Revue de droit de l'Université de Sherbrooke

RDUS

THE BILLS OF EXCHANGE ACT AND CONFLICT OF LAWS

Ian F. G. Baxter

Volume 10, numéro 1, 1979

URI : https://id.erudit.org/iderudit/1110726ar
DOI : https://doi.org/10.17118/11143/19420

Aller au sommaire du numéro

Éditeur(s)

Revue de Droit de l'Université de Sherbrooke

ISSN

0317-9656 (imprimé)
2561-7087 (numérique)

Découvrir la revue

Citer cet article

Baxter, I. F. G. (1979). THE BILLS OF EXCHANGE ACT AND CONFLICT OF LAWS. *Revue de droit de l'Université de Sherbrooke*, *10*(1), 197–213. https://doi.org/10.17118/11143/19420

Résumé de l'article

Dans son article, l'auteur souligne que les législateurs, les commissions de réforme du droit et la doctrine n'ont prêté que très peu d'attention aux problèmes d'application de la loi des lettres de change en droit international privé et ce, malgré la croissance mondiale des échanges bancaires et financiers internationaux. L'auteur envisage de se référer aux us et coutumes du commerce bancaire international comme critères de négociabilité de certains effets. Il examine les règles de conflit régissant les contrats (« proper law of the contract » doctrine) applicables aux lettres de change.

On y discute du texte et de l'application des articles 160 à 164 dela *Loi des lettres de change*.

On y traite du problème des dettes en devises étrangères dans le contexte d'une dépréciation du dollar canadien par rapport à la devise étrangère qui survient après l'inexécution d'une obligation de payer; on discute d'un arrêt de la Chambre des Lords qui s'y rapporte, *Miliangos* v. *Frank (Textiles).* On recommande d'abroger l'article 163 de la Loi canadienne.

L'auteur fait l'étude comparative des approches civilistes et de Common Law quant à la *Loi des lettres de change*, plus particulièrement en ce qui concerne l'effet d'un faux endossement.

On plaide en faveur de l'avènement d'une nouvelle convention internationale portant sur la législation en matière de lettres de change à laquelle adhéreraient les pays de juridiction de droit civil et ceux de Common Law. A défaut d'une nouvelle convention, l'article formule des propositions en vue d'améliorer l'insatisfaisante situation actuelle.

THE BILLS OF EXCHANGE ACT AND CONFLICT OF LAWS

par Ian F.G. BAXTER*

Dans son article, l'auteur souligne que les législateurs, les commissions de réforme du droit et la doctrine n'ont prêté que très peu d'attention aux problèmes d'application de la loi des lettres de change en droit international privé et ce, malgré la croissance mondiale des échanges bancaires et financiers internationaux. L'auteur envisage de se référer aux us et coutumes du commerce bancaire international comme critères de négociabilité de certains effets. Il examine les règles de conflit régissant les contrats ("proper law of the contract" doctrine) applicables aux lettres de change.

On y discute du texte et de l'application des articles 160 à 164 de la Loi des lettres de change.

On y traite du problème des dettes en devises étrangères dans le contexte d'une dépréciation du dollar canadien par rapport à la devise étrangère qui survient après l'inexécution d'une obligation de payer; on discute d'un arrêt de la Chambre des Lords qui s'y rapporte, Miliangos *v.* Frank (Textiles). *On recommande d'abroger l'article 163 de la Loi canadienne.*

L'auteur fait l'étude comparative des approches civilistes et de Common Law quant à la Loi des lettres de change, *plus particulièrement en ce qui concerne l'effet d'un faux endossement.*

On plaide en faveur de l'avènement d'une nouvelle convention internationale portant sur la législation en matière de lettres de change à laquelle adhéreraient les pays de juridiction de droit civil et ceux de Common Law. A défaut d'une nouvelle convention, l'article formule des propositions en vue d'améliorer l'insatisfaisante situation actuelle.

---

* Professor of Law, Faculty of Law, University of Toronto.

PLAN

INTRODUCTION

This topic has not received much attention from legislators, law reformers, or in the literature. The relevant sections of the *Canadian Bills of Exchange Act*[1] were taken from the U.K. statute of 1882. Critical discussion of principles in standard texts is mostly centred around questions on choice of law theory, such as the "single law doctrine" versus the "several laws doctrine", or whether any, or which, of the forms of the "proper law of the contract" are appropriate. Reported cases are rare and not always helpful. There are major uncertainties as to the meaning of some phrases in the Canadian and English sections.

The other side of the picture is a world-wide expansion of international banking and finance servicing export-import transactions and other aspects of international business, of increasing volume and complexity.

In addition to commercial paper[2], the negotiable certificate of deposit (C.D.) now plays a very important role in both national and

1. *Canadian Bills of Exchange Act*, R.S.C. 1970, c. B-5.

2. The term "commercial paper" is used here as a collective term to cover cheques, bills of exchange and promissory notes. See Baxter, Law of Banking (2d ed., 1968), 34. The definition in the American Uniform Commercial Code also includes certificates of deposit: U.C.C. (1962) s.3-103 (Official Comment, 1). The Code includes certificate of deposit in the article 3 definition of a "negotiable instrument": s.3-104.

international money markets[3]. It is stated in Dicey and Morris[4], that the rule in English law is that an instrument for securing the payment of money may be made a negotiable instrument by statute or "by custom of the mercantile world in England, which custom may, if well established, be of recent origin...". It would seem, however, that an instrument such as a Euro-currency negotiable C.D. depends for its negotiable status on the customs and practice of international banking, and particularly on the customs and practice of the financial institutions operating in one or more of the Euro-currency markets (the principal market being in London). There has been a strong development of international money and bond markets in the last few decades[5], and these international markets are actual and potential sources for the creation of new negotiable instruments, and sources of customary rules for dealing with them. Such a development should encourage those who predict a new Law Merchant (as an autonomous legal system created through standardization or arbitration clauses, standard contracts, and standard conditions)[6]. In the same general category (though arising from convention and not from custom) there is a tendency to internationalize or regionalize[7] money of account. The United Nations Convention on the Carriage of Goods by Sea, 1978 (the Hamburg Rules) designates as the unit of account, the Special Drawing Right as defined by the International Monetary Fund[8].

The law sometimes regards commercial paper as a set of contracts and sometimes as a piece of property[9]. The most outstanding legal "break-through" in the history of commercial paper was the concept of rights notionally embedded in the paper and portable with it. This enabled the theories of chattel dealings to be applied by analogy to commercial paper, so avoiding cumberso-

3. C.D.s have a role in the Euro-currency and Asian currency markets, beginning with the London Dollar C.D. in 1966. See, for example, Bell, The Euro-dollar Market and the International Financial System (1973), 39-40 and 55-57; Davis, The Euro-Bank (1976), 26-27 and 39-40. The Euro-currency C.D.'s outstanding recently amount to billions of dollars: Financial Times of London World Business Weekly, Vol. 2, No. 14 (1979), 33.

4. *Conflict of Laws*, (9th ed., 1973), 839, Rule 162.

5. Asian Currency markets now exist in addition to Euro-currency markets.

6. See Kegel, The Crisis of Conflict of Laws, (1964), 112 Rec. des Cours, 93, 260.

7. As presently in the EEC.

8. Silard, Carriage of the S.D.R. by Sea: the Unit of Account of the Hamburg Rules (1978) 10 J. of Maritime L. and Commerce, 13.

9. American Restatement of the Law Second, Conflict of Laws, ch. 8, topic 4.

me, and perhaps uncertain transfer by assignment. But, although this duality of characterization may be useful as an approach to internal dealings with commercial paper, it is a possible source of confusion in transnational dealings, because the connecting factors may be different for contract and property.

The so-called "proper law"[10] of a contract, seems to approximate, in current doctrine, to the system of law chosen by the parties (expressly or impliedly), usually called "party autonomy", or failing a choice, the system of law "with which the transaction has its closest and most real connection"[11]. The American Uniform Commercial Code[12] allows the parties to choose the applicable law when the transaction bears a reasonable relation to the selected state, and failing such agreement, the Code applies to transactions bearing an appropriate relation to the enacting state. Legal advisers can predict reasonably well under modern proper law theory if the parties have expressed a choice, or where the usual contact elements are clearly weighted in favour of one legal system. Otherwise the results may really be unpredictable without litigation[13]. Such a doctrine could be frustrating and unhelpful if applied to commercial paper, which normally contains no party selection of an applicable law; of which "certainty" is said to be the keynote[14]; and which could be traded in a secondary market. Indeed, the Canadian and U.K. statutes do not use the current doctrine, but are based on earlier theories of the proper law which aimed to assist predictability by applying the *lex actus*.

The usual connecting factor for property is the situs at the time of the transaction[15]. *Cammell* v. *Sewell*[16] is regarded as the basic

10. A term which, of itself, conveys nothing as to how to select it. Savigny's proposed task was: to ascertain for every legal relation the area of law to which, in view of that relation's particular nature, it belongs, or by which it is controlled. See discussion in Von Mehren and Trautman, The Law of Multistate Problems (1965), 42-46.

11. Dicey and Morris (9th ed., 1973), 721.

12. S.1-105 (1962). American Restatement of the Law Second, Conflict of Laws, s.214.

13. See, for example, *Imperial Life Assurance of Canada* v. *Colmenares*, (1967) S.C.R. 443; *Ross* v. *McMullen*, 21 D.L.R. (3d) 228; *Compagnie d'Armement Maritime* v. *Compagnie Tunisienne de Navigation*, (1971) A.C. 572; *Coast Lines* v. *Hudig & Veder Chartering*, (1972) 1 Q.B. 34.

14. Baxter, The Law of Banking (2d ed., 1968), 39.

15. But some writers criticize the present use of situs in private international law as excessive: see, for example, Weintraub, Inquiry into the Utility of Situs as a Concept in Conflicts Analysis, (1966) 52 Cornell L.Q. 1.

16. (1860) 5 H & N 728, 157 E.R. 1371, 29 L.J. Ex. 350, 2 L.T. 799.

English law precedent for applying the *lex situs* to particular transfers of movables, but it is a confused case, and even its ratio is not free from doubt[17]. The policy of such a rule is the protection of titles acquired validly by the law of the place of acquisition. It has been argued that there is a similar policy theme for commercial paper, namely, the promotion of free circulation, and, as a corollary, the protection of the holder in any action with a remote party[18]. But this approach places a great deal of emphasis on the transferor — transferee relationship, whereas there are other and perhaps even more important relationships involved, such as that of acceptor and holder. The theory of embedded rights applies "chattel thinking" —, but it could be argued that this involves a strained analogy between a corporeal movable and paper carrying embedded legal rights[19]. Commercial paper is a chameleon, because it is also a debt instrument and a chose in action, and the characteristic situs as a debt instrument would be the place where it is payable.

Some of these policy issues can be suggested by a hypothetical[20]. X in Canada draws a cheque on a Canadian bank, payable there, and mails it to a French payee. Y fraudulently obtains the cheque, forges an endorsement in France and receives cash for the cheque there from a French bank. In French law, by the principle of autonomy[21], an *ex facie* complete chain of endorsements gives a good title. But by Canadian law a forged signature would be "wholly inoperative" on these facts[22]. So by the internal *lex situs* of the transfer, the French bank acquires a good title, and can claim reimbursement from the Canadian bank. By the internal *lex loci solutionis*, the French bank has no title[23].

---

17. Baxter, Secured Transactions and Conflict of Laws, (1978) 3 Can. Bus. L.J. at 57-59. See also Dicey and Morris (9th ed., 1973) 535.

18. Note in (1942) 55 Harv. L. Rev. 1181. See also generally Stumberg, Commercial Paper and the Conflict of Laws, (1953) 6 Vand. L. Rev. 489. But the rule may also have the effect of invalidating a transaction which is valid in the internal law of other systems e.g. in that of the common residence of corporate parties to the transfer.

19. The place of endorsement will not usually appear on the instrument so it may be difficult to ascertain, if the title of a later holder is challenged by the acceptor. Batiffol and Lagarde, Droit International Privé (5th ed., 1971) Vol. 2, 181.

20. Cf. Johnson and Parachini, Forged Indorsements and Conflict of Laws (1965) 82 Banking L.J. 95.

21. A good title is given by — une suite ininterrompue d'endossements, même si le dernier endossement est en blanc. C. com., 120-121 (France).

22. S.49(1).

23. The cheque in this hypothetical is an "inland bill" (see B.E. Act s.25) and by s.161 its endorsement should be interpreted, as regards the payer, by Canadian law. But

I- THE CANADIAN BILLS OF EXCHANGE ACT

The sections of the Canadian Bills of Exchange Act dealing with conflict of laws[24] are not a complete statement of the private international law of commercial paper, but give the applicable law for (a) "requisites in form" as to the validity of the instrument and supervening contracts; (b) "interpretation" of drawing, endorsement, acceptance or acceptance *supra* protest; (c) the duties of the holder in regard to presentment for acceptance or payment, "and the necessity for or sufficiency of a protest or notice of dishonour"; (d) the calculation in Canadian money when the instrument is expressed in foreign currency; (e) the due date of an instrument drawn in one country and payable in another. Questions not falling within these sections must be determined by common law principles and one of the problems is to fix the boundaries between the sections and the common law, since the drafting of the conflict sections is uncertain in places.

If commercial paper is drawn in one country and negotiated, accepted or payable in another country, its validity "as regards requisites in form" is determined by the law of the place of issue, and the validity of supervening contracts "as regards requisites in form" is determined by the *lex loci contractus*[25]. However, if commercial paper, issued out of Canada, is valid as to form by Canadian law, then, as regards enforcing payment, it may "be treated as valid as between all persons who negotiate, hold or become parties to it in Canada"[26]. Suppose a bill of exchange drawn payable to bearer is issued in France, and it is negotiated to X who is now the holder of it in Canada. By Canadian law[27] a bill may be validly drawn payable to bearer, but such a bill is not valid by French internal law[28]. If the acceptor is a French bank and the bill is payable in France,

---

in *Alcock* v. *Smith*, (1892) 1 Ch. 238, there was also an inland bill, and (although there is a corresponding provision in the English B.E. Act) the court recognized a title valid by the *lex situs*. This case is discussed later in this article, and also the problem of the meaning of "interpretation" in s.161.

24. Ss.160-164.

25. B.E. Act, s.160. "Issue" involves "delivery". For the meaning of "issue" see B.E. Act, s.2(j) and for the meaning of "delivery" see B.E. Act, s.2(g).

26. B.E. Act, s.160(3).

27. B.E. Act, s.17(1).

28. C. com. 110(6) (France). Also e.g. (Italy) 2 R.D. 14 Dic. 1933 N 1669, 1(6); (Switzerland) C.O. 991(6); (W. Germany) 1933 W.G. 1; (Belgium) C. com., It. 8, 1(6) (L. 31/12/55); (Portugal) C. com. 278(3); (Mexico) L. Gen. de Titulos y Operaciones de Crédito, 76(6).

payment might be refused. The Canadian provision leans in favour of validating the instrument. German law is said to favour a *lex validitatis* approach[29].

Section 161 of the Canadian statute deals with the "interpretation" (undefined) of the drawing, endorsement, acceptance or acceptance *supra* protest of commercial paper, drawn in one country and negotiated, accepted or payable in another. A distinction is made between and "inland bill" and a "foreign bill"[30]. The *lex loci contractus* is applied to a foreign bill, but "where an inland bill is endorsed in a foreign country, the endorsement shall, as regards the payer, be interpreted according to the law of Canada".

In *Canada Life Assurance* v. *Canadian Imperial Bank of Commerce*[31] orders on cheques were addressed to a New York "agency" of the bank. The trial judge held that "person" in section 25(1) (b) of the Bills of Exchange Act referred to the bank as a whole and not to an agency. The Bank Act defines a branch of a bank as including an agency[32]. But the Ontario Court of Appeal held that the cheques were not inland bills. Although the Bank Act provides that a branch "includes an agency, the head office and any other office of the bank,"[33] so that, for example, the power to "open branches"[34] includes the establishment of an agency,it does not follow that a branch is equivalent to an agency. Branches are part of the parent bank, although for some purposes they may be regarded as distinct[35], but an agency proper is an independent contractor, paid by commission. But although the name was "The Agency, Canadian Imperial Bank of Commerce" the New York operation appears to have been really an "off-shore" office (or branch) of the bank, and it was not incorporated. It was licenced by New York law to accept

29. According to Ehrenzweig and Jayme, Private International Law (1973) Vol. 2, 112, the German rules on negotiable instruments have established the "prevalence of any pertinent validating law".

30. Defined in B.E. Act, s. 25.

31. (1976) 8 O.R. (2d) 210, 57 D.L.R. (3d) 498, 74 D.L.R. (3d) 599. The Supreme Court of Canada dismissed an appeal by judgment pronounced on May 22, 1979. The relevant section of the American Uniform Commercial Code was s.3-405(1) (c).

32. S.2(1) (e). See also Bill C-57, 26-27 Eliz. 2, 1977-78, clause 2(1).

33. S.2(1) (e).

34. S.75(1) (a).

35. For example: (repayment of deposit) *Joachimson* v. *Swiss Bank Corporation*, (1921) 3 K.B. 110; *Arab Bank* v. *Barclays Bank*, (1954) A.C. 495; (B.E Act, s. 165(3)); *Bank of Nova Scotia* v. *Gould*, (1978) 17 O.R. (2d) 96; (*situs* of deposit) *Rex* v. *Lovitt*, (1912) A.C. 212, 219.

deposits and provide services for "foreign" customers, and the cheques were in $U.S. The Supreme Court of Canada held the cheques were not drawn upon a person resident in Canada, and so they were foreign bills. Suppose that after the issue of a cheque addressed to the off-shore office of a Canadian chartered bank, and before payment of it, the drawer-customer transfers the off-shore balance to a Toronto branch of the same bank, could the bank refuse payment of the cheque (assuming adequate funds in the customer's Toronto account) on the ground that the off-shore office and not the bank was the drawee? Who is the drawee, the bank as a whole or just the off-shore office? A bank need not pay a cheque at a branch other than the one on which it is drawn[36], but this result is based on reasonable business practice, because it is there that the customer's signature can be verified.

The *Canada Life* case raised the question as to whether section 161 applied at all. Is the effect of a forged or unauthorized signature a matter of "interpretation" within that section? In *Alcock* v. *Smith*[37] an inland bill of exchange was drawn accepted and payable in England. It was endorsed in blank in Norway and delivered to an agent of the English plaintiffs. It was seized in regard to a Norwegian judgment against a partner in the plaintiffs' firm and sold at a public auction, at a time when it was overdue. It was then transferred by the purchaser to a Swedish bank. By the English statute an overdue bill "can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had"[38]. But by both Norwegian and Swedish law the transferee in good faith of an overdue bill was not subject to the equities. The court applied the foreign *lex actus*. Lindley L.J. said: "Now, this bill was indorsed in such a way that, interpret as you will, there is nothing wrong in the indorsement. In fact, if you interpret it according to English law, the result is just the same as if you interpret it according to any other law". Page L.J. stated that: "As to personal chattels, it is settled that the validity of a transfer depends, not upon the law of the domicile of the owner, but upon the law of the country in which the transfer takes place". *Alcock* v. *Smith* seems to rest on two propositions: (i) that, contrary to the view of Chalmers[39], "interpretation" does not include the

36. *Prince* v. *Oriental Bank*, (1878) 3 App. Cas. 325.

37. (1892) 1 Ch. 238.

38. S.36(2). Compare the Canadian B.E. Act, s.70(1).

39. See Dicey and Morris (9th ed., 1973), 853.

obligations of the parties as deduced from such interpretation, but it is limited to the meaning of the words written on the instrument, and (ii) that if section 161 is so interpreted, then, because of the theory of embedded rights, commercial paper (at any rate if it is payable to bearer) should be treated on the analogy of chattel property by applying the *lex situs* at the time of transfer[40]. The authorities are not all one way on the first proposition, but Castel[41] takes the view that: "Section 161 deals with interpretation *stricto sensu* and applies the *lex loci contractus*. With respect to intrinsic validity and effect, the ordinary rules of conflict of laws in the field of contracts are applicable independently of the Act... Unfortunately, some courts both in England and in Canada have held that the interpretation in section 161 includes the obligations of the parties as deduced from such interpretation, or the legal effect of each of the contracts embodied in a bill". In the *Canada Life* case the Supreme Court of Canada found it unnecessary to decide what "interpretation" means in section 161 and the case has done nothing to clarify the law on this important point.

It is argued in Dicey and Morris that it would have been more consistent "with the English conflict rules governing contracts in general and more in accordance with the best interests of commerce to choose as the proper law of each contract, not the law of the place of delivery but the law of the place of payment"[42]. A practical difficulty about section 161 is to ascertain where the different contracts on the bill were made, since this information may not be obtainable from the instrument itself. Payment must be made to the holder[43], and section 88 gives the rules for determining the proper place for presentment[44]. But in commercial practice, in the great majority of cases, the address of the acceptor, drawee or maker[45] will be easily obtained.

---

40. Compare *Cammell* v. *Sewell:* see notes 16 and 17.

41. Canadian Conflict of Laws (1977) Vol. 2, 589-590. See also Falconbridge, Conflict of Laws (2d ed., 1954), 327-340; Dicey and Morris (9th ed., 1973), 851-854.

42. P. 852. It is suggested there that this was the view of Chalmers based on the fiction in the Digest of Justinian that everyone is deemed to have contracted in that place in which he is bound to perform.

43. B.E. Act, s.139(2).

44. B.E. Act, s.183 reference a note.

45. Legal systems based on the Geneva Convention, (such as French law, C. com. 110(5)) require inclusion of the place of payment in a bill of exchange or in a cheque (French D.L. 30 Oct. 1933).

The duties of a holder with respect to presentment for acceptance or payment "and the necessity for or sufficiency of a protest or notice of dishonour" are referred by section 162 to the law of the place "where the act is done or the bill is dishonoured". What is the exact meaning of the phrases "the act is done" and "the bill is dishonoured", and is failure to present included[46]?

Section 163 deals with the situation where commercial paper is drawn out of, but payable in Canada, and the sum payable is not expressed in Canadian currency. A conversion formula is given by section 163, namely, "the rate of exchange for sight drafts at the place of payment on the day the bill is payable"[47]. It is suggested in Dicey and Morris[48] that the principle of section 163 should apply to a bill drawn or a note made in the U.K. and payable there, and expressed in a foreign currency. In Canadian terms this would mean that if X makes a note in Montreal, also payable there, in favour of Y for a sum of 100,000 French francs, the amount payable on the due date will be the value in Canadian dollars of a sight draft on Paris for 100,000 French francs at the maturity rate of exchange[49]. This is an application of the *lex loci solutionis*, and the critical element in section 163 is the Canadian place of payment.

But unhappily debts are not always paid on the due date, and foreign exchange rates are not constant. Mann[50], referring to the corresponding provision of the United Kingdom statute, states: "The exclusive adoption of the rate of exchange of the day of maturity gives vivid expression to the fact that, at least in 1882, a depreciation of the pound sterling was believed to be impossible". But the modern situation had to be considered by the House of Lords

46. For literature references see Castel, Canadian Conflict of Laws (1977) Vol. 2, 588-590; Falconbridge, Conflict of Laws (2d ed., 1954) 329-340. Duty to present is probably not covered: *Bank Polski* v. *Mulder*, (1941) 2 K.B. 266, (1942) 1 K.B. 497; *Cornelius* v. *Banque Franco-Serbe*, (1941) 2 All E.R. 728.

47. As to "sight", see Baxter, The Law of Banking (2d ed., 1967), 44.

48. (9th ed., 1973), 862.

49. Compare *Salim Nasrallah Khoury (Syndic in Bankruptcy)* v. *Khayat*, (1943) A.C. 507, (1943) 2 All E.R. 406, which involved the added complication of a late payment and a fall in the value of the French franc between the due date and the actual date of payment.

50. Legal Aspect of Money (3rd ed., 1971) 321. According to Mann, 323-324, the English common law rule is that a debt expressed in a foreign currency, but payable in England, may be paid in foreign currency or sterling at the debtor's option. As to French practice, see Mann, 317-319.

in *Miliangos* v. *Frank (Textiles)*[51]. In this case a sale of goods contract between a Swiss seller and an English buyer was written in Swiss francs. The goods were delivered, but the price was not paid, and bills of exchange drawn in Switzerland and accepted by the buyer were dishonoured on the due dates. The sum due was 416, 144 Swiss francs and the maturity date conversion was £42,038. But a judgment in Swiss francs at the date of the court hearing would have given a conversion of about £60,000.

The prior "breach date conversion" rule, i.e. that English courts could only express their judgments in sterling, "to which the foreign currency must be converted as at the date when the debt became due..."[52], had existed, apparently, for some 350 years. The House of Lords considered, however, that a departure from the rule was justified, and decided in favour of a judgment in Swiss francs, by a majority of 4 to 1. Lord Wilberforce[53] confined his approval, at the present time, of a change in the breach date rule, to claims such as those in the *Miliangos* case, namely foreign money obligations, "sc. obligations of a money character to pay foreign currency arising under a contract whose proper law is that of a foreign country and where the money of account and payment is that of that country or possibly of some other country but not of the United Kingdom". Conversion should be at the date when the court authorized enforcement of the judgment in sterling[54].

Lord Wilberforce stated[55] that "justice demands that the creditor should not suffer from fluctuations in the value of sterling. His contract has nothing to do with sterling: he has bargained for his own currency and only his own currency". This expresses a fair and common sense policy — *pacta sunt servanda.* Why should a foreign currency creditor receive less than the stipulated amount of his debt because the Canadian dollar depreciated against that foreign currency after the due date and before payment? Surely the rule ought to be that a debtor can pay a foreign currency creditor either the stipulated amount of foreign currency (and any interest,

51. (1976) A.C. 443; *Schorsh Meier* v. *Hennin*, (1975) Q.B. 416. Compare *Deutshe Bank Filiale Nürnberg* v. *Humphrey*, (1926) 272 U.S. 517.

52. *Miliangos* v. *Frank (Textiles)* per Lord Wilberforce, 458, 459, and *per* Bristow J. (1975) Q.B. 487, 492. It had been applied by the House Lords in *In Re United Railways of Havana and Regla Warehouses* (1961) A.C. 1007.

53. At p. 467.

54. At pp. 497-8 *per* Lord Cross of Chelsea.

55. At p. 465.

etc.), or if the debtor cannot lawfully buy the foreign currency, then (at least) the equivalent in the currency of the forum country converted at the date when the money *is paid* by the debtor to the creditor. Only in this way is the parties' bargain maintained, whether or not the debt is paid on time[56].

Section 163 of the Canadian statute contains a conversion formula which is not suitable when the instrument is dishonoured on presentation for payment, and there is a delay before actual payment is made[57]. The section should be repealed.

II- THE GENEVA CONVENTIONS

There are two general complementary approaches to transnational questions namely, (1) private international law and (2) standardization of the legal rules of different states by international conventions. Both have had an influence in regard to negotiable instruments. National statutes on commercial paper have traditionally divided into two main camps — those based on Chalmer's statute, such as Canada, the United Kingdom, and various other members of the Common Law world, and Civil Law countries that have based their law on the Geneva Conventions of the nineteen-thirties. A third type has been added by the American Uniform Commercial Code, which is essentially a modernization and development of Chalmer's model.

There is a general similarity of format and substance between the Geneva Conventions and Common Law models for commercial paper statutes, but two of the areas of difference have special importance for conflict of laws, namely, (a) the form and definition of commercial paper; and (b) the effect of forged or unauthorized endorsements[58]. The Geneva Convention countries have more

56. With respect, the restriction by Lord Wilberforce, confining departure from the breach date rule to cases where the debt arises under a contract having a foreign proper law, should not apply. The key question is not — what is the proper law? — but whether the obligation stipulated repayment in the creditor's own (foreign) currency.

57. S.72(4) of the U.K. Bills of Exchange Act (which corresponds to B.E. Act, s. 163) has been repealed by the Administration of Justice Act 1977, s.4.

58. Another area of difference is the "provision" in French law, in the law of other Civil Law countries, and in the law of Scotland: Baxter, The Bill of Exchange as an Assignment of Funds (1954) 31 Can. Bar Rev. 1131. But this does not seem to have contributed to private international law.

extensive requirements as to definition than those in Chalmer's model or in the Uniform Commercial Code. For example, a bill of exchange in French law must contain *inter alia* the term "lettre de change"; the place of payment; an indication of the date and place of drawing; the name of a person to whom or to whose order payment is to be made[59].

A more important area of difference is the treatment of forged and unauthorized endorsements[60]. Section 49 of the Canadian Act provides that (subject to estoppel and a notice requirement in regard to cheques) a forged or unauthorized signature is "wholly inoperative". But where a cheque "is delivered to a bank for deposit to the credit of a person and the bank credits him with the amount of the cheque, the bank acquires all the rights and powers of a holder in due course of the cheque"[61]. Section 50 gives formulae for recovery, in certain circumstances, where payment has been made on a forged or unauthorized endorsement "in good faith and in the ordinary course of business".

But the Geneva Convention systems have the concept of "autonomy" whereby each good faith endorsee obtains rights distinct from those of the transmitter of the title, and an apparent *ex facie* complete chain of endorsements gives a valid title (to a good faith endorsee). "Le détenteur d'une lettre de change est considéré comme porteur légitime s'il justifie son droit par une suite ininterrompue d'endossements, même si le dernier endossement est en blanc"[62]. The "autonomy" doctrine requires "absence de mauvaise foi et de faute lourde"[63]. The principle is expressed thus in Percerou and Bouteron[64]; "Le porteur acquiert un droit autonome et

59. C.com 110 (D.L. 30 October 1935 as to cheques). Compare: Wechselgesetz 1933, Scheckgesetz 1933 (W. Germany); R.D. 1669, 1933, art. 1 and R.D. 1736, 1933, art. 1 (Italy); C.O. 991 (Switzerland).

60. See, for example, *Embiricos* v. *Anglo-Austrian Bank*, (1905) 1 K.B. 677; *Canada Life Assurance* v. *Imperial Bank of Commerce*, see note 31 *supra*.

61. S. 165(3). See Baxter, Law of Banking (2d ed., 1968) 58, n.1. The Law Reform Commission of Canada has recommended repeal of this provision as giving too wide powers and protection to collecting banks, and makes proposals for new rules based on Article 4 of the U.C.C., e.g. ss.4-205 and 4-208/9. The United Kingdom statute protects a bank which pays on a cheque endorsement in good faith and in the ordinary course of business: s.60(U.K.).

62. C. Com. 120 (France). See also article 121.

63. M. Cabrillac, La lettre de change dans la jurisprudence, (1974), 91. See also H. Cabrillac, Le chèque et le virement (1962), ss. 104, 135.

64. La nouvelle législation française et internationale du chèque, s. 67.

direct à l'égard des signataires du titre qui ne peuvent lui opposer un moyen de nullité ou de résolution qu'ils auraient pu faire valoir à l'encontre d'un porteur précédent". Other Civil Law countries have adopted the autonomy principle[65]. In these countries, a forged or unauthorized endorsement is not what Falconbridge called a "real" defence, namely one that "is based upon the nullity of the *res* without regard to the merits or demerits of the plaintiff. It is a good defence, so far as that defendant is concerned, even against a holder in due course, and as a general rule a holder cannot even claim title through the signature of that defendant"[66].

The autonomy principle protects the title of the good faith transferee and so the title of a buyer in a secondary market. "Autonomy" is meant to relate to the desirable quality of "certainty" in transfer dealings with commercial paper.

If international uniformity of rules on forged and unauthorized endorsements were to be achieved, a major source of conflict of laws on commercial paper would be eliminated. Surely it ought to be possible (in view of the very extensive, world-wide use of commercial paper) for the Common Law and Geneva Convention camps to get together with the U.N. and agree on an internationally uniform statute. But unhappily, the rules of conflict of laws for bills and notes remain a monument to human intractability and unwillingness to compromise.

With what legal rights is a market purchaser of commercial paper really concerned? He wants to know that, either the instrument will be paid on presentation, or if not, that he can sue on it successfully. Essentially he will rely on his inspection of the instrument and its apparent regularity, and his estimate of the credit standing of the drawee or acceptor (and the drawer and secondary parties) or the maker of a note. Only exceptionally will he be likely to buy an instrument that seems to be in any way irregular. Perhaps a buyer may be less particular about his inspection of the instrument if he knows that the applicable law contains the doctrine of autonomy. In any event, the buyer (if he thinks about the matter)

---

65. For example, Belgium: Law of 31 Dec. 1955, art. 16; Switzerland: C.O. 1006; Italy: R.D.. 1669, 14 Dec. 1933, art. 20; C. civ. 1994, 2008; Ferri, I Titoli di Credito (1952) s.25; De Semo, Trattato di Diritto Cambiario (1963) s.456; Salandra, Manuale di Diritto Commerciale (1959) Vol. 2, s. 87; Mexico: Cervantes Ahumada, Titulos y Operaciones de Crédito (1961) 20, 21; U.S.S.R.: Grzybowski, Soviet Private International Law (1965) 91.

66. Banking and Bills of Exchange (6th ed., 1956) 665; Baxter, Law of Banking (2d ed., 1968) 57.

may be uncertain as to what law applies to validity of title on transfer. In regard to the application of Canadian law, for example, a buyer may be confused as to whether valid title is "interpretation" under section 161, and he may not know, from inspection of the paper, where a prior endorsement was made. So, how valuable to a purchaser is a choice of law rule applying the *lex situs* of the paper at the time of the transfer? Also, it must be remembered that many transactions are international (and may be conducted by agents) and the paper may be physically in state A at the time of the transfer, but the ordinary residences of the final holder and the acceptor may be in state B. Should the law of A determine whether the final holder can enforce payment against the acceptor?

Arguments have been made that the *lex loci solutionis*, the law of the ordinary residence, or place of business of the acceptor (or the drawee in the case of a cheque or the maker in the case of a note) should be the main (or even sole) connecting factor for commercial paper[67]. Prior to the U.K. Bills of Exchange Act, "The Scottish court considered that all questions arising out of bills of exchange should be referred to the law of their acceptance. The dominant feature of a bill was the liability of the acceptor, and all the other parties to it were liable only as sureties for him"[68]. According to Battifol and Lagarde[69]: "... c'est au lieu de paiement que le droit se réalisera, que les litiges naîtront, que les mesures conservatoires devront être prises, que l'exécution forcée sera généralement poursuivie: bref c'est en ce lieu que le droit se manifeste extérieurement; c'est sur lui que, selon la formule de Savigny, l'attention des parties est dirigée; il paraît donc rationnel que la loi qui y est en vigueur gouverne le titre qui y sera payable". This view is essentially an idealization of the concept of *situs*, upon the thought that a debt is localized where it is to be paid[70].

---

67. Dicey and Morris, (9th ed., 1973) 852, see note 42.

68. Anton, Private International Law (1967) 417. So a bill accepted in Edinburgh was a "Scotch document": *Robertson* v. *Burdekin*, (1843) 6 D. 17, 27 *per* L.J.-C. Hope.

69. Droit International Privé, (5th ed., 1971) Vol. 2, 181.

70. Compare "... the situs of a debt is where the creditor normally enforces payment", and in regard to corporate debtors" "... the debt has a situs in that country in which the debt is primarily payable, according to the ordinary course of business between the parties, or to an express or implied term of the contract creating the debt": Castel, Canadian Conflict of Laws (1977) Vol. 2, 335, 338, on simple contract debts.

CONCLUSION

It is, I think, fair comment that the Canadian private international law of commercial paper is unsatisfactory, and some of the main reasons are indicated in this article. The real solution is an international uniform law on commercial paper and C.D.'s, sponsored by the United Nations and adopted by the main banking countries. The Common Law and Geneva Convention approaches are already not so far apart although there are one or two difficult areas, particularly the treatment of forged and unauthorized endorsements. In the Canadian solution for this problem the loss falls finally on the first holder after the forged or unauthorized endorsement[71]. But where a cheque is deposited to an account with a collecting bank, that bank acquires the rights and powers of a holder in due course[72]. So, under the Canadian statute, in regard to cheques, a principle of "autonomy" applies to a collecting bank which credits an account with the cheque. In the circumstances given in section 165(3), the effect is to place a collecting bank in a similar position to a bank in a Geneva Convention country such as France[73]. But in any other situation, for example in the case of a bill of exchange or a promissory note or where a cheque is paid in cash and not "delivered to a bank for deposit to the credit of a person...", the result is different and sections 49 and 50 apply. In these other situations the Geneva Conventions apply the autonomy principle. Section 60 of the United Kingdom statute protects a bank which pays a cheque in good faith and in the ordinary course of business, and this is also a limited application of "autonomy".

When there has been a forged or unauthorized endorsement and there is no recovery, or incomplete recovery, from the fraudulent party, and there has been no complicity or negligence by other parties to the instrument, the question is then how to allocate the loss among innocent persons. Both the Common Law and Geneva Convention solutions select, in principle, a victim among the innocent parties. These solutions are all unsatisfactory and arbitrary. Generally, the only proper "victim" is the forger or unauthorized person, and if a claim against that person fails, then the correct solution to the problem is to institute a system whereby

71. B.E. Act, ss.49, 50.

72. B.E. Act, s. 165(3). See note 61. The subsection does not require the bank to have a title to the cheque. It does not even exclude bad faith and negligence by the bank, although such exclusion may be implied.

73. See notes 62, 63 and 64.

the loss is covered by a form of insurance[74]. If an insurance approach were proposed by the United Nations and acceded to by the main banking countries, this would be a major step towards internationally uniform legislation on commercial paper.

Aside from uniformity of national legislation, can improvements be made in the existing Canadian rules of conflict of laws in relation to commercial paper?

The suggestions made by various writers in favour of the *lex loci solutionis*, or in favour of the law of the place of business (or ordinary residence) of the acceptor, drawee or maker, i.e. of the payor designated in the instrument, deserve very serious consideration[75]. They contain the possibility of a choice of law basis for the transnational use of commercial paper with an attractive amount of certainty and simplicity of application. The place of payment need not appear on an instrument under the Common Law statutes, but it will frequently be the same as the place of business of the designated payor[76]. The place of business or ordinary residence of the designated payor, if not indicated on the instrument, will nearly always be easy to ascertain, and in a great many cases it will be a bank or financial institution doing business in the country in which the commercial paper was issued. So, if the place of business of the designated payor is in Canada the commercial paper can be regarded as a "Canadian instrument" and subject to Canadian law; if the place of business is in France it can be regarded as a "French instrument"; if the place of business is in Brazil it can be regarded as a "Brazilian instrument", and so. In this way, those who transfer or deal with the instrument will know from the instrument itself what is its "nationality" and what law governs transactions upon it. The governing law will be a known international constant, notwithstanding dealings that may take place with respect to the paper in different countries.

74. The writer has suggested elsewhere that the law should require that any such loss "be carried by a special compensation or insurance fund supported by contributions from (a) all the Canadian banks and (b) all depositors of these banks by a service charge on their accounts (the maximum amount to be fixed from time to time by the Minister of Finance)". The Law of Banking, (2d ed., 1968), 59.

75. See notes 67, 68 and 69.

76. Compare, for example, B.E. Act, ss. 88 and 183.