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INTERNATIONAL PAYMENTS

NEGOTIABLE INSTRUMENTS

Note by UNIDROIT concerning the effects of the international
bill of exchange in the executory process

The secretariat of UNIDROIT, having had the honour to participate in the meetings of the working party convened by the UNCITRAL secretariat in connexion with the preparation of draft uniform rules applicable to an instrument for optional use in international payments, would draw the Commission's attention to one aspect of the problem which was mentioned, but not discussed, in the working party.

This is the question of considering the desirability of conferring on the new instrument certain advantages which would encourage States to adopt the uniform rules and encourage businessmen to exercise the option of using the instrument in their international transactions.

Apart from the advantage that would accrue from the fact that the provisions governing the new instrument would be almost completely uniform in the various States which had recognized it, consideration should also be given to the possibility of taking unification a step further by conferring on the international instrument the effects of an executory instrument in all signatory countries of the Convention, or at least assimilating it to similar national instruments for enforcement purposes.

The two alternatives will be considered separately below:

1. The bill of exchange, as a negotiable instrument, has special characteristics not only substantively but also as regards procedure. Yet, thus far, attempts at unification have dealt only with the first aspect, namely, legal regulation of the substance of negotiable instruments (the Geneva Conventions of 1930 and 1931, and the very recent preliminary draft on international bills of exchange prepared by the UNCITRAL Working Group. As regards the second aspect - possible regulation of the procedure relating to negotiable instruments in the declaratory and executory phases - each legal system has maintained its independent position, leading to considerably divergent solutions. The reasons why no efforts have thus far been made to achieve unification with regard to negotiable instruments procedure must be sought in the difficulty encountered by any attempt to co-ordinate (and perhaps unify) the legal rules governing procedure under the different systems of law.
2. The possibility of making the bill of exchange an immediately executory instrument is unquestionably bound up with the regulation of negotiable instruments procedure. Neither the Geneva Convention concerning bills of exchange and promissory notes nor the one relating to cheques contains any provision on this aspect of the problem.

However, article 1, second paragraph, of the Convention on the Stamp Laws in Connection with Bills of Exchange and Promissory Notes contains the following rule: "They (the Contracting Parties) may also decide that the quality and effects of an instrument 'immediately executory' which, according to their legislation may be attributed to a bill of exchange and promissory note, shall be subject to the condition that the stamp law has, from the issue of the instrument, being duly complied with in accordance with their laws."

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Thus, the only purpose of this one reference in the Convention to the possible executory effects of a bill of exchange is to leave any decision on the point to the discretion of the legislator in each country.

3. The purpose of this note is not to review, even in broad outline, the various solutions adopted on the subject by the laws of various countries. However, in order to form a rough estimate of what the chances of success would be for a proposal that the effects of an executory instrument should be conferred, by international agreement, on a bill of exchange, a brief survey of the state of the law under the principal legal systems is called for.

4. Negotiable instruments have the quality of executory instruments in the following countries:

- Argentina: Negotiable Instruments Act, art. 60; Code of Civil Procedure, arts. 464, 465 (6);
- Colombia: Commercial Code, art. 834; Code of Civil Procedure, art. 981;
- Costa Rica: Commercial Code, art. 783; Code of Civil Procedure, art. 425 (7);
- Cuba: Commercial Code, art. 521;
- Honduras: Commercial Code, art. 575; Code of Civil Procedure, art. 447 (2) and (5);
- Italy: Negotiable Instruments Act, art. 63; Code of Civil Procedure, art. 474 (2);
- Mexico: Commercial Code, art. 167; Code of Civil Procedure, art. 1391;
- Nicaragua: Code of Civil Procedure, art. 168 (2) and (3);
- Paraguay: Code of Civil Procedure, arts. 673, 399 (6);
- Romania: Negotiable Instruments Act, art. 61;
- Spain: Commercial Code, art. 521; Code of Civil Procedure, art. 1429 (4);
- Uruguay: Commercial Code, art. 868; Code of Civil Procedure, art. 874 (8).

In Italy, the tradition of including an executory clause in bills of exchange is very ancient; it dates back to the Statutes of the Cities of Genoa, Bologna and Florence in the fifteenth and sixteenth centuries.

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The legal basis for attributing executory force to a bill of exchange lies in the will of the debtor in respect of the negotiable instrument, who voluntarily submits to acts of execution, thus relieving the creditor of the obligation to go through the lengthier process leading to a declaratory judgement. The bill of exchange is, therefore, an executory instrument of contractual origin.

5. Apart from the countries mentioned in paragraph 4, there is at present no legal system which recognizes bills of exchange as having immediately executory effects.

It should be noted, however, that Switzerland, through the Federal Act concerning Execution and Bankruptcy of 11 April 1889, provides a special procedure for the enforcement of negotiable instrument debts which amounts, in substance, to conferring executory effects on negotiable instruments (articles 177-189 of the Act). This procedure, whereby the creditor may request the executing office to notify the debtor of an order to pay, is subject to the condition that the debtor is liable to the bankruptcy process (i.e., that he is entered in the register of commercial enterprises).

6. In fact, all legal systems provide special procedures for the recognition and enforcement of debt-claims arising out of negotiable instruments, whether or not the effects of an executory instrument are attributed to the instrument in question. A feature of these procedures is the extreme speed with which the creditor can obtain through the courts an order for payment of the amount owed to him by the debtor, the bringing of an action for a declaratory judgement being necessary only if the debtor puts in a defence within a certain time. The following may be cited as examples:

- France: Procédure d'injonction (Act No. 51-756 of 5 July 1957);
- Germany: Mahnverfahren (Code of Civil Procedure, para. 688),
Wechselmahnverfahren (Code of Civil Procedure, para. 592);
- Italy: Procedimento d'ingiunzione (Code of Civil Procedure, art. 633);
- United Kingdom: Summary procedure before the High Court 1/ and before the County Court. 2/

1/ Order 14 of the Rules of the Supreme Court.

2/ County Court Rules, Order 6, rule 2.

These special procedures are, in every case, necessary and irreplaceable in order to produce certain effects, such as judicial mortgage (hypothèque judiciaire), which can be registered only on the strength of a court order and not of the negotiable instrument alone, even if the latter is recognized as an immediately executory instrument.

The brief survey above shows that, while attributing to a bill of exchange the effects of an immediately executory instrument is advantageous to the creditor, it does not preclude the possibility of the debtor's contesting the validity of the instrument, both in form and in substance, in any defence which he may put in during the executory process. Moreover, the effects of an executory instrument do not cover certain acts of execution, such as a registration of mortgage.

7. Following this recapitulation of the state of the law in the matter, it remains to consider in what form and within what limits unification might hereafter be feasible as regards the executory process in connexion with negotiable instrument debt-claims.

One solution might be to include in the Convention, by virtue of which the uniform provisions relating to the international bill of exchange would be adopted, a provision conferring on the new instrument the effects of an immediately executory instrument, without prejudice to any pleas in defence which the debtor might make during the executory phase.

The objection which may, quite rightly, be raised to such a solution is that it would create a privileged status for the international instrument in countries where a negotiable instrument does not have the effects of an executory instrument.

In that case, one would have to fall back on an alternative solution, which would be to supplement the Geneva Conventions with a new agreement recognizing that bills of exchange and promissory notes (and perhaps also cheques) governed by those Conventions, and the proposed new international instrument, have the effects of an executory instrument.

The difficulties which such a solution might encounter are fully appreciated, despite the importance to businessmen of such subsequent progress towards unification.

Should it appear clear that neither of the solutions set out above are feasible, an essential minimum concession would be to assimilate the new instrument to similar national instruments in the country where the debt-claim is to be recovered, so that the creditor can enjoy the advantages accorded to negotiable instrument debts by the national law. Such a provision would mean that the international instrument would be recognized as immediately executory in countries where similar effects are conferred on national negotiable instruments; he would be able to avail himself of the special procedures laid down for national negotiable instruments wherever such procedures exist.

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Whatever solution may be feasible, there is no doubt that the problem must be solved, since it is difficult to see how anyone can opt for the new international instrument without knowing how effective it will be in relation to the law of the country where the debt-claim is to be recovered.

A solution to this problem, which was not essential when the Geneva Conventions were adopted, since they were concerned only with unification of the laws governing national negotiable instruments, becomes vital once the subject under consideration is the creation and regulation of an international negotiable instrument that will normally have effect outside the frontiers of the country in which it was issued.
