

CHAPTER 63

Checks

I. THE SPECIAL LAW ON CHECKS

Differentiation. In the Anglo-American enactments the check is defined as a bill of exchange drawn on a bank payable on demand.¹ What particular elements this variety of a bill of exchange does have, is relegated to the background, but they are not insignificant.² The Continental laws, developing the check more recently, and then rapidly, instituted an "autonomous" type of commercial paper. It is now regulated separately in the Geneva Convention of 1931,³ though supplemented by national legal rules of the member states, and in many special statutes in other countries. The authors of the Convention, however, were anxious to preserve as much analogy as feasible to the Convention on Bills and Notes of 1930.

Whereas the long preparation of the prior treaty was largely inspired by the hope for accession of the common-law countries, no illusion in this respect remained in 1931.⁴ The effort became a purely European compromise. Even so, three main systems were to be reconciled, the French, German, and Italian. Considering the fundamental divergencies then existing, the unification was hailed as a conspic-

¹ BEA s. 73; NIL s. 185.

² See the enumeration in 10 C.J.S. 412 and Supp. 1953.

³ Convention portant loi uniforme sur les chèques, Geneva, March 1931. 5 HUDSON, Intern. Legisl. 889 No. 283 (hereafter called *Geneva Check Convention*); Convention destinée à régler certains conflits de lois en matière de chèques, Geneva, March 19, 1931, 5 HUDSON, *id.* 915 No. 284. (hereafter called *Geneva Rules*.)

⁴ MOSSA, Check 86.

uous progress, although the 57 sections are incomplete and variegated by 31 reservation clauses, all of which have been used, some by all or almost all member states.⁵ The law of checks was called at the Hague in 1912 "un enfant de Bohème" and in Geneva in 1931 "un enfant terrible."⁶

Among the differences between checks and bills of exchange, two are outstanding: checks enjoy total or partial exemption from the tax imposed on bills, and the time for presentment and for suing is much shorter. Conflicts law, moreover, is strongly influenced by the importance of the banking institution and bank collection tying the check to the individual bank visible on the face of the paper; no such drastic connection is afforded by similar negotiable instruments.

Also, the conflicts rules of the Bills of Exchange Act and those of the American courts on bills and notes pretend to include checks, although the peculiar nature of these instruments evidently demands some distinction. The Geneva Check Convention is accompanied by a convention on conflict rules, which shows even more improvisation than its counterpart concerning bills and notes, and has unhesitatingly adopted the latter's controversial rules on capacity, form (with one meritorious addition), and "effects," as well as the time for suing in recourse. A gratifying part will be found in article 7, which puts a series of incidents uniformly under the law of the place where the check is payable.

⁵ See the table in HAMEL ET ANCEL, *La convention de Genève sur l'unification du droit du chèque*, (1937). HAMEL, 1 *Banques* 85 § 703 considers as a reservation art. 4 par. 3 of the Check Convention (allowing a member state to validate obligations between its nationals contracted abroad in the form of the national law); hence, this paragraph not mentioned in the reservations used by France has no effect. The contrary opinion of 2 PERCEROU ET BOUTERON 177 n. 3 seems less well-founded.

⁶ GIANNINI, *Sistema* 354.

In the other countries, the European controversies are shared.

United States. If the conflicts rules concerning bills of exchange largely suffer from uncertainty, an additional grievous complication centers on the question whether there are modifications of these rules with respect to checks. In the most important jurisdiction, New York, the views have changed. In *Hibernia National Bank v. Lacombe*, the Court of Appeals declared in a case involving a check that the nature, validity, interpretation, and effect of the instrument were governed by the law of the place of payment.⁷ *Amsinck v. Rogers*, establishing a scheme of division between the topics pertaining to the inception of negotiable instruments and the incidents of performance (payment), drew a line of distinction between bills and checks. The *Hibernia* decision was explained on the general principle of *lex loci contractus*, because the drawer of a bill of exchange undertakes to pay at the place of drawing, and the drawer of a check contracts to pay at the place of payment.⁸ Finally, in *Swift & Co. v. Banker's Trust Co.*, the court in 1939 overruled the distinction, assuming that the Negotiable Instruments Act establishes a uniform law in which the obligations of a drawer of a check or a bill of exchange payable at demand are identical, and hence also the conflicts rules are common. Thus, the validity and effect of the drawer's contract should be governed by the law of the place of contracting. A check drawn in Chicago to a fictitious person upon a bank in New York through fraud of an employee of the drawing firm, was held to be a check payable to the bearer under an Illinois statute of 1931 and correctly paid by the New York bank; under the Negotiable Instruments Act, adopted in New York,

⁷ 84 N.Y. 367.

⁸ 189 N.Y. 252, 257.

the result would have been contrary.⁹ This cannot be the last word.

Authority in the other American jurisdictions remains thoroughly divided.¹⁰

Function. The check is contrasted with bills of exchange as serving payment while bills are instruments of credit and financing. With the actual low stand of private international credit operations, hoped to be temporary, the check has made an enormous advance and, at present, may sometimes replace commercial drafts or promissory notes in their own field; certainly it is often used as security. Nevertheless, the statutes and the regulations by bank accords and most standard conditions are intended for instruments essentially contemplating payment. In the United States, the banks handle daily an estimated number of 35 millions of checks mainly in the service of collection for payment.¹¹

By another functional restriction, checks in some parts of the world are more or less strictly regarded as local paper. At one time, it was specially noted in Latin America that Cuba and San Salvador permitted international circulation.¹²

Conflicts. The contrasts between the Geneva uniform check law and the Anglo-American statutes have been repeatedly described in detail, notably by Feller.¹³

Conflicts of laws relating to this subject are bound to

⁹ *Swift & Co. v. Banker's Trust Co.* (1939) 280 N.Y. 135, 144, 19 N.E. (2d) 993. Whilst usually the local law of a bank is emphasized, here a bank is discharged for the reason that at the place of issue the check was payable to bearer, depending on the fraudulent act of an employee of the drawer, unknown to both parties.

¹⁰ See 10 C.J.S., Supp. 1953, Bills and Notes § 48.

¹¹ MALCOLM, "Article 4, A Battle with Complexity," *Wisc. L. Rev.* (1952) 265, 270 and additional information by Mr. Malcolm.

¹² ARGANA § 32.

¹³ FELLER, "The International Unification of Laws Concerning Checks," 45 *Harv. L. Rev.* (1932) 668. On the fundamental differences from English law, see GUTTERIDGE in 2 PERCEROU ET BOUTERON 222.

occur in increasing numbers, but for one reason or another, they very seldom reach the courts. The Conference of 1931 diligently tried to obtain progress over the preparatory drafts and succeeded in clarifying at least those questions most troublesome in international circulation. Such topics were revocation (stop payment), provision (cover), time for presentment, and prescription (time for suing). The Rules of Geneva transcend this subject matter, although they leave much open to doubt.

The habitual neglect of the conflicts rules by the law-makers has produced doubts even with respect to the scope of application of the Geneva Rules. Although Germany has adopted them with the Convention in a new domestic law, and Italy now has clearly two different laws for the member states and other states, in France it is controversial whether the ratified Geneva Conflicts Rules are general or intended for the member states.¹⁴

A number of provisions are closely shaped after the model of the conflicts rules on bills and notes; they involve capacity (art. 2), form (art. 4), effects of obligations (art. 5), and form of protest (art. 8). Little will have to be added in these respects to the remarks made in the foregoing chapters.

The Rules have established a list of problems specially assigned to the law of the place of payment:

“Article 7. The law of the country in which the cheque is payable shall determine:

(1) Whether a cheque must necessarily be payable at sight or whether it can be drawn payable at a fixed period after sight, and also what the effects are of the post-dating of a cheque;

(2) The limit of time for presentment;

¹⁴ For general application because France has not restricted the ratification of the Convention, HAMEL, *Banques Suppl.* 84 § 700; *contra* 2 PERCEROU ET BOUTERON 171 § 196.

(3) Whether a cheque can be accepted, certified, confirmed or visaed, and what the effects are respectively of such acceptance, certification, confirmation or visa;

(4) Whether the holder may demand, and whether he is bound to accept, partial payment;

(5) Whether a cheque can be crossed or marked either with the words 'payable in account' or with some equivalent expression, and what the effects are of such crossing or of the words 'payable in account' or any equivalent expression;

(6) Whether the holder has special rights to the cover and what the nature is of these rights;

(7) Whether the drawer may countermand payment of a cheque or take proceedings to stop its payment (*opposition*);

(8) The measures to be taken in case of loss or theft of a cheque;

(9) Whether a protest or any equivalent declaration is necessary in order to preserve the right of recourse against the endorsers, the drawer and the other parties liable."

The solutions given to the most troublesome questions will be reviewed presently.

II. CREATION

1. *Form.* Article 4 of the Geneva Check Rules reproduces the obnoxious disunity left in the Rules on bills concerning form, but adds a salutary relief (paragraph 1, i.f.): "Where the form of the place of the signature is not observed, it shall be sufficient if the forms prescribed by the law of payment are observed."

2. *Capacity of Drawer.* Article 2 of the Rules, organized after the model of the analogous rule concerning bills, results in the principle that the national law of the drawer at the time of the signature determines his capacity of contracting in general and drawing checks in particular, while subsequent death or insanity is immaterial (Check Conv. art. 33). In the American practice, capacity is governed

by the law of the place of delivery; and if capacity existent at the time ceases subsequently as the Bill of Exchange Act states in case of the drawer's death, a respective notice to the bank ends its authority to pay.¹⁵ In conflict the law of the place of payment should decide (*infra* III 2).

3. *Capacity of Drawee*, "Passive check capacity." The legal definition of a check in the Anglo-American Acts requires drawing on a banker. This is also the law of Austria, Germany, and the Scandinavian countries and the declared aim of article 3 of the Check Convention; but subjected to a strong restriction:

"A cheque must be drawn on a banker holding funds at the disposal of the drawer and in conformity with an agreement, express or implied, whereby the drawer is entitled to dispose of those funds by cheque. Nevertheless, if these provisions are not complied with, the instrument is still valid as a cheque."

The statement of the principle was thus deprived of any sanction, in order to satisfy the countries where either a check could be drawn on anybody, as was then the law in France, or on institutions assimilated to bankers, as the French law is now.¹⁶ A reservation, No. 4, allows striking out the "nevertheless" sentence or extending the category of capable drawees. Both these privileges have been utilized, and in some statutes it now seems doubtful whether a check on a nonbanker is considered a bill of exchange, as in the United States, or radically void.

The article proceeds to uphold in any case the obligations arising out of the signatures affixed in countries whose laws permit drawing on persons such as the drawee.

¹⁵ BEA sec. 75, and see FELLER, 45 Harv. L. Rev. 686.

¹⁶ France: Decree Law, October 30, 1935, art. 3 amended by Law, Feb. 14, 1942.

In view of these differences, article 3 of the Check Rules states:

"The law of the country in which the cheque is payable determines the persons on whom a cheque may be drawn."

The Convention would certainly have done better either to adopt the entire common-law rule or to exclude any reservation for nullity as check or nullity altogether.¹⁷ Fiscal interests have played an excessive role in the question.

The Italian statutes recognize as checks instruments issued and payable in a foreign country only where the drawee has passive check capacity in that country;¹⁸ but these are valid anyway under the Geneva Rules, article 3.

The principal conflicts rule with its choice of the law of the place of payment is clearly adequate; the check being concentrated upon the right of the drawer to draw upon the specific drawee, his quality has to be determined by his own law. When, before the Convention, a check drawn in Austria on a nonbanker in Paris was a check in France, it was no check in Austria.¹⁹

Illustrations. (i) A check is drawn in New York on the Credit Municipal de Bordeaux recognized in France as assimilated to banks. Under Geneva Rule 3, the check is valid in France and under Geneva Convention, article 3, likewise in Germany. In an American court the law of the place of issue would result in invalidity as check, that of the place of payment in validity, and the latter should be preferred, despite the New York Court of Appeals.

(ii) Vice versa, where a check is drawn in Paris on an American stock exchange broker, American indorsers would be liable under the law of bills of exchange in most Con-

¹⁷ For the latter method MOSSA, Check 140.

¹⁸ Italy: RD., Dec. 21, 1933, art. 3, par. 1, criticized as immaterial by MOSSA *l.c.* 141. The German Check Law § 25 contained an exception for checks payable abroad which made sense in face of a *lex loci contractus*.

¹⁹ STROBELE 91.

tinental and American courts. But what would be the French solution? It would seem that article 3 of the French Check Law means only French, not foreign *agents de change* and *courtiers en valeurs mobilières*, and the instrument would not be considered a check. Yet according to an official Instruction concerning the stamp duty,²⁰ the reasoning of which goes beyond the stamp question, it is fatal that the instrument does not bear the name "lettre de change," wherefore it would not be treated as a negotiable instrument at all.

III. COVER AND STOP PAYMENT

1. *Cover.* The most dreaded of all obstacles to unification of the law of negotiable instruments has a particular aspect in the law of checks; the existence of cover is the avowed requirement even in those countries that do not believe in the tacit transfer of cover by the creation of cambial rights. The requirement, it is true, is subject in the Check Convention of Geneva to degrees of seriousness depending upon the quality of the drawee as banker. The Check Rules, article 7 (b), call for the law of the country in which the check is payable, to determine:

"Whether the holder has special rights to the cover and what the nature is of these rights."

This rule, quite contrary to the Rules concerning bills and notes, which declare for the law of the issue, was generally recommended.²¹ As justification, it was alleged that a check is drawn on the basis of a credit the amount of which is not identical with the sum of the check; that the banks must pay it immediately in the course of large business and there is no time to study various foreign laws;

²⁰ Instruction No. 4228 de la Direction générale de l'Enregistrement, etc., Dec. 2, 1935, 2 PERCEROU ET BOUTERON 268.

²¹ HIRSCH, Provision 154; STROBELE 95; the commissions of experts, the Institute of Int. Law, 33 III Annuaire 268, 277. The French writers are inclined to this solution against Cass. (Feb. 6, 1900) S. 1900.I.161.

and, above all, that subsequent insolvency of a drawer or his order of stop payment, subject to a foreign law, ought not to disturb a banker, at a place where the underlying claim of the drawer is deemed to have been transferred to the payee and the holder.²²

Illustration. A check drawn in New York on a bank in Paris is presented by the holder at a time when the drawer had become a bankrupt. While an American bank knowing this would refuse payment, the Paris bank must pay the holder in his quality as assignee of the cover to the extent of the sum payable on the check. The Mixed Arbitral Tribunal between Belgium and Germany decided by the same test of *lex loci solutionis* that a Belgian plaintiff had no claim in the clearing against a German bank according to the German law, ignoring the doctrine of cover.²³

Specific party agreements for the assignment of cover are to be distinguished in principle. They are frequent in Germany as well as in the United States when banks discount a negotiable instrument in security transactions. On the other hand, certification of a check by a bank is considered assignment of the funds to the amount of the check.²⁴ It would seem that despite the theoretical difference from the French type, the applicable law should always be that of the bank.

2. *Stop Payment.* Common law and civil law are in sharp disagreement not only concerning the effect of death and bankruptcy of the drawer of a check on the right of the holder, but also on revocability. At common law the order

²² PERCEROU and MARKS VON WÜRTEMBERG in the Conference, see BOUTERON, Statut 705 ff.

²³ TAM Germano-Belge (Jan. 1, 1929) 8 Recueil Trib. Arb. M. 791. The point was separate from the added fact that there cover was never provided.

²⁴ Comm. Credit Corp. v. Orange County (1950) 34 Cal. (2d) 766, 214 Pac. (2d) 319; cf. New York L. 1944 c. 537 § 325; 37 McKinney's Cons. L. Ann., § 325a, forbidding stop order; Natl. City Bank of Cleveland v. Erskine (N.Y. 1953) 110 N.E. (2d) 508.

to pay may be countermanded at pleasure,²⁵ though there may be liability in the internal relations. Evidently the revocation also ends the authority of the holder to receive, which traditionally, though no longer correctly, is regarded as an authority of agency. For the draftsmen of the Geneva Convention it was a matter of course that a check creates irrevocable relations.

The Convention left additional differences among its own members. The principle is that revocation of a check is not effective until the time of presentment has expired (article 32, paragraph 1). But by exercising Reservation No. 16, a majority of the states have prohibited revocation even after the time for presentment ends. Conflicts Rule, article 7, no. 7, conveniently makes this question depend on the law of the place of payment. Partly it has been perceived that the three problems of cover, subsequent incapacity of the drawer, and stop payment, are closely connected²⁶ and ought to be subject to the law of the place of payment.

If the authorization of the bank to pay is emphasized over that of the payee or holder to receive, the same test will be applied in England and, we hope, also in an American court.

Illustrations. (i) A check drawn in Chicago on a bank in Hamburg, Germany, is countermanded before payment; under German law the stopping is immaterial, even after the time of presentment expires; under American law it

²⁵ BEA sec. 75 and for the United States, BRADY, Bank Checks § 206. It is interesting that the New York surrogate decision, *In re Mason's Estate* (1948) 194 Misc. 308, 86 N.Y.S. (2d) 232, likewise does not hesitate to apply *lex loci solutionis* in the case of an Italian check upon a New York bank. The drawer died before the bank paid the check, but the bank did not know it. The court resorted to the customary New York rule as laid down in *Glennan v. Rochester Trust and Safe Deposit Co.* (1913) 209 N.Y. 12.

²⁶ MOSSA, Check 318.

would be effective. The German law should be applied. In the case of a German check on an American bank, revocation should be allowed.

(ii) A check drawn in Paris upon a bank in New York is revoked. This has consequences not only in the United States but also in France. In France, the drawer is exempt from the heavy penalties of French criminal law, as stop payment may be considered outright crooked.²⁷ In the United States, New York law has been applied without hesitation, where an Italian drawer died before the check upon a New York bank was cashed, although in the same breath the Surrogate referred to the applicability of the law of the place of contracting to checks.²⁸ In fact, the *lex loci solutionis* was competent.

3. *Restriction to Specific Holders.* The Geneva Convention made a compromise between the English "general" and "special" crossing of checks which was adopted in France, Italy, and other countries, and the German and Austrian clause "payable in account" (*nur zur Verrechnung, à porter en compte*). The Convention finished a considerable debate by permitting and regulating both types itself and opening a large choice to the state laws (articles 37-39). Where a country allows only crossing, a check carrying the other clause is construed as a crossed check, and vice versa (Reservation No. 18). The Conflict Rules (article 7, No. 5) add that the law of the place of payment decides which clause is admissible and what its effect is.

Illustration. The drawer in London crosses a check on a bank in Vienna with two lines not inserting any name between them (general crossing). The check figures in Austria, and by the Geneva Rules in all member states, as a check payable in account. It cannot be paid in cash to a third banker or a customer of the drawee (as under

²⁷ HAMEL, 1 *Banques Supp.* § 714, p. 88, d; 2 PERCEROU ET BOUTERON 185 n. 2.

²⁸ *In re Mason's Estate* (1948) 194 Misc. 308, 86 N.Y.S. (2d) 232.

article 38 of the Convention) or to a banker (as under the Bills of Exchange Act § 70 (2)).

In England the question falls under the law of the place where the check is first delivered; but can the transformation of the drawee's duty by his own law be ignored? There was a long debate in the Geneva Conference on whether during the circulation in the country of origin itself the law of issue should determine the nature of the payment clause. The majority rejected this exception, to give the place of payment more importance.²⁹

In the United States neither type is used, since in contrast to the Geneva Convention, article 35, and the Bills of Exchange Act, 60, the drawee is responsible for examining the genuineness of indorsements.³⁰

4. *Time for Action.* The time for suing has been fixed at a much shorter period in the Continental laws than for bills of exchange.³¹ The Geneva uniform check law, article 52, allows six months after the end of the time for presentment against the drawee and six months from reimbursement by him or the day when he himself was sued for each endorsee.

However, under Reservation No. 25, after the expiration of these periods actions may be based on enrichment and against a drawer who has failed to provide cover; these provisions have been commonly instituted.³²

The Check Rules, article 6, assign these problems to the law of the place where the check has been created. But interruption and suspension of the period of limitation is left to "each state," and other states may react as they wish.³³ In the common-law countries, the *lex fori* actually

²⁹ GIANNINI, *Sistema* 354.

³⁰ FELLER (*supra* n. 13) 690 n. 143.

³¹ Geneva Conv. on Bills of Exchange, art. 70.

³² France: art. 25 par. 3; Germany: art. 58; Italy: art. 59.

³³ Reservation No. 26.

controls these incidents, though with certain references to other laws, but whether under the Convention *lex fori* or *lex loci contractus*, or *lex loci solutionis* governs, no one knows.

That the law of the place of issue does not furnish an adequate unitary solution, is as true as in the case of bills of exchange. This test was simply adopted as a matter of school tradition.³⁴

³⁴ E.g., Italy: Cass. (March 3, 1933) *Foro Italiano*, 1933 I 730: check issued by an Argentinean to the order of an Italian and payable at a branch of the same bank in Italy: prescription according to Argentine law; *Cf. CAVAGLIERI* 397.