of convenience, states an exception for the "definition of *vis major*" which should be that of the place of payment.[86] But this defeats the alleged principle. Arminjon distinguishes liberation by *vis major* and the obligations of the holders, which remain under their several laws.[87] Their duties, however, are essentially changed. The decisive question is: whether the law of the place of payment, quite contrary to the several laws principle, ought to be stretched,[88] so as to afford equitable relief to the holder, menaced in the preservation of his recourse. This should be affirmed with the exception of events affecting merely personal relationships.[89]

The American Negotiable Instruments Act uses a threefold language to define the exceptions to the duties of protest, presentment, and notice; these steps are "not re-

[83] RABEL, 5 Z. ausl. PR. (1932) 326, 330.

[84] E.g., 2 BAR § 310; SURVILLE § 498; 4 LYON-CAEN ET RENAULT § 660; 4 WEISS 463 f.

[85] 2 BROCHER 331; DIENA, 3 Tratt. 182, 192; 2 MEILI § 193; CAVAGLIERI, Dir. Int. Com. 390.

[86] LORENZEN 156.

[87] ARMINJON, DIP. Com. 371 § 203.

[88] Stretched over its normal scope which does not, despite the Restatement, § 332, include the causes of nonperformance, *supra* Vol. II, 466, *cf. supra* 205 f.

[89] RABEL, 6 Z. ausl. PR. 332 ff.; v. CAEMMERER, 4 Rechtsvergl. Handwörterbuch 265; KESSLER 151; HUPKA 256 f.

quired," [90] or "excused," [91] or "dispensed with." [92] Nevertheless, we do not see that these expressions have ever been neatly differentiated,—they are in fact merged in the Uniform Commercial Code, section 3-511—or would be able to furnish adequate categories for conflicts purposes. Yet, all these cases cannot be treated on the same footing. The following divisions may be proposed.

(a) *Personal defenses.* To stay within the American examples, an indorsee may sue the indorser or a maker or drawer without presentment, protest, or notice, where both parties knew that the instrument would not be honored and both were in fraud or the drawer was dishonest and the indorser knew it.[93] Likewise, where the indorser has participated in an application for bankruptcy of the maker, which made payment impossible at the time of maturity;[94] or the indorsee had to retain the check for a few days in the interest of the drawer and the indorser.[95]

The courts invoke waiver by conduct or construe sections 79, 80 "broadly." In truth, the exemption is based on circumstances outside the instrument, characterizing the underlying relationship between just the two parties. The individual contract and its law, under the principle of independence, govern the incident.

A different situation which, however, equally must produce the application of the several laws doctrine, arises where really waiver is written in the bill with restriction to a two-parties-relation.

[90] §§ 79, 114 no. 4, 159 (liability of the drawer); §§ 80, 115 no. 3, 159 (liability of indorser).

[91] §§ 81, 113, (delay by *vis major*).

[92] §§ 82 (3), 109-111, 159 (waiver); 82, (1), 112, 159 (impossibility).

[93] DANIEL 1236, 1792; going farther: First Nat. Bank v. Currie (1907) 147 Mich. 72, 110 N.W. 499; Start v. Tupper (1908) 81 Vt. 19, 69 Atl. 151 (semble); NORTON, Bills and Notes (ed. 4) 561.

[94] J. W. O'Bannon Co. v. Curran (1908) 129 App. Div. 90, 113 N.Y.S. 359.

[95] Churchill v. Yeatman, Gray Grocer Co. (1914) 111 Ark. 529, 164 S.W. 283.

(b) *Incidents of Payment.* In contrast to the group just described, the holder may encounter obstacles "beyond his control" or "not imputable to his fault." It stands to reason [96] that the law of the place of payment is competent, e.g., to free the holder unable to levy protest. Impossibility and frustration will work in this manner as grounds of exemption under the Anglo-American acts.[97]

Although the Geneva Convention introduces the exception of *vis major,*[98] it does not fully reach the scope of the Anglo-American exemptions on which recourse may be based when protest etc. is delayed. It excuses only absolute and objective, total impossibility, not frustration, excessive or extraordinary difficulty, partial or relative impossibility, while on the other hand destruction of the instrument belongs to another category.[99] Where, e.g., death or illness prevent the holder or his agent from presenting the bill, he may be excused under American law, but not according to the uniform law.

Illustration. A check could not be presented at a bank in Amsterdam during the German occupation. Dutch law had to control the question whether the recourse survived. This also agrees with BEA, section 72 (3). Strangely, an English judge instead applied the substantive rule of BEA, section 46 (2), to dispense with presentment.[100]

The much debated question concerning the moratory laws of the place of payment [101] has finally been answered

[96] To the same effect:
England: BEA sec. 72 (3).
Italy: Cass. (July 4, 1927) 4-5 Annuario Dir. Comp., Parte III, 10; Cass. *Sez. Unite* (July 1, 1927) Rivista 1928, 94.

[97] NIL sec. 81, 82 no. 1, 112, BEA 46, 50; Uniform Commercial Code 3-511 (1).

[98] Geneva Conv., art. 54.

[99] See in particular HUPKA 148 ff.; ANGELONI, Cambiale (ed. 3) 448 ff., §§ 222 f.

[100] Cornelius v. Banque Franco-Serbe (1941) 2 All E.R. 728; *cf.* DICEY (ed. 6) 699, illustration 2.

[101] LORENZEN 158, 161; ARMINJON, DIP. Com. 372 § 204.

by the Geneva Convention insofar as the wording of article 54 on *vis major* expressly names prevention by a "legal prohibition," "prescription légale," by any state.[102] Decrees and ordinances are included, but the co-ordination with acts of God introduces too short a waiting period of thirty days for termination of the unsurmountable obstacle to presentment or protest, and the ample reservations of the states, allowing deviations from article 54 and defense against foreign *moratoria* (annexe II, article 22), have marred the uniformity of the regulation.[103]

(c) *Estoppel.* The difference between the two situations described under (a) and (b) is illustrated by a German decision applying the American rule of estoppel. This rule prescribes, according to a frequent quotation, that:

"Where the indorser of a note by words or acts has in fact misled and put the holder off his guard and reasonably induced him to omit due presentation for payment and notice of non-payments, he is deemed in law to have waived the performance of these ceremonies. . ." [104]

In a case of the Appeal Court of Berlin, the holder, suing upon a German executed indorsement in a bill payable in New York, sought excuse for not having given timely notice and resorted to the American estoppel rule, under the theory that the unitary law of the place of payment should prevail. The bill was indorsed by the signature of the defendant's son as authorized agent, but the father, falsely denying that the son's signature was genuine, induced the holder to fetch back the instrument from New York where it had been sent for presentment, in order to have the defendant examine it. After exact investigation of the facts,

[102] Comptes rendus 1930 p. 253, 256-262.
[103] HUPKA 162-171.
[104] Foster, J. in Kent v. Warner (Mass. 1866) 12 Allen 561, 563; In re Swift (1901) 106 Fed. 65, 68.

the court held that the plaintiff's conduct satisfied the conditions under which NIL, section 159 dispenses with protest, for the time being, allowing it when the cause of delay ceases to operate.

The court wandered off from the principle of the several laws:

"The question is only whether the provisions excusing failure to protest belong to the provisions involving the time for protest (law of the place of payment) or to the provisions involving the necessity of a timely protest (law of the domicil of the defendant in recourse). The first view is preferable and highly suggested by convenience. Protest is an act to be made at one time by the last holder of the bill, commonly in a very short space of time. The last holder cannot be supposed to know and observe all laws of the debtors in recourse. Security of commerce therefore requires that a protest still permissible and in time under the law of the place of payment should also be available against a regressee whose domicil has other rules on the effect of delay in making protest." [105]

This eloquent reasoning unfortunately clashes with the existing rules. The recourse against the German indorser stood under German law which seemed to afford merely an action for tortious violation of good morals, but may have provided a more efficient remedy than that recognized for the case at bar. In any case, also under American law to which the court resorted, estoppel dispenses only with the recourse against the one indorser who induced the holder.

III. Time for Suing

1. Suing for Recourse

In the common-law jurisdictions, scarcely a doubt has been expressed that limitation of action, as usual,[106] is

[105] KG; (13th Div.), (April 25, 1932), 6 Z. ausl. PR. 334, IPRspr. 1932, 97, 100.

[106] Vol. III, p. 475 ff.

governed by the *lex fori*.[107] Some of the old leading decisions to this effect dealt with negotiable instruments. The exceptions, such as contained in the borrowing statutes, apply of course, and "extinction" of the action or discharge of the debtor takes the case out of the rule.

In the civil-law doctrine,[108] by which limitation of action is recognized as a substantive institution, governed by the law of the contract, it was taken for granted that the principle of independence was to prevail.[109] But the draftsmen of the Geneva Rules, apprehensive that the drawer might be freed earlier than his indorsee, chose just this situation to impose a single applicable law. As such they selected the law of the place of issue, because the basic law of the bill would afford the appropriate contractual ground for the single law.[110]

Article 5 of the Geneva Rules expresses this meaning so badly that it became controversial whether it refers only to periods of preclusion rather than also to limitation of action. The broader construction, however, prevails and is founded upon the fact that the time restrictions almost everywhere are but genuine limitations of action. No interpretation serves to extend the provision to the causes of interruption and suspension of the time period, which are left either to the *lex fori*[111] or to the several laws,[112] or reserved to national legislation.[113]

[107] LORENZEN 164; more recently, *e.g.*, Coral Gables v. Christopher (1937) 108 Vt. 414, 189 Atl. 147, 109 A.L.R. 474; Gaffe v. Williams (1942) 194 Ga. 673; Western Coal and Mining Co. v. Jones (1946) 27 Cal. (2d) 819.

[108] An attempt to collect decisions on the special matter ends in failure to discover a principle; see ARMINJON, DIP. Com. 374 § 206.

[109] 2 BAR § 308; DIENA, 3 Tratt. § 247.

[110] The writers also refer to an express utterance of a draftsman, Comptes rendus p. 363, *cf.* 2 MOSSA, La cambiale secondo la nuova legge (1937) 841 § 811; KESSLER 153 n. 1; ARMINJON ET CARRY 531 § 476.

[111] HUPKA 221 invoking a conflicts rule implied by Conv., art. 16 and Reservation, art. 17.

[112] ARMINJON-CARRY 531 § 476; ARMINJON, DIP. Com. 376 § 207 refers suspension for minor age to the national law.

[113] Geneva Conv., Annex II art. 17.

The entire idea of article 5, however, is wrong. This very problem could have remained in the domain of the principle of independence, since commonly the time periods run successively. As the rule now is, a bill issued in England carries a privilege to sue during three years in Continental recourses, which are normally of a few months or even weeks, and of one year under the Geneva Convention, article 70, for the holder and six months for an indorser, provided that the Geneva Rules have been made the only conflicts rules of the matter at the forum.

2. Suing for Payment

There is a problem for the civil law courts, respecting the obligation of a maker or acceptor, whether they should use a criterion different from what they would select for the respective contract as a whole. It would seem that there is a strong and sound tendency to apply the law of the place of payment, irrespective of its application to the obligation of the primary parties.[114]

[114] See for France the comment by BATTIFOL, Traité 550 § 549 on Cass. civ. (July 7, 1938) Gaz. Pal. Oct. 27, 1938, p. 530 (which establishes even a unitary rule for recourse against the Geneva Rules. In Germany *lex loci solutionis* has been applied in its quality as the general rule of contracts (2 RGZ. 13; 6 RGZ. 24, etc.).