THE UNITED NATIONS DRAFT CONVENTION ON INTERNATIONAL CHECKS AND THE MAJOR DIFFERENCE BETWEEN THE CHECK LAW OF THE UNITED STATES AND THAT OF CIVIL LAW COUNTRIES

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Introduction and Overview

The United Nations Commission on International Trade Law (UNCITRAL) has recently been circulating for comment two "Draft Conventions" dealing with Commercial paper, namely, the Draft Convention on International Bills of Exchange and International Promissory Notes and the Draft Convention on International Checks. The Conventions will not apply to all international instruments but only to those designated on their face as being subject to a Convention by the use of such terms as "International Check" or "International Bill of Exchange". The Commission (UNCITRAL) met most recently to consider these conventions (and for other purposes) in May of 1983 in Vienna and will meet again in the spring of 1984 in New York. By that time the Secretariat of the Commission is supposed to have tabulated the comments of the various nations and located the most troublesome features of each Convention. It is the International Check Convention that is of primary interest to us here.

The United States has sent its comments to 41 parties in 24 countries. The United States' position is reserved with respect to the Draft International Check Convention because it introduces the European system of checks crossed with parallel lines or of checks which in some other way indicate on their face that they must be deposited in the account of the payee by the collecting bank, or the collecting bank will be liable for any loss resulting from its failure to do so. The United States believes that the

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disadvantages of attempting to introduce these rules to Americans may exceed the advantages. The United States indicates that it is not likely to support this convention in its present form. The United States suggests that Chapter Seven containing the “crossed check” provisions might be made optional and would then probably not adopted by the United States.

The United States’ position fails to take account of the fact that the crossed check provisions were adopted to make up for the otherwise insufficient protection against forgery of checks and of indorsements provided in civil law countries and copied into the Draft Convention. If insufficient protection is granted to drawers under the Convention, drawers will not elect to use the Convention. In short, the United States suggestions seems aimed at destroying a remedy for the defect (lack of protection against forgery) in the Conventions. Some experts think that this might be the worst of all possible worlds.

The Draft Convention on International Bills of Exchange and International Notes

Bills of Exchange are similar to checks, except that bills of exchange are drawn against private parties rather than against banks and bills of exchange need not be payable on demand. The Draft Convention on International Bills of Exchange similarly fails to provide adequate forgery protection for the drawer, and furthermore does not provide for the possibility of crossing bills of exchange. However, most bills of exchange originate in large businesses and ordinarily are handled only by businesses and banks. Experience seems to indicate that the risk of forgery in the case of bills of exchange is less than in the case of checks. This may be because larger enterprises are more capable of protecting themselves against forgery and often have insurance to cover their losses. Nonetheless, this writer is informed that the Draft Convention on International Bills and Notes may in the end fail to be adopted because it contains compromise provisions providing liability for forgery in a few situations in which liability did not exist in civil law countries and for that reason may be rejected by those countries. Con­versely, the Convention provides less protection against forgery than the American banking community is accustomed to, and partly for that reason it does not receive much support from the American banking community. A tentative guess at this early time is that substantial additional “social­fact” study of the placement of forgery loss will be conducted before any conventions on this subject are adopted.

The Critical Difference Between the Check Law of the United States and that of Civil Law Countries — Placement of the Loss Resulting from Forgery

A thorough understanding of the check law of the United States and that of civil law countries is necessary to the selection of the best rules
for a common check law. It is the thesis of this paper that the check law of the United States provides much greater protection to check users, leads to a wider use of checks, and creates for a greater checking account business for banks than does the check law of civil law countries.

The United States Basic Rule on Liability for Forgery

Both United States and civil law provide for "order paper" (payable only to a particular party or parties) and for "bearer" paper payable to bearer. Bearer paper is similar to paper money and anyone who issues it or owns it is subject to loss by theft or otherwise in the same way as one who owns paper money. It is of little interest to us here, because it is not designed to and does not provide much protection against loss by theft or otherwise.

Order checks are payable only to a particular party (or parties). It is in cases involving order checks and bank check forms that the distinction between United States and civil law is sharpest. Under the United States system, one who has a checking account may carry a blank check with him in his wallet, and he may fill it out and mail or otherwise send it to the payee, all without substantial risk of loss. United States law makes the personal use of checks a convenient and safe way of handing "money" and a very large percentage of people in the United States handle their money this way. In the case of loss of the check (by theft or otherwise), and forgery, the loss will ordinarily fall on the person who takes from the forger or on the payor bank; it will not ordinarily be placed on the person from whom the check or check form was stolen. ¹

The Civil Law System

Most civil law countries either ratified the Geneva Conventions on Commercial Paper, which were signed in Geneva in 1933 (e.g., France, Germany), or have adopted similar provisions for their law without formally joining the Conventions. These conventions are similar to United States law in many ways, but they differ in several radical aspects. Although the English commercial paper law is often classified with the United States law as "common law" in contrast to civil law, the English and the civil law have similar rules, including those concerning "crossed-checks" in these critical questions of loss placement in cases of forgery, and the United States law reaches different results. ²

1. Under the civil law system payor banks can, and almost always do,

¹ The details of the United States law of commercial paper can be found in Unit II of R. Braucher and R. Riegert, Introduction to Commercial Transactions (Foundation Press, Minneapolis, N.Y., 1977).

disclaim liability in their contracts with their customers and on their printed forms for paying checks containing forged drawers' or indorsers' signatures. This means that carrying blank checks is like carrying your bank account around with you in cash. A thief can steal a check from you and, if he is successful in forging and cashing it, your only recourse may be against the thief — a recourse which is usually worthless.

2. Even the possession of an order check payable to yourself is dangerous under the civil law because a good faith transferee of an order check which appears to be properly indorsed may cut off the true owner's rights, even though one or more indorsements are forgeries.

Informal empirical research by the author has revealed that the greater danger involved in using checks in civil law countries is the principal reason that the use of checks in civil law countries is much less common than it is in the United States. Instead of using checks, people in civil law countries often use an "Ueberweisung" system in which the bank is instructed to transfer funds from A's account to B's account in the same or a different bank. People expecting payments (such as businesses, medical doctors, or lawyers) will have their banks and bank account numbers printed on their billing statements so that their customers will be able to pay by transferring funds into those accounts. The rules governing the Ueberweisung system are contained in the contracts of the account holders with their banks and are the same for all private banks. A study of this bank-transfer (Ueberweisung) system might reveal that it is more efficient than check systems for this type of payment.

The same bank account can ordinarily be used for both bank-transfer and checking purposes and is known a giro (revolving) account. When this author opened to giro account at a German bank in the early 1950's, check books were given to German customers and carefully guarded, but were not ordinarily given to foreigners. Today minors may have giro accounts in Germany with approval of their parents, but check books are not issued to minors.

In the 1970's check cashing cards appeared, and their appearance made checks much more useful for face-to-face payments of all kinds than they had been. The check cashing card usually guarantees that the issuing bank will pay a check properly drawn by the customer on it for an amount of $120 or less. Furthermore, banks now prefer or require the use of checks instead of withdrawal slips for cash withdrawals at the bank, because account customers are ordinarily responsible for the misuse of blank checks, which have been issued to them and are used for withdrawals.

\[8 \text{§ 5 German Check Law of August 14, 1933. For details of German Check Law, which follows the Geneva Convention, see A. Baumbach & W. Hefermehl, Wechselgesetz und Checkgesetz (Beck, Munich, 1981).} \]

\[4 \text{§§ 19, 21 German Check Law of August 14, 1933.} \]

\[5 \text{A. Baumbach & W. Hefermehl, supra 573,74.} \]
The great majority of non face-to-face payments are still made today by bank transfer rather than by mailing checks. Where a customer desires to transfer money to several persons, he may use a collective transfer form supplied by the bank which usually provides for six transfers on the same form. It is now becoming more and more common for a giro account holder to authorize his creditors (for example, utility companies) to withdraw funds from the customer’s account to pay the customer’s bills.

In the relatively few cases in which people in civil law countries make payment by mailing a check, they ordinarily use the crossed check or some other indication on the face of the check indicating to all who see the check that it has been exposed to the possibility of theft and can only be collected by a collecting bank which has paid it into an account of the payee. A bank which collects a check it has not paid into the account of the payee is liable for any loss resulting therefrom.

The rules governing commercial paper in the various civil law countries following the Geneva Conventions may not be precisely the same. They may differ from one another for three reasons (1) there are differences in the wording of the statutes as adopted, (2) the courts of the various nations may interpret the same statutory wording differently, (3) local custom may be different, for example, printed German check forms and banks contracts with customers authorize payor banks to pay checks to anyone who presents them.

There are of course, other important differences between the check law of the United States and that of the civil law countries. For example, in civil law countries the term “check” must appear in the text of a check but words such as “order” need not appear in order paper. The opposite is true in the United States. It may be more difficult to stop payment on checks in some civil law countries where a personal defense exists and the rights of a third party has not intervened (for example, in Mexico) than it is in the United States, because a check is regarded in some countries as a title rather than an instruction to the bank. In most civil law countries on the other hand, for example, in Germany, you can stop payment much as you can in the United States. It is almost impossible to cash a check at a bank other than your own in a civil law country without possession of a check card guaranteeing payment of the check by the drawee bank; in the United States such cards are seldom issued. There are, of course, many other differences between the two systems, which in each system are dealt with in semester long courses. None of these differences, however, come close to matching the fundamental importance of the placement of the

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6 § 1 German Check Law of August 14, 1933.
7 § 3-104 Uniform Commercial Code.
8 CERVANTES, ———
9 § 22 German Check Law of August 14, 1933; 85 BGHZ §46, decision of November 8, 1982.
loss resulting from forgery discussed above. Placing the forgery risk on the bank in the way the American law does not only creates a desirable situation for the checking account customer, but may also have helped to stimulate banking business and contributed to the growth and economic success that most American banks have experienced since World War II.  