TRAVELLER'S CHEQUES AND CREDIT CARDS IN PRIVATE INTERNATIONAL LAW

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I. INTRODUCTION

1. The explosive growth of international tourism and of international travel in general has brought about new developments in the methods used for transferring means of payment over national frontiers. The traditional methods do not suit the needs of the modern traveller. Travellers carrying gold or cash may become the target of pickpockets and thieves. It is, further, all too easy to leave things behind in an hotel or on a train. Another traditional method, that of carrying banker's cheques or letters of credit, also has disadvantages. The traveller cannot convert these instruments into cash in small amounts when paying his bill in an hotel or restaurant. Often, he can obtain cash at one particular bank only. Moreover, the validity in time of a banker's cheque is very limited. The one great advantage of banker's cheques and of letters of credit is that they are of no use to a thief.

What the traveller needs is a method of carrying funds that would protect him from loss or theft, while permitting him to obtain money in small amounts wherever he goes. The answer to this need has been found in two relatively recent phenomena: the traveller's cheque[1] and the international credit card.

Although the traveller's cheque and the credit card give rise to complex legal relationships, they have not until now led to any major lawsuits.[2] This is, in itself, a very propitious sign, witnessing as it does to the trustworthiness of the companies issuing traveller's cheques and credit cards. As the matter has been put by Hawkland:[3]

> Although the travellers check has been used for three quarters of a century it is still regarded in American legal circles as something of an anomaly and its precise legal characteristics have not yet been determined. This surprising situation is due in large part to the fact that cases involving travellers checks

[1] Traveller's cheques must be distinguished from guaranteed cheques such as, e.g., *Eurochèques*. These are normal cheques complemented by a special guarantee as to their coverage. See Rodhe, *Anvisningar och kreditkort*, Stockholm 1971, pp. 18–19.

[2] Winizky, "Le chèque de voyage", *Rapports généraux au VII^e Congrès international de droit comparé, Uppsala 1966*, Acta Instituti Upsaliensis Jurisprudentiae Comparativae, vol. 9, Stockholm 1968, pp. 238–55, at pp. 245 f.

[3] Quoted from Winizky, *op. cit.*, pp. 248 f.

> rarely come before the courts, because their issuers consistently have pursued a policy of promoting saleability and marketability by sustaining losses upon doubtful checks.

The legal analysis of traveller's cheques and credit cards is complicated by the fact that the relationships arising in connection with their use are often of an international nature, involving conflicts of laws.

We shall first of all describe how the traveller's cheque and the international credit card fulfil their economic role, i.e. how they work. We shall then seek to establish the legal nature of these documents, as well as of the different relationships arising from their use. Finally, the question of the national legal system applicable to these relationships will be posed and, we hope, at least partially answered.

The public-law aspects of traveller's cheques and credit cards, for example their standing from the point of view of the exchange-control rules in various countries, will not be dealt with here.

II. THE FUNCTIONING OF TRAVELLER'S CHEQUES AND CREDIT CARDS

2. *Traveller's cheques.* The prospective traveller takes the decision to procure traveller's cheques. He contacts an office of the issuer or of the issuer's agent and places his order. He specifies, perhaps with the advice of the issuer or the issuer's agent, which currency he wants and in what denominations. The issuer is usually a bank or a big travel agency. If the traveller has contacted an agent representing several issuers, he may even have a choice of issuer. When the cheques are prepared, the traveller signs each one in a specified place in the presence of the issuer (agent) and pays the full value of the cheques at the current rate of exchange plus a commission (often one per cent plus a lump sum per order). Then the cheques are his and he can use them on his travels.

The inscription on the face of a traveller's cheque varies somewhat from issuer to issuer. A typical text on a traveller's cheque in English runs as follows:[4]

> When countersigned below with this signature [here follows the space where the traveller puts his signature when purchasing the cheque—M. B.] pay this cheque to the order of [here follows a blank space where the name of the payee may be filled in—M. B.].

[4] The American Express Company's and Barclays Bank's traveller's cheques. The traveller's cheques issued by the French Société Générale state: "Payez contre ce chèque à l'ordre de ... contre signature en présence de l'acceptant."

The traveller's cheque is not signed by hand by the issuer or by his agent. Nevertheless, it usually contains a *printed* facsimile of the signature of the issuer's representative, e.g. the chairman or the cashier. Some cheques do not contain even such a facsimile.[5] The traveller's cheque does not bear the name of the person or persons to whom the order to pay is addressed.[6] Somewhere on the face of the cheque, there is a blank space with an instruction directed to the traveller: "Countersign here in the presence of the person cashing." Last but not least, the cheque also contains the denomination of its value. The usual denominations of traveller's cheques in U.S. dollars are 10, 20, 50 and 100 dollars.

The better-known traveller's cheques are accepted at practically all banks and money changers throughout the world. They can often be used even when paying for various goods and services, for example at hotels, shops, restaurants and airline offices. It is a condition that the traveller shall countersign the cheque in the presence of "the person cashing". This person is also entitled to ask for proof of the traveller's identity. After the cheque has been cashed, it is, in one way or another, sent to the issuer who, in turn, pays its value to the person who cashed it. The cheque has now gone through the full circle (or perhaps we should say triangle) and is back where it started from, i.e. the issuer. This journey may take quite a time. The validity in time of some traveller's cheques is unlimited[7] and it is no secret that the main income of the issuer does not come from the commission paid by the traveller when purchasing the cheques but rather from the interest accruing on the money from the time the traveller pays it to the issuer until it is paid by the issuer when redeeming the countersigned cheques (the "float"). Since the issuer is paid in advance, the operation is not risky from his point of view. As the issuer is a reputable company, the persons who issued money against the cheques can also feel secure. The possibility of loss is, nevertheless, not excluded; for example, there may be a sudden change in exchange rates. The issuer sometimes also assumes the obligation to replace or refund lost or stolen traveller's cheques.

[5] E.g. the traveller's cheques issued by the West German Commerzbank. According to some writers, the existence of the facsimile is of decisive importance for the legal nature of the instrument, e.g. Heinichen, *Die Rechtsgrundlagen des Reisecheckverkehrs*, Berlin 1964, p. 46.

[6] Some "traveller's cheques" have been formulated as promises to pay, but their legal nature seems to differ from that of traveller's cheques *stricto sensu*. They are a kind of promissory note. See Heinichen, *op. cit.*, pp. 32 f., and Winizky, *op. cit.*, p. 244. Ellinger, "Travellers' Cheques and the Law", 19 *University of Toronto Law Journal*, pp. 132–56 (1969), at pp. 136 f., is against treating such notes differently, on the ground that traveller's cheques are regarded by the business community as a single legal category, irrespective of their pattern. It is, however, submitted that it is not possible to ignore the text printed on the face of a negotiable instrument.

[7] E.g. the traveller's cheques issued by the American Express Company or by the French Société Générale.

3. *Credit cards.* The functioning of a credit card is in several respects different from that of a traveller's cheque. First of all, the prospective traveller cannot be as sure of obtaining a credit card as he can be of obtaining traveller's cheques. In the latter case, the traveller pays *in advance* and there is thus no need for the issuer to inquire into his economic standing. This is not so when the traveller applies for a credit card. He then has to fill in an application form containing a number of personal questions. If the traveller is deemed to be a "risk", the card will be refused. If, on the other hand, he is considered trustworthy, he will be issued with a personal card carrying his name and signature as well as the number of the card and the name of the issuer. In most cases the traveller pays an annual fee to the issuer for the privilege of having the card.

In what follows, we shall limit ourselves to *external* credit cards which are used for obtaining credit from persons other than the issuer. *Internal* credit cards, for example those issued by some car-hire companies, can only be used when paying for goods and services provided by the issuer.

The traveller can use the credit card when paying in shops and at hotels, car-hire firms, etc. Instead of paying in cash, the traveller presents the credit card and signs the supplier's bill, usually on a special form provided by the issuer. The signed bill is then sent by the giver of credit, for example an hotel, to the issuer of the card, who pays the bill. The issuer, in turn, charges the card-holder through a statement sent at regular intervals, e.g. once a month.

It should be added that the credit card is honoured only at a limited number of establishments. The issuer concludes with establishments providing goods or services special contracts whereby the latter undertake to honour the card, while the issuer promises to pay the bills. The greater part of the issuer's income comes from these contracts, since they give him the right to deduct a commission, usually 5–7 per cent, from the amount of all bills so paid. The issuers have created huge networks of these contracts. Some issuers claim to have millions of them. The enterprises honouring the card are identified by the card-holder with the help of catalogues provided by the issuer or through some visible sign, e.g. an adhesive label on a shop window.

III. THE LEGAL NATURE OF TRAVELLER'S CHEQUES AND CREDIT CARDS

4. *Traveller's cheques.* It appears that the typical traveller's cheque is not a cheque in the usual sense, since it does not fulfil the legal requirements

imposed on cheques. Among the circumstances preventing the traveller's cheque from being an ordinary cheque according to the Geneva Convention,[8] we may mention the following:

(*a*) the traveller's cheque is not properly signed by the issuer;
(*b*) not all traveller's cheques contain an indication of the date of issue;
(*c*) the validity in time of traveller's cheques varies from issuer to issuer, whereas the validity of ordinary cheques is fixed by law;
(*d*) the name of the drawee bank is not indicated, unless the order to pay printed on the traveller's cheque is interpreted as being addressed to the issuer himself,[9] which is, however, in principle prohibited by the Convention;
(*e*) the order to pay on ordinary cheques must be unconditional, whereas on traveller's cheques the order to pay is usually conditional on the countersignature of the traveller;[1]
(*f*) the law forbids and punishes the drawing of an ordinary cheque that is not covered by the issuer's balance with the drawee, whereas the issuer of a traveller's cheque does not have an account with every establishment in the world where the traveller may turn up with the cheque;
(*g*) the drawee of an ordinary cheque must be a bank, whereas traveller's cheques are often cashed at hotels, restaurants, etc.

The Anglo-American rules on cheques are somewhat more liberal than those imposed by the Geneva Convention, but even they require that the drawee bank shall be named with reasonable certainty and that the order to pay shall be unconditional.

For similar reasons, the traveller's cheque cannot be a bill of exchange under the Geneva Convention concerning bills of exchange and notes.[2] The Convention requires, in any case, that the instrument shall contain the term "bill of exchange" (*lettre de change, Wechsel*, etc.), a condition which is not fulfilled by traveller's cheques. It is, on the other hand, possible that

[8] Convention Providing a Uniform Law for Cheques, of March 19, 1931, published, e.g., in Hudson, *International Legislation*, vol. 5, Washington 1936, pp. 889 ff.

[9] There have been efforts to interpret the order to pay printed on the traveller's cheque as addressed to the issuer himself or even as a promise to pay. Despax, "Les travelers cheques", *Revue trimestrielle de droit commercial* 1957, pp. 335 f.; Wiswald, *Les agences de voyages*, Lausanne 1964, p. 97. The French Cour de cassation declared on Jan. 20, 1960 (*Recueil Sirey* 1961.2.75) that "si les chèques de voyage ont les apparences extérieures du chèque, ils ne répondent pas à la qualification juridique du chèque et expriment non pas un mandat, mais seulement un engagement de payer contracté par le banquier émetteur". Cf. also the same court's decision of Jan. 16, 1963 (*Recueil Sirey* 1963.2.286). The case law consists mostly of criminal cases involving, e.g., forgery. On the French legal writing and practice in this area, see Heinichen, *op. cit.*, pp. 133–42. Käser, "Rechtliche Aspekte des einheitlichen DM-Reisechecks", *Zeitschrift für das gesamte Kreditwesen* 1962, pp. 399–402, takes the view that German traveller's cheques are ordinary cheques drawn by the traveller and not by the issuer. Several authors seem to believe that the traveller's cheque is drawn by the issuing bank upon itself; cf. Ellinger, *op. cit.*, p. 136, further references in Winizky, *op. cit.*, pp. 247 f.

[1] Ellinger, *op. cit.*, pp. 137 f.

[2] Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, of June 7, 1930, published, e.g., in Hudson, *op. cit.*, pp. 516 ff.

the traveller's cheque might fulfil the requirements imposed on a bill of exchange in Anglo-American law, though here, too, opinions are divided.[3]

In a few countries, special rules of law have been developed for traveller's cheques. One such country is Czechoslovakia, whose Code of International Trade of 1963 (Act no. 101) contains some elementary provisions.[4] Special legislation has also been introduced or proposed in some other states.[5]

If a traveller's cheque is neither an ordinary cheque nor a bill of exchange, what is its legal value?

The traveller's cheque seems to be similar in nature to a German *Anweisung*, a French *délégation* and a Swedish *anvisning*.[6] It is not altogether easy to find a corresponding term in English. It seems, however, that "delegation" is the most appropriate one.[7] An example of a delegation in Anglo-American law is the letter of credit.[8]

The legal rules concerning delegation may vary from country to country.[9] It is, nevertheless, possible to establish certain features of delegation that are more or less the same in all important legal systems.

The issuer of a delegation (in our case the issuer of the traveller's cheque) authorizes the delegate (in our case the person cashing the cheque) to pay money to the payee (in our case the traveller) for the account of the issuer. At the same time, the issuer authorizes the payee to receive the payment from the delegate. The payee does not acquire any direct rights *vis-à-vis* the delegate until the delegate has declared that he accepts the delegation, i.e. until, e.g., a bank or an hotel has accepted the traveller's cheque instead of cash. Whether the delegate is under an obligation to accept the delegation does not follow from the delegation itself, but it may follow from, for example, a previously concluded contract between

[3] American courts have sometimes considered traveller's cheques to be bills of exchange, *Paulink* v. *American Express Company*, 163 The North Eastern Reporter 740 (Mass. Sup. Ct. 1928). On the nature of traveller's cheques in Anglo-American law, see Heinichen, *op. cit.*, pp. 110–26; Käser, "Der amerikanische Travelers Check in der internationalen Rechtsprechung", *Zeitschrift für das gesamte Kreditwesen* 1961, pp. 196–202, at p. 198; Ellinger, *op. cit.*, pp. 137 f. See further "Negotiability of Travellers Checks", 47 *Yale Law Journal*, pp. 470–76 (1937–38).

[4] Sections 676–80 of the Code.

[5] Winizky, *op. cit.*, pp. 243 f. A Draft Convention on special Latin-American traveller's cheques was elaborated in 1972. See *Revista del Notariado* 1973, pp. 305–9.

[6] The ordinary cheque is, in fact, often considered to be a special type of *Anweisung*, *délégation*, *anvisning*, etc.

[7] According to the *Oxford English Dictionary*, Oxford 1933.

[8] *Halsbury's Laws of England*, 4th ed., vol. 3, London 1973, pp. 99 ff.; Williston, *A Treatise on the Law of Contracts*, vol. 4, New York 1936, pp. 2779 f.

[9] For German law, see secs. 783–92 of the German Civil Code and Palandt, *Bürgerliches Gesetzbuch*, 31st ed. Munich 1972, pp. 693 ff. In France, sec. 1275 of the French Civil Code and Planiol and Ripert, *Traité pratique de droit civil français*, 2nd ed., vol. VII:2, Paris 1954, pp. 676–83. In Sweden, Tiberg, *Skuldebrev, växel och check*, Stockholm 1974, pp. 106–10.

the issuer and the delegate. Whether the issuer is obliged to arrange the acceptance and whether he is liable to pay himself if the delegation is not accepted are also questions answered not by the delegation itself but by the contract between the issuer and the payee.

A peculiar feature of traveller's cheques, if these be conceived of as delegations, is that they do not contain the name of the delegate. The authorization to pay, printed on the face of the cheque, must be interpreted as being addressed to all physical and legal persons throughout the world.

Another peculiarity is that the delegation is made to order ("or his order", "to the order of"), i.e. it is intended to be negotiable. The law of most countries does not allow persons to create, at will, new types of negotiable instruments. Traveller's cheques are, nevertheless, universally treated as negotiable and it may be argued that they have acquired the status of negotiable instruments as a result of universal mercantile usage.[1]

Normally the traveller does not write the name of the payee in the space reserved for that purpose on the face of the traveller's cheque. In practice, a cheque thus countersigned *in blanco* by the traveller is converted from a delegation "to order" into a delegation "to bearer".[2] The traveller might, of course, insert his own name as that of the payee; the cheque would still be negotiable by endorsement. It is simpler merely to countersign the cheque and negotiate it by delivery. It is not unusual that the person cashing the cheque, for example an hotel, fills in his own name as that of the payee. But it also quite commonly occurs that the name of the payee is never inserted and that the cheque is negotiated by simple delivery all the way until it reaches the issuer for redemption. As was held by an American court,[3] countersigned traveller's cheques are fully negotiable. It seems that they are negotiable by delivery until the name of the payee is inserted; afterwards they are negotiable by endorsement. In these circumstances, it is impossible to say that it is always the traveller who is the payee and that it is always the person in whose presence he countersigns the cheque who is the delegate. If the traveller uses the cheque in an hotel and the hotel inserts its own name as that of payee, then it is in fact the hotel's bank that is the delegate (hotels, etc., usually sell the countersigned cheques to their banks). It follows from what has been said that the "person cashing", i.e.

[1] Ellinger, *op. cit.*, p. 139.

[2] *Emerson* v. *American Express Co.*, 90 Atlantic Reporter 2d 236 (Mun. C. A. District of Columbia 1952).

[3] *Ibid.* Non-countersigned traveller's cheques, on the other hand, are not negotiable, *American Express Co.*, v. *National Bank*, 7 The Southwestern Reporter 2d 886 (Texas C. C. A. 1928) and *Venable* v. *American Express Co.*, 8 South Eastern Reporter 2d 804 (North Carolina Sup. Ct. 1940).

the person in whose presence the cheque must be countersigned, is not necessarily identical with the delegate. The "person cashing" is rather the first in line of the persons who act as delegates when they accept the cheque and as payees when they sell it to their next-in-line.

In practice, the circulation of countersigned traveller's cheques is limited. An ordinary citizen who did not have particularly good contacts with a bank would find it very difficult to obtain cash in exchange for a cheque signed and countersigned by somebody else. The instructions published by the various issuers of traveller's cheques usually provide that payment to a bearer other than the traveller can be effected only if the bearer, by endorsing the cheque, takes full responsibility towards the acceptor of the cheque. A free circulation of countersigned "bearer" cheques is, however, quite conceivable, for example between hotels, shops or banks. Even though a bank might refuse to accept a countersigned cheque presented by a person other than the traveller, it would probably be willing to assume a mandate to present the cheque to the issuer for redemption on behalf of the bearer.

It is possible to say that a typical traveller's cheque is a negotiable delegation addressed to undetermined delegates. However, some traveller's cheques may appear to be of a different nature. Thus, according to the instructions for the handling of the traveller's cheques in lire issued by Credito Italiano, by selling the cheques the selling agent authorizes the traveller to draw the cheques on the account of the selling agent with Credito Italiano. This gives the impression that it is the traveller, and not the issuer, who is the drawer of the cheques. Support for this view could be found also in the fact that no signature of a representative of the Credito Italiano appears on the face of the cheque, not even in facsimile form. On the other hand, the same instructions refer to "the issuing office, the place and date of issue", having in mind the place and date of the purchase of the cheques *by* the traveller. This is rather confusing. The explanation of this unusual construction is probably to be found in the atypical system used by Credito Italiano when selling the cheques. The agent who has sold the cheques to the traveller is not required to pay their value to Credito Italiano at once, but only after Credito Italiano has redeemed the countersigned cheques, for example from an Italian hotel. It appears that Credito Italiano intends to play the role of a mere go-between and of a supplier of the printed forms for traveller's cheques. In this respect, Credito Italiano constitutes an exception.[4] Besides, this construction does

[4] It appears that some Australian issuers have adopted a similar construction, Ellinger, *op. cit.*, p. 136. It should be noted that Credito Italiano ceased to issue traveller's cheques as from Jan. 1, 1976.

not correspond to the realities of the situation. An hotel which has cashed a Credito Italiano traveller's cheque expects to be paid by the Credito Italiano and not by the unknown foreign bank which had sold the cheque to the traveller. It would be contrary to the whole idea behind traveller's cheques to consider some Credito Italiano traveller's cheques to be "better" than other Credito Italiano traveller's cheques, depending on the balance of the selling agent's account with the issuer. The use of the term "selling agent" in the instructions also indicates that it is not the Credito Italiano but the bank which sells the cheques to the public that is the go-between in the transaction. Last but not least, the traveller countersigning a Credito Italiano traveller's cheque has no intention of himself drawing a negotiable instrument for the payment of which he might be held liable.

5. *Credit cards.* A credit card usually provides only very meagre reading. It does not contain any promise, order or authorization by the issuer. Decorative ornamentation apart, the card usually contains no more than the name of the issuer, the name and signature (sometimes also the photograph) of the card-holder, and the number of the card. Sometimes, there is also an indication of the period of validity of the card and there may also be inscriptions like "not transferable", "not valid if cancelled or revoked", etc.

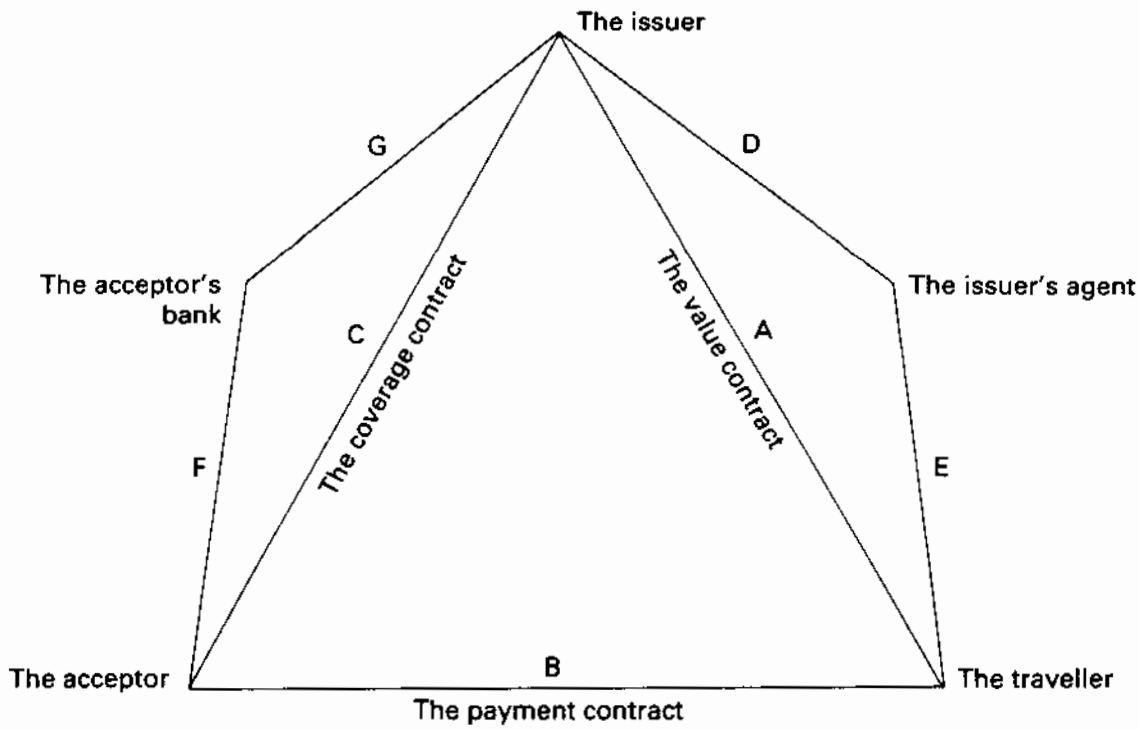
The fundamental legal difference between a traveller's cheque and a credit card is that the credit card has no meaning or value in itself. It gains all its legal relevance from the contracts which refer to it. Thus it is possible to say that the credit card is only a special type of identity card, identifying its holder as a party to certain contracts (the contract between the issuer and the card-holder) and as a beneficiary of other contracts (the contracts between the issuer and the enterprises providing goods and services).[5]

IV. LEGAL RELATIONS ARISING AT THE USE OF TRAVELLER'S CHEQUES AND CREDIT CARDS

6. *Traveller's cheques.* Let us imagine that the American Express Company, a well-known issuer of traveller's cheques and credit cards, sells a traveller's cheque to a Swedish resident in Stockholm through a Swedish bank. The Swedish traveller takes the cheque with him to France, where he uses it instead of cash when paying his hotel bill. The hotel sends the

[5] Rodhe, *op. cit.*, pp. 46 f.

countersigned cheque to its bank, which presents it to the American Express Company for redemption. This simple story has given rise to several legal relationships, which can be illustrated by the following model:



7. *Relationship "A"*. This is the relationship based on the contract under which the traveller purchases the cheques from the issuer. The traveller agrees to pay for the cheques at the latest when he receives them and he also assumes certain other obligations, for example to notify the issuer immediately of any loss or theft of the cheques. The issuer promises to deliver to the traveller cheques containing a delegation from the issuer to "anybody in the world" to pay a certain sum to the payee or his order for the account of the issuer. The delegation also authorizes the payee to receive that sum from the delegate. The obligations of the issuer go further, however, than the negotiable delegation expressed on the face of the cheque. The issuer, it is true, does not guarantee that the cheque will be accepted by the delegates. Such a guarantee would be very difficult to give, since the delegates are practically all the banks, hotels, restaurants, shops, etc., in the world. The issuer promises, however, that he will in any case redeem the cheque. Thus, any traveller purchasing American Express Company's traveller's cheques is given a copy of a contract, the principal provision of which is as follows:

> The Issuer ["Amexco"] and Purchaser agree that: Amexco will pay to Purchaser or his order, in the country in whose currency the Travelers Cheque is issued, the amount shown on the face thereof, or if the Purchaser or holder

> requests, the face amount of the Travelers Cheque converted into the currency of the country where the Travelers Cheque is offered for encashment...

The issuer also assumes other obligations: he may, for example, undertake, under certain conditions, to replace or refund lost or stolen cheques.

Since the relationship between the delegator and the payee is often called the "value relationship" (*le rapport de valeur, das Valutaverhältnis*), the term *value contract* will be used in this paper to denote the contract between the issuer of the traveller's cheque and the traveller.

8. *Relationship "B"*. The traveller asks a hotel cashier: "Will you accept this traveller's cheque instead of cash?" The representative of the hotel answers "Yes". From this moment, the hotel may be called the acceptor.[6] In practice, of course, the question and the answer are not always formulated explicitly. Some enterprises display signs or labels with, e.g., the words "XZ Traveller's Cheques Welcome" and such an indication may be interpreted as a legally binding promise to accept the cheque. Since the better-known brands of cheques are almost universally accepted in establishments of a certain standing, it may even happen that the traveller simply assumes that acceptance will be forthcoming and does not bother to inquire about this beforehand. However, an hotel or any other establishment is normally under no legal or contractual obligation to accept the cheques and it may ask the traveller to pay in cash.

The moment of the legally binding promise to accept need not be identical with the moment of the actual acceptance and payment. Thus, an hotel may inform the traveller, already at his arrival, that it accepts traveller's cheques, whereas the actual countersignature and delivery of the cheque take place later on, probably at the traveller's departure.

At the moment when the acceptor expresses or promises his acceptance, the traveller obtains a direct right against him. Usually, this does not mean a right to demand payment from the acceptor, but rather a right to use the cheque as a means of payment *to* the acceptor in exchange for goods or services. The traveller does not, however, lose his rights *vis-à-vis* the issuer until he actually delivers the countersigned cheque to the acceptor.

If the acceptor first asks the traveller to countersign the cheque in his presence and then refuses to accept it, for example because the signature

[6] According to German law, the acceptance of a delegation must be done in writing on the instrument itself. See sec. 784(2) of the Civil Code. An oral declaration of acceptance can, however, be interpreted as a legally binding promise to accept, see Palandt, *op. cit.*, p. 695. The American law allows any form of declaration and the acceptance is effective by notification, see Rabel, *Conflict of Laws*, vol. 4, Ann Arbor 1958, p. 179. The position of French law is the same, Planiol and Ripert, *op. cit.*, p. 677.

and countersignature seem to him not to correspond, the traveller is in a difficult situation. He may conceivably have a direct action against the acceptor for breach of the promise of acceptance, but this is hardly of practical value for a foreign tourist. What if he goes to another acceptor? Can he expect that the cheque will be cashed by that acceptor even though the cheque requires countersignature in the presence of the person cashing? The solution used in practice is that the traveller signs again on the back of the cheque in the presence of the new acceptor. This new signature is equivalent to endorsement, thus entailing the responsibility of the traveller as endorser. This method is even used when a countersigned cheque is presented by someone other than the person entitled to countersign it. The American Express Company, in its printed instructions, gives the following advice to acceptors:

> If a countersigned Cheque is presented by anyone other than the person whose signature already appears in the upper left corner, to minimize your risk obtain the endorsement of the person presenting the Cheque on the back, satisfy yourself as to your recourse against the presenter, and observe usual banking precautions as if accepting any endorsed instrument.

Similar advice is given by Credito Italiano:

> The payment or negotiation of the cheques to a party other than the purchaser of the same can be effected whenever the bearer, by endorsing the cheque, takes full responsibility...

A question that may arise is whether the traveller warrants the acceptor that the countersigned cheque will be redeemed by the issuer. If the issuer is, for example, declared bankrupt after an hotel has accepted the cheque at its face value, can the hotel demand payment from the traveller? It follows from the nature of delegation that the acceptor accepts the cheque at his own risk and that he may raise with the traveller only such objections as relate to the validity of the acceptance or relate to his own relations to the traveller.[7]

A different approach, it seems, should be used towards the problem of exchange rates. For example, if a Swedish hotel promises, at the beginning of the traveller's stay, to honour his traveller's cheques, this does not mean that it also promises to accept them at the exchange rate valid on the day when the promise was given. Unless a different agreement can be proved, the exchange rate valid on the day of the actual payment should be applied.

[7] Sec. 784 of the German Civil Code; Planiol and Ripert, *op. cit.*, p. 678; Tiberg, *op.cit.*, p. 108. If the traveller *endorses* the cheque, he may, nevertheless, incur the endorser's liability.

The relationship between the traveller and the acceptor is governed by the so-called *payment contract,* under which the traveller offers the cheque and the acceptor accepts it or promises to do so. This is often only a part of a larger contract, for example a contract of hotel accommodation. But it may also be an independent contract. The acceptors often, but not always, demand a fee from the traveller for cashing the cheques.

9. *Relationship "C".* At the time when the acceptor accepts the traveller's cheque, he is usually not in such a previous legal relationship to the issuer as would oblige him to accept the cheque. It is, of course, quite conceivable that there is a contract between the issuer and a bank or an hotel providing that the cheques shall be accepted. In such cases, the question may arise whether the traveller, who is not a party to such contracts, can invoke them *vis-à-vis* the bank or hotel. The traveller will normally have no direct action, unless the applicable legal system sees in the contract such a *pactum in favorem tertii* as gives the third person the right to claim performance.[8]

Let us return to the more common situation where the acceptor accepts the cheque without being under any obligation to do so. By accepting the cheque, the acceptor undertakes to fulfil the delegation. It is, however, not until the acceptor actually obtains the countersigned cheque that he obtains a direct claim against the issuer. The acceptor here acts as mandatary of the issuer.[9] He acts in his own name, but on the issuer's behalf. This contract of mandate may be called a *coverage contract,* since the relationship between the issuer and the acceptor is often referred to as the "coverage relationship" (*le rapport de couverture, das Deckungsverhältnis*). Under the contract, the acceptor agrees to pay the traveller for the account of the issuer. The issuer assumes the obligation to compensate the acceptor, provided the mandate has been carried out according to instructions. Should the issuer refuse to compensate the acceptor because the latter has committed some fault, for example by paying against cheques having no countersignature or a countersignature strikingly different from the original signature on the cheque, the only action against the issuer that is open to the acceptor is one based on enrichment without just cause. But to prove such enrichment is not easy, since the issuer, under the *value contract,* may have undertaken to compensate the traveller even for lost or stolen

[8] Secs. 328 ff. of the German Civil Code; Palandt, *op. cit.*, pp. 338–46; sec. 1121 of the French Civil Code; Ferid, *Das französische Zivilrecht,* vol. 1, Frankfurt–Berlin 1971, pp. 544–7; Hessler, *Om stiftelser*, Stockholm 1952, pp. 57 ff.

[9] The term "mandate" is here used in a wide sense. The legal concept of mandate varies, of course, from country to country. See, for example, on the German *Auftrag*, secs. 662–76 of the German Civil Code, and Palandt, *op. cit.*, pp. 612 f.; on the French *mandat*, secs. 1984–2010 of the French Civil Code and Ferid, *op. cit.*, pp. 735–7; on the Swedish *uppdrag*, Bengtsson, *Särskilda avtalstyper I,* Stockholm 1972, pp. 103 f.

cheques. In practice, the acceptor sends the non-countersigned or wrongly countersigned cheque to the issuer for encashment and it is the issuer who does the investigating. With the help of the number of the cheque, it may be possible to trace the traveller and ask him to confirm his countersignature. It is also possible to wait for a time to see whether the traveller will report the cheque missing. If the validity in time of the cheque is limited, it is reasonable to wait until the term of validity elapses.

In reality, the acceptor will scarcely rely on his position as a delegate *vis-à-vis* the issuer. Usually the possession of a countersigned cheque makes it possible for the acceptor to act as payee under a negotiable instrument. It has already been said that normally the name of the payee is not inserted in the empty space reserved for that purpose on the face of the traveller's cheque.

It seems to be the current practice that the issuer pays the acceptor the full face value of the cheques, no more and no less. The *coverage contract*, if conceived of as a mandate, is thus an *unpaid* mandate. The willingness of banks, hotels, etc., to accept traveller's cheques is usually an extra service provided in connection with another contract, for example a contract for the exchange of currencies or the contract of hotel accommodation. An hotel that refuses to accept traveller's cheques may lose customers. Besides, as has already been mentioned, some acceptors charge the traveller a fee for acceptance.

The risk of currency fluctuations is carried by the acceptor until the countersigned cheque is presented to the issuer for redemption, or until the acceptor sells the countersigned cheque to somebody else. An hotel seldom sends the countersigned cheque direct to the issuer for redemption. It usually sells the cheque to its bank and in that relationship it does not play the role of a delegate (mandatary) demanding compensation from the issuer of the delegation (see section 12 *infra*).

10. *Relationship "D"*. In reality, persons other than the issuer, the traveller and the acceptor are also involved in legal relations concerning traveller's cheques.

First of all, the issuers of traveller's cheques usually sell the cheques to the public through other persons, for example banks or travel agencies. Let us imagine that a Swedish prospective traveller wants the traveller's cheques issued by the American Express Company. He will not approach an office of the issuer, a distant foreign corporation. Instead, he will purchase the cheques from his bank in Sweden. The bank is authorized to act in the name of the issuer by a contract of agency. The standing of the bank is similar to that of any other commercial agent. The contract has,

however, some other aspects as well. For example, the agent is entrusted with the cheque forms and in this respect he acts as consignee.[1]

The intermediary selling the cheques to the public is usually given the right to retain a substantial part of the commission paid by the traveller when purchasing the cheques. The mandate is thus a paid one (*mandat salarié*).

11. *Relationship "E".* Since the agent of the issuer acts in the issuer's name, the traveller will stand in a direct legal relationship to the issuer. But is there also a contract between the agent and the traveller? For example, does the agent guarantee that the issuer will fulfil his obligations? There is no doubt that the agents, if asked, would deny any such responsibility invoking their position as intermediaries.[2] The agent seems to be neither a commission merchant nor an undisclosed agent, since even a traveller without legal training will probably be aware of the fact that he is contracting with the issuer.[3] But even if the agent were considered to be a party to the contract, he could not be held responsible for the obligations of the issuer. The traveller demands American Express traveller's cheques and that is what he gets. This does not, however, mean that the traveller never has any direct action against the agent.

Let us assume that the agent committed some fault when selling the cheques in that, for example, he gave wrong instructions to the traveller as to the use of the cheques. The traveller can probably hold the issuer responsible for the damage under the *value contract* (section 7 *supra*), since the principal is probably held responsible by the applicable law for his choice of agents and for their faults, and the issuer will afterwards have the right of recourse against the agent. But it is also conceivable that the traveller will have an extracontractual, *ex delicto* claim directly against the agent, for example if the agent negligently or dishonestly gave the traveller wrong instructions.

Until now we have presumed that the traveller has simply ordered cheques of a certain issuer and in a certain currency. In practice, the traveller will often rely upon the advice of the agent, who represents several issuers. A Swede going to South America may, for example, ask his bank to recommend him cheques that are accepted everywhere in South America. (In fact, a traveller with cheques in any other currency than U.S.

[1] Ellinger, *op. cit.*, pp. 150–56.
[2] Ellinger, *op. cit.*, p. 149.
[3] This is only the author's guess. Exceptions are possible, e.g. if the agent (a bank clerk selling the cheques) by mistake creates the impression that the traveller is contracting with the agent and not with the issuer.

dollars will find himself in a very precarious situation in South America.) Here the bank gives professional advice under a special contract with the traveller and it could be liable for wrong advice under the provisions of the law applicable to this contract. A problem the courts may face in this connection is whether the bank provided the advice free of charge or against payment, since it is usual to make a difference in liability between the two cases. The bank does not charge the traveller extra for the advice, but it would be wrong to treat the professional advice given by the bank as a "friendly service" without legal relevance. The bank is paid indirectly, by retaining part of the commission paid by the traveller when purchasing the cheques. It seems only reasonable to hold the bank liable if it does not act with the requisite professional care.[4]

In the case of *Lesch* v. *Farmers' and Merchants' State Bank of New Salem* (Sup. Ct. N. Dak. 1926),[5] the traveller asked his banker to sell him traveller's cheques issued by a particular issuer. Since the bank did not have such cheques, it offered the traveller traveller's cheques of another issuer, assuring the traveller that they were "absolutely good". Subsequently, the issuer went bankrupt and the cheques sold to the traveller were dishonoured. The court held the bank liable for having made false representations to the traveller.

12. *Relationship "F"*. If the acceptor is not a bank, he will normally sell the countersigned cheque to his bank, which will present the cheque to the issuer for redemption in its own name and for its own account.

If the acceptor, for example an hotel, has filled in the space on the cheque reserved for the name of the payee with its own name, it will have the position of the payee and the bank will act as the delegate. There will thus be a new triangle of legal relations. The same can be said if the hotel sends the cheque to the bank with the space left blank. And even if the name of the traveller stands as that of the payee, the subsequent possessors will be able to play the role of the payee, since the cheque is made out "to order". An uninterrupted chain of endorsements will, of course, be necessary.

It may also happen that the bank is empowered by the issuer to redeem the cheques in the issuer's name, i.e. as the issuer's agent. In that case, the hotel will normally be in no direct legal relationship to the bank.

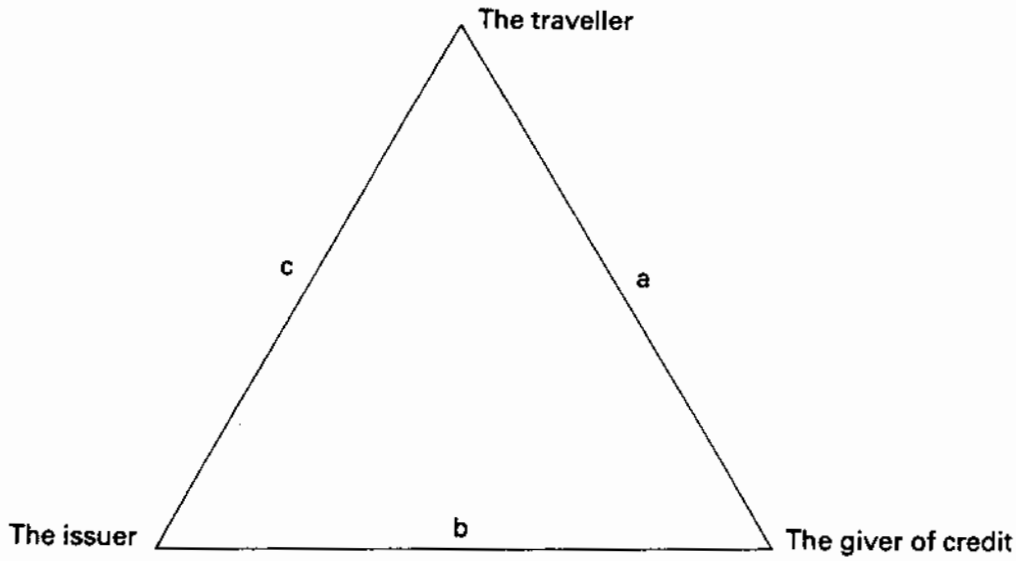
The acceptor's bank sometimes assumes another role, especially if the cheque is affected by some irregularity. It will not buy the cheque, but it will agree to present it to the issuer for redemption for the account of the

[4] See Bengtsson, *op. cit.*, pp. 173 f.
[5] 211 North Western Reporter 687.

acceptor. This is a contract of mandate, the hotel being the mandator and the bank being the mandatary.

13. *Relationship "G".* If the bank has bought the countersigned cheque from the acceptor, for example from an hotel, it will become a party to the *coverage contract.* The situation is different when the bank only presents the cheque to the issuer for the account of the acceptor. If the bank does so in the acceptor's name, it will still be the hotel and the issuer who form the coverage relationship. It is, however, also conceivable that the bank presents the cheque in its own name, although for the account of the acceptor. The position of the bank will here be similar to that of a commission merchant.

14. *Credit cards.* The legal relations arising in connection with the use of credit cards can also be illustrated by a triangle:



15. *Relationship "a".* The relationship between the traveller and the giver of credit, for example a shop or an hotel, is normally not limited to the question of credit. It may, for example, involve a contract of sale of goods (chattels), a contract of transportation or a contract of hotel accommodation. In fact, a pure contract of loan is often explicitly forbidden by the contracts that the issuer of the card has concluded with the travellers and with the enterprises providing goods and services.

Upon presenting the card and signing the bill, usually on a special form provided by the issuer of the card, the traveller will be given credit. A condition is that the credit giver shall have concluded a contract to that effect with the issuer of the card.

If we interpret the bill signed by the traveller as a delegation, then the

traveller is the delegator (issuer of the delegation) and the issuer of the card is the delegate.[6] The position of the giver of credit is that of a payee.

16. *Relationship "b"*. The relationship between the credit giver and the issuer of the card is governed by the contract under which the credit giver, for example an hotel, promises to give credit to card-holders and the issuer promises to redeem the bills, both promises being valid only under certain conditions and up to a certain limit. The contracts also contain other provisions, for example about the commission to be deducted by the issuer. There is usually, moreover, a clause to the effect that the credit giver will not charge card-holders more for his goods and services than he charges customers paying in cash.

The duty of the credit giver to provide credit must also be interpreted as his right to do so. An enterprise not connected with the issuer by a contract has no right to demand redemption of a bill by the issuer of the card, even though the traveller has presented the card and signed the bill in the prescribed manner. The contractual obligation of the issuer to "buy" the bills signed by a card-holder is comparable to a permanent acceptance of delegations issued by the card-holder.

The answer to the question whether the contract between the issuer and a credit giver gives any direct rights to the card-holders depends on the attitude of the applicable law towards obligations to the benefit of third parties.[7]

17. *Relationship "c"*. The relation between the issuer of the card and the card-holder (the traveller) is regulated by a contract. This contract obliges the issuer to issue a credit card to the traveller and to authorize him to use it in order to obtain credit at establishments connected with the issuer by contracts as described in section 16 *supra*. The issuer also guarantees, it seems, that the traveller really will obtain credit at these establishments. On the other hand, the traveller assumes the obligation to adjust his balance with the issuer at certain regular intervals. The issuer often undertakes to bear the loss caused by misuse of lost or stolen cards, but only as from the

[6] This is the view of Rodhe, *op. cit.*, pp. 42–7, and of Meznerics, *Law of Banking in East-West Trade*, Leiden–Budapest 1973, p. 198. Cf. Chabrier, *Les cartes de crédit*, Paris 1968; Zahrnt, "Die Kreditkarte unter privatrechtlichen Gesichtspunkten", *Neue Juristische Wochenschrift* 1972, pp. 1077–81; Chappenden, "Credit Cards: Some Legal Problems", 48 *The Australian Law Journal*, pp. 306–15 (1974). Chappenden, *op. cit.*, p. 307, goes so far as to suggest that between the card-holder and the merchant there might be no contractual relationship at all. The merchant supplies goods to the card-holder because he is under a contractual duty to the issuer to do so and in consideration of the issuer's promise to reimburse him. Chappenden himself writes, however, that it is more plausible to admit the existence of a contract, e.g. a contract of sale, between the card-holder and the merchant giving credit.

[7] See section 9, note 8, *supra*.

moment when the card-holder notifies him of the loss or theft. Some issuers go still further and limit the personal liability of the card-holder to a symbolic amount. Among the other provisions usually included in the contract, an obligation on the part of the card-holder to pay an annual fee to the issuer can be mentioned.

V. TRAVELLER'S CHEQUES AS NEGOTIABLE INSTRUMENTS IN THE CONFLICT OF LAWS

18. *Problem.* As has already been said, credit cards have no independent value in themselves. They do not contain any order or promise and they are not negotiable. They are a kind of private identity cards. It is thus meaningless to ask which law governs their validity and effects as documents. The relationships of the parties are governed by the proper law of the contract involved (sections 34–36 *infra*).

The situation as regards traveller's cheques is quite different. They are intended to be negotiable instruments. Negotiability means that the countersigned traveller's cheque and rights under it can be transferred by endorsement and delivery or by delivery alone. It means also that the debtor under the instrument cannot invoke against a *bona fide* holder any defences available against prior holders. It is generally recognized that the obligations arising under a negotiable instrument have an existence independently of the original contract which has given rise to the issuing of the instrument.

Thus, it is important to distinguish two types of rights and liabilities arising in legal relations concerning traveller's cheques. Some rights and liabilities are based on the negotiable instrument as such, for example the liabilities of the issuers and endorsers of negotiable instruments in general. Other rights and liabilities are not based on the instrument itself but on an accompanying contract, for example the contractual obligation of the issuer to replace or refund stolen cheques. The terms "*cambial*" and "*extracambial*" will be used to denote these two types of rights and liabilities respectively.[8] In this chapter, we are interested in the law applicable as to the *cambial* rights and obligations arising in legal relations involving traveller's cheques.

It is generally recognized that the cambial problems concerning negotiable instruments should be solved by application of laws determined by special conflict rules.[9] Negotiability requires that the rights and obligations

[8] Rabel, *op. cit.*, pp. 134 f.

[9] Batiffol and Lagarde, *Droit international privé*, 5th ed., vol. 2, Paris 1971, pp. 179–86; Dicey and Morris, *The Conflict of Laws*, 9th ed. London 1973, pp. 839–66.

of the various persons involved shall be determined on the basis of the instrument itself, without having to go back to the contracts which do not appear on the face of the instrument. The question about the applicable law must thus also be answered on the basis of the instrument itself.

The following legal problems of a cambial nature may conceivably arise in connection with the use of traveller's cheques.

(*a*) The question of the cheque's validity and of the validity of the countersignature, endorsement and acceptance with regard to the acting person's legal capacity. It is especially important to ask about the capacity of the traveller, who is always a physical person. It is, for example, possible that the traveller is considered of age in his home country but is under age according to the local law of the country he is visiting. The problem becomes more complicated if he has two "home countries", i.e. if his permanent residence or domicile is in a country other than the country of his citizenship. Which law is to govern?

(*b*) The validity of the cheque and of the endorsement and acceptance with regard to the requirements of form. Which law should determine the formal requirements imposed on negotiable instruments? Must acceptance be done in writing on the instrument itself in order to be binding on the acceptor?

(*c*) The legal effects of drawing, endorsement and acceptance of a traveller's cheque. Which law governs the cambial obligations of the issuer (drawer), endorser, acceptor? For example, does the endorser guarantee to a subsequent holder in due course that the issuer will fulfil his obligation? Which law is to answer this question?

(*d*) Rights *in rem* to the traveller's cheque. Which law governs the effect of the cheque's transfer as to third parties? Can a *bona fide* purchase of a countersigned cheque give a valid title to the purchaser regardless of the title of the seller? Which law governs this question?

It must be pointed out that there is practically no case law involving the private international law aspects of traveller's cheques. It will thus be necessary to use analogies from conflict rules intended to determine the law applicable to other kinds of negotiable instruments or to negotiable instruments in general. Still, the typical traveller's cheque is a rather peculiar negotiable instrument, differing from other negotiable instruments both in its form and in its purpose. It is thus also necessary to ask whether the various conflict rules used for other types of negotiable instruments are suitable for traveller's cheques and, if not, what conflict rules should be used instead.

First, we shall glance at the conflict rules concerning negotiable instruments in the United States and England and in the countries adhering to the Geneva Conventions on bills of exchange and cheques. This will be followed by an attempt to propose solutions of our own adapted to the specific features of traveller's cheques.

19. *United States.* Because of the almost universal enactment of the Uni-

form Commercial Code by the states of the Union, interstate conflict-of-law problems relating to negotiable instruments are unlikely to arise. On the international level, however, such problems continue to occur.

According to the Restatement of the law of conflict of laws,[1] the obligations of a drawer of a draft, as well as of an endorser, are determined by the local law of the state where he delivered the instrument. This state is presumptively the state where the instrument is dated, if such a state is indicated, and, in the absence of notification to the contrary on the instrument, this presumption is conclusive with respect to a holder in due course.

On the other hand, the obligations of an acceptor are determined by the local law of the state designated in the instrument as the place of payment. In the absence of such designation, the obligations of an acceptor are governed by the law of the state where he delivered the instrument. The presumption about the place of delivery, described above, is valid here, too.[2]

The law governing the obligations of the drawer, endorser and acceptor also governs their capacity to be bound[3] and moreover it answers the question whether the instrument satisfies the formal requisites of negotiability with respect to them.[4]

It emerges from the foregoing that the instrument may give rise to a series of obligations, each of them governed by its own law. Thus, the obligations of the drawer, endorser and acceptor will not necessarily come under the same law.

The local law of the state where a negotiable instrument was at the time of the transfer of an interest in the instrument determines the validity and effect of the transfer as to third parties. The rationale of this rule is that the instrument is a tangible thing, a chattel.[5] As between the parties to the transfer, its validity and effects are governed by the proper law of their contract.[6]

Finally, details of presentment, payment, protest and notice of dishonour are determined by the law of the place where these activities take place.[7] On the other hand, the actual necessity of a protest or notice of dishonour is determined by the law governing the obligations of the particular obligor, for example an endorser.

[1] *Restatement of the Law (2d), Conflict of Laws (2d)*, vol. 1, St. Paul 1971, p. 706 (rule 215). In what follows referred to as *Restatement*.
[2] *Restatement*, p. 701 (rule 214).
[3] *Restatement*, pp. 703, 707; Rabel, *op. cit.*, pp. 173 f.
[4] *Restatement*, pp. 703, 708.
[5] *Restatement*, p. 712 (rule 216).
[6] *Restatement*, p. 713.
[7] *Restatement*, p. 715 (rule 217).

20. *England.* According to the English conflict of laws, negotiable instruments are to a large extent treated as chattels. Whether they are negotiable and whether and how they can be transferred by delivery or endorsement are matters governed by the law of the country in which the instrument is situated at the time of the transfer.[8]

English conflict rules concerning negotiable instruments usually have in mind bills of exchange or promissory notes under the Bills of Exchange Act, 1882. Although it is very doubtful whether traveller's cheques can be considered to be bills of exchange under English law,[9] the conflict rules applied to bills of exchange are not without interest.

According to the principal rule, the validity as regards requisites in form of the instrument is determined by the law of the country of issue, i.e. the country where the instrument is first delivered, complete in form, to a person who takes it as a holder. The validity as to form of supervening acts such as endorsement or acceptance is determined by the law of the country where the endorsement or acceptance takes place.[1]

The duties of the holder with respect to presentment, protest or notice of dishonour are determined by the law of the place where the act was done or the bill dishonoured.[2]

The legal effects of the drawing, endorsement and acceptance are governed by the law of the country where they are made.[3]

As can be seen, English private international law, too, adheres to the view that the different obligations based on the negotiable instrument can be governed by different legal systems.

In addition to the provisions mentioned, there are also some one-sided conflict rules giving application to English law. Thus, if an instrument issued abroad conforms in form to English law, it may, for the purpose of enforcing payment, be treated as valid between all persons in the United Kingdom. An instrument issued abroad is, further, not invalid solely because it is not stamped in accordance with the law of the country of issue.[4] If an "inland bill", i.e. a bill which is or on its face purports to be drawn within the British Isles and either payable there or drawn upon a person

[8] Dicey and Morris, *op. cit.*, p. 841; Cheshire, *Private International Law*, 9th ed. London 1974, p. 256.

[9] It seems that the legal nature of traveller's cheques has not been discussed in any English reported case.

[1] Dicey and Morris, *op. cit.*, p. 848; Cheshire, *op. cit.*, p. 256.

[2] Dicey and Morris, *op. cit.*, p. 859; Cheshire, *op. cit.*, pp. 259 f.

[3] Dicey and Morris, *op. cit.*, p. 850; Cheshire, *op. cit.*, p. 258; sec. 72(2) of the Bills of Exchange Act 1882.

[4] Dicey and Morris, *op. cit.*, p. 848; Cheshire, *op. cit.*, p. 257.

there, is endorsed abroad, the endorsement will, as regards the payor, be interpreted according to the laws of the United Kingdom.[5]

21. *Countries parties to the Geneva Conventions.* With the exception of the common-law area, the laws on bills of exchange and cheques of most countries are based on the Conventions concluded in Geneva in 1930 and 1931. These Conventions have led not only to a large-scale unification of domestic law, but also to a unification of the conflict-of-law rules concerning bills of exchange and cheques.[6] It has already been said that ordinary traveller's cheques are neither cheques nor bills of exchange under the Geneva Conventions, since they do not fulfil the formal requirements imposed by the Conventions. This does not, however, necessarily imply that a traveller's cheque cannot be considered to be a bill of exchange or an ordinary cheque by a court in a country adhering to the Geneva Conventions.

Art. 3 of the Convention for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes states that the form of a bill of exchange is governed by the laws of the territory in which the bill has been signed. This means that a traveller's cheque which, according to the laws of the country of issue, fulfils the formal requirements of a bill of exchange might conceivably also be considered as a bill of exchange in the countries adhering to the Geneva Convention. Similar conflict rules are included in the Convention for the Settlement of Certain Conflicts of Laws in Connection with Cheques.[7] It must be added that the Conventions[8] give the contracting states the right not to apply the unified conflict rules to obligations undertaken outside the territories of contracting states and as to law which is not in force in the territory of any contracting state. This means that the Conventions do not oblige the courts in, for example, Sweden to apply the conflict rules to a bill of exchange signed in the United States. The Conventions have, nevertheless, been adopted as Swedish law[9] without any such reservation and thus the Swedish conflict rules based on the Conventions are applicable quite gen-

[5] Dicey and Morris, *op. cit.*, p. 851; Cheshire, *op. cit.*, p. 259.

[6] Convention for the Settlement of Certain Conflicts of Laws in Connection with Bills of Exchange and Promissory Notes, of June 7, 1930, published, e.g., in Hudson, *op. cit.*, pp. 550 ff. Convention for the Settlement of Certain Conflicts of Laws in Connection with Cheques, of March 19, 1931, published, e.g., in Hudson, *op. cit.*, pp. 915 ff.

[7] Art. 4.

[8] Art. 10 of the Convention relating to bills of exchange and art. 9 of the Convention concerning cheques.

[9] The Act on Bills of Exchange and the Act on Cheques, both of May 13, 1932.

erally. This seems also to be the situation in many other countries adhering to the Conventions.[1]

According to both Conventions, the capacity of a person to bind himself is determined by the person's national law, *lex patriae*. The Conventions accept explicitly the concept of *renvoi* as to personal legal capacity, stating that if the national law provides that the law of another country is competent in the matter, this latter law shall be applied. The person issuing the cheque or bill of exchange is, in any case, bound if his signature has been given in a territory in which, according to the law in force there, he would have the requisite capacity. From this last rule there is, however, an exception: any contracting state may refuse such obligations assumed by its own nationals abroad.[2]

The form of any contract arising out of a bill of exchange or cheque is regulated by the law of the territory where the instrument has been signed. As to cheques, it is sufficient if the forms prescribed by the law of the place of payment are complied with. If the obligation is not valid as to form according to the applicable law mentioned, but is in conformity with the laws of the territory where a subsequent contract, for example an endorsement, has been entered into, the irregularity of the previous contract does not make the subsequent contract invalid.[3]

The effects of obligations arising out of a cheque is determined by the law of the country where the obligations have been assumed.[4] The obligations of the acceptor of a bill of exchange are governed by the law of the place where the bill is payable. The effects of the signatures of other parties liable on a bill of exchange are determined by the law of the place where the signatures were affixed.[5]

According to both Conventions, the limits of time for the exercise of rights of recourse are governed by the law of the place where the instrument was created.[6]

The form and the limits of time for protest and other similar measures are regulated by the laws of the country where the protest has to be drawn up or the measures in question have to be taken.[7]

[1] Batiffol and Lagarde, *op. cit.*, p. 180 note 29; Loussouarn and Bredin, *Droit du commerce international*, Paris 1969, pp. 542 f.; Philip, *Dansk international privat- og procesret*, Copenhagen 1971, p. 320.

[2] Art. 2 of both Conventions.

[3] Art. 4 of the Convention relating to cheques; art. 3 of the Convention concerning bills of exchange.

[4] Art. 5 of the Convention concerning cheques.

[5] Art. 4 of the Convention concerning bills of exchange.

[6] Art. 6 of the Convention concerning cheques; art. 5 of the Convention concerning bills of exchange.

[7] Art. 8 of both Conventions.

In addition to lacking conflict rules on cheques and bills of exchange, the countries adhering to the Geneva Conventions normally lack conflict rules applicable to other types of negotiable instruments, for example traveller's cheques.

It is of interest to note that the Geneva Conventions, too, adhere to the view that the different obligations emanating from a cheque or from a bill of exchange, for example the obligations of the drawer, endorser and acceptor, may be governed by different legal systems. It can thus be said that there is practically universal agreement on this matter.[8] Admittedly, this may lead to a situation where a debtor is sued who has no right of redress against previous warrantors.

22. *Legal capacity of issuer, endorser and acceptor.* The question of personal legal capacity is not limited to negotiable instruments and it might be questioned whether there is any need for a conflict rule other than the general conflict rules governing capacity. Nevertheless, special conflict rules for the capacity to be bound by a negotiable instrument have been adopted in most jurisdictions.

Among the countries adhering to the Geneva Conventions, there are also states, for example Denmark and Norway, whose private international law normally prefers *lex domicilii* to *lex patriae* as regards the personal capacity of physical persons. By accepting the Conventions, even these countries accepted the rule that the capacity of a person to be bound by a cheque or bill of exchange is governed by the law of nationality. Further, even countries traditionally hostile towards the doctrine of *renvoi,* for example Sweden, accepted the *renvoi* in this case as prescribed by the Conventions. Last but not least, the Conventions stipulate that capacity according to the *lex loci actus* is normally sufficient, a rule that is not always applied to the capacity to perform other legal acts.

American conflict rules also distinguish capacity to be bound by a negotiable instrument from other cases of capacity, considering the capacity to be bound by a negotiable instrument to be governed by the law designated in the instrument as the place of payment or, in the absence of such designation, by the law of the state where the document was delivered.[9] In England, too, there is authority for the view that the capacity to be bound by a negotiable instrument should be governed by the *lex loci contractus.*[1] This means that the usual conflict rules governing capacity are here pushed aside.

[8] Dicey and Morris, *op. cit.*, p. 843; Rabel, *op. cit.*, pp. 150 f. But see Batiffol and Lagarde, *op. cit.*, pp. 183 f.

[9] *Restatement*, p. 703; cf. Rabel, *op. cit.*, pp. 173 f.

[1] Dicey and Morris, *op. cit.*, p. 846 note 68; cf. Rabel, *op cit.*, p. 173 note 5.

The legal capacity of the maker (issuer) of a traveller's cheque will hardly ever cause problems, since the issuers are internationally known legal persons. Although it is, of course, theoretically possible to discuss the law according to which the courts are to examine whether, e.g., the First National City Bank of New York is an existing corporation and whether the cheque has been "signed" by persons entitled to represent the issuer, such discussion would hardly be of great practical value. But even an endorser or an acceptor can be a legal person and it should be said that the capacity of legal persons to be bound by a negotiable instrument should be governed by the personal law of the company as determined by the usual conflict rules of the forum.

It is of greater interest to examine the capacity of physical persons, especially of the traveller. It is, it seems, uninteresting to ask about the legal capacity of the person countersigning the cheque, since the countersignature in itself appears to be a purely factual act, although it is accorded legal relevance by the cheque ("When countersigned below with this signature..."). The countersignature is not identical with delivery or endorsement of the cheque by the traveller. It only changes the cheque into a negotiable instrument. The Italian Court of Cassation considered the countersignature to be an endorsement *in blanco*.[2] This is, it is submitted, incorrect. Before the countersignature the cheque is not negotiable at all and after countersignature no endorsement is necessary if the space for the name of the payee is left blank, as it usually is. If the traveller fills in his own name as that of the payee, the countersignature is not sufficient as endorsement and if the name of the acceptor, for example an hotel, is filled in as the name of the payee, then the traveller has not even the right to endorse the cheque.

But even if the countersignature in itself is not a legal act on the part of the traveller, the traveller's legal capacity is of interest since it is usually he who negotiates the cheque by delivery or, more seldom, by endorsement. It is submitted that the traveller should be incapable of negotiating the cheque only if he is incapable under the law of the country of his nationality, the country of his domicile and the country where he acts. Thus, if one of these legal systems considers him capable, he should be bound. The rationale of this view is that the transactions involving traveller's cheques usually do not involve extravagant sums of money and that the acceptor, for example an hotel, should be allowed to rely upon local law. Traveller's cheques are perhaps especially useful for inexperienced young people travelling abroad and it would not be wise to force them to carry cash

[2] Italian Court of Cassation, Aug. 10, 1953. *Monitore dei tribunali* 1953, p. 371.

instead of the more secure cheques. It should also be borne in mind that the traveller's cheques of a child in a summer camp have probably been bought for him by his parents in his home country and that this can be interpreted as the parents' consent to the negotiation of the cheque by the child.

23. *The form and negotiability of a traveller's cheque and the obligations of the issuer.* It is submitted that these matters should be governed by the law of the seat of the issuer. It is practically impossible to find any other connecting factor that could be used. The place of issue and the place of payment are normally not indicated on the instrument. The place where the cheques were delivered to the traveller by the issuer or his agent is also frequently not indicated and it would, moreover, be very unsuitable as a connecting factor. It has to be stressed that a traveller's cheque must have the same validity and the obligations of the issuer emanating from the cheque must be the same regardless of the place where the traveller purchased it. This principle is important not only for the protection of the issuer, but also and above all for the protection of the various acceptors all over the world. They must, if the cheque is to fulfil its purpose, be able to rely on the validity of the cheque and the obligations of the issuer always being the same, to know for example that an American Express Company's traveller's cheque is equally good whether it has been purchased by the traveller in New York or in Stockholm. The only connecting factor that can satisfy this requirement is the law of the seat of the issuer. This seat need not be the seat of the main office of the issuer. Thus, the American Express Company issues cheques in French francs and in West German marks and they are marked with the inscription "Redeemable by American Express International Banking Corporation, Paris" and "At American Express Bank GmbH Frankfurt/M.", respectively. It seems logical to apply French or German law in such cases.

A question of rather theoretical importance is whether the issuer should have the freedom to choose the law applicable to his obligations under the cheque. Such an indication of choice of law on the face of the cheque, for example "Pay according to the law of New York . . .", has, to my knowledge, never been used. Nevertheless, the American Uniform Commercial Code[3] gives effect to a choice-of-law provision on a negotiable instrument, provided that the chosen law bears "a reasonable relation" to the transaction. One must agree with Rabel[4] that such freedom of choice is unnecessary,

[3] Sec. 1–105 of the Uniform Commercial Code; *Restatement*, pp. 705, 711.

[4] Rabel, *op. cit.*, pp. 148 f.; cf. Wolff, *Private International Law*, 2nd ed. Oxford 1950, p. 483.

especially in the case of traveller's cheques which involve only moderate sums of money and are not used for large-scale commercial transactions.

It should thus normally be the law of the seat of the issuer that should determine whether the cheque can be a negotiable instrument at all and whether it fulfils the requirements of form. The same law should govern the obligations of the issuer, especially his duty to redeem the countersigned cheques.

24. *The form of endorsement, acceptance and payment and the obligations of the endorser and acceptor.* It is suggested that these questions are to be regulated by the law of the place where endorsement, acceptance and payment take place.[5] As to the form, this is only an application of the *locus regit actum* principle. The same principle should also apply to the question whether and how a holder of the cheque must take steps like protest or notice of dishonour if he wants to use his rights of recourse against previous endorsers. Whether he has any rights of recourse should, however, be determined by the law of the place where the previous endorsement had taken place. The problem of recourse will, however, very seldom arise, since the countersigned cheques are normally negotiated not by endorsement but by simple delivery. Further, the question of recourse may only arise if the issuer himself refuses to redeem the cheque, since there is no drawee indicated on the instrument.

It follows from what has been said that the obligations of the issuer may be governed by a law different from the law that governs the obligations of an endorser or of an acceptor. This is in accordance with the needs of practical life. The acceptor, for example an hotel or a taxi driver, will with every right expect to be obliged under the local law. The same can also be said about endorsements, for example when an hotel endorses the countersigned cheques to its bank.

25. *Rights* in rem *to the traveller's cheque.* It seems that this aspect, especially the question of *bona fide* acquisition of a *countersigned* cheque and of the rights under it, should be governed by the *lex rei sitae*, i.e. by the law of the place where the cheque was situated at the time of the transfer. This rule is relevant when, for example, there is a lawsuit between two or more persons claiming title to the cheque.[6] The conflict rule is the same as that which applies to chattels in general. The *situs* appears to be a suitable connecting factor when the courts are studying the validity and effect of a

[5] See Heinichen, *op. cit.*, p. 107; Käser, *Zeitschrift für das gesamte Kreditwesen* 1961, p. 199.

[6] *Restatement*, pp. 712–15; Nial, *Internationell förmögenhetsrätt*, 2nd ed. Stockholm 1953, p. 72; Heinichen, *op. cit.*, p. 107; Käser, *Zeitschrift für das gesamte Kreditwesen* 1961, p. 199.

transfer as between persons who were not parties to it, for example between a *bona fide* holder and a previous holder from whom the cheque had been stolen.

VI. CONFLICTS OF LAWS AND THE EXTRACAMBIAL LEGAL RELATIONS ARISING AT THE USE OF TRAVELLER'S CHEQUES AND CREDIT CARDS

26. *Traveller's cheques.* The use of traveller's cheques gives rise to other legal relations besides those emanating from the cheque itself as a negotiable instrument. These *extracambial* relations, too, may contain foreign elements and the question of the applicable law may arise. We shall discuss the relationships one by one on the basis of the previously described model (section 6 *supra*).

27. *The value relationship.* Let us imagine that a Swede buys traveller's cheques issued by the West German Commerzbank. The transaction takes place in Stockholm and the issuer is represented by a Swedish bank. Which law governs the contract between the issuer and the traveller? Which law determines the validity of the contract (not of the cheque itself!) in respects other than form and legal capacity of the parties? Should there be any argument about the delivery of the cheques, the payment of their price or of the commission, the right of the traveller to revoke his order, which law is to be applied? If the issuer or his agent committed some fault, for example the traveller was sold cheques of an earlier, no longer valid issue, which law governs the issuer's liability for damages? Which legal system should be relied on in the interpretation of the issuer's contractual obligation to replace or refund stolen or lost cheques? Which law determines the issuer's liability for the acts of his agents, for example of a bank in the traveller's home country which sold the cheques to the traveller? These are only some examples of the legal questions that may conceivably arise. All that can be said is that these questions are to be answered on the basis of the proper law of the contract. It is, however, more difficult to say which law is the proper law.

The contract shows connections with the country of the issuer, but also with the country of the permanent residence of the traveller. It is, further, probably a frequent occurrence that the traveller purchases the cheques in a country other than the country of his residence. On the other hand, the country in which the cheques are intended to be used is hardly of relevance

in this connection. Equally irrelevant, it is suggested, are the language of the cheque and the currency of the cheque. Both the currency and the language of the cheque will be among those common in international circulation and they do not reflect any real relationship of the contract to a particular country.

According to the private international law of practically all countries, the parties to a contract may choose the applicable law.[7] Such choice of law cannot, however, normally be found in contracts of this kind. The contract between the issuer and the traveller is, further, a consumer contract where one of the parties, the traveller, is not a merchant but a private citizen. It is not quite clear whether the freedom to choose the applicable law (party autonomy) should be allowed in consumer contracts also.[8] The courts will in most cases have to use other methods in order to establish the applicable law. These methods vary from country to country, although they have many common features. It would be out of place to analyse them in detail in this paper. Nevertheless, it can be said that the basic idea of all these methods is to determine the law that has the most relevant relationship to the contract in question. This problem of the most relevant relationship can thus be discussed irrespective of which country is the country of the forum.

Should the traveller contract directly with the issuer in the issuer's own country, there can hardly be any doubt that the law of the seat of the issuer will be the proper law of the contract. But, as has already been mentioned, the traveller normally concludes the contract with the local representative of the issuer in the country of the traveller's own residence. The performances, i.e. the delivery of the cheques and the payment of their price, also usually take place in the country of the traveller. Last but not least, the contract will be concluded on a standard form, which means that the conditions and provisions are dictated by the issuer. It seems reasonable to protect the traveller by applying his law instead of the law of the distant country of the issuer.[9] This protection of the traveller does not, of course, mean that the law of the traveller's own country is in all circumstances more favourable to him than the law of the country where the issuer has his seat. The contrary may equally well be true. The real content of the protection is different: the court is inclined to apply the law that is

[7] *Restatement*, vol. 1, pp. 558–75; Dicey and Morris, *op. cit.*, pp. 721–42; Batiffol and Lagarde, *op. cit.*, pp. 207–20; Kegel, *Internationales Privatrecht*, 3rd ed. Munich 1971, pp. 255–7; Eek, *The Swedish Conflict of Laws*, The Hague 1965, pp. 266 f.

[8] Ehrenzweig, "Adhesion Contracts in the Conflict of Laws", 53 *Columbia Law Review*, pp. 1072–90 (1953); Lando, "Consumer Contracts and Party Autonomy in the Conflict of Laws", *Mélanges de droit comparé en l'honneur du doyen Åke Malmström*, Stockholm 1972, pp. 141–58.

[9] Heinichen, *op. cit.*, p. 106, would apply the law of the issuer's seat here, too.

presumed to be closer to the way of thinking of the traveller, the law he probably knows a good deal about even if he is not a lawyer. Another advantage, in a practical sense, of the application of the law of the traveller's residence is the fact that the courts will in this case normally apply their own law, the *lex fori*.

The situation might be different if the traveller purchased the cheques in a country other than the country of his residence. The country of purchase may be quite accidental; for example, it may be only a country of transit for the traveller. Let us imagine a young American travelling in Europe who asks his parents for more money. The parents send him the money and he immediately converts it into traveller's cheques. It is probable that he will do so in the country where he happens to be when the money reaches him and there is probably no other connection between him and that country. It lies in the nature of traveller's cheques that they are purchased by people "on the move" and it might be that if the country of the traveller's residence and the country of purchase are different, the law of the issuer's seat is more suitable for the purpose of governing the contract than is the law of the place where the contract was concluded or the law of the country where the traveller resides. In any case, the application of the law of the issuer's seat appears to be quite logical when the traveller himself comes from the issuer's country, for example where a tourist from New York buys in Europe traveller's cheques issued by a New York bank.

Although the traveller's cheque may in certain respects be considered a chattel, the contract between the issuer and the traveller should not, when the question of proper law arises, be considered a contract of sale of goods. It is, rather, a mixed contract or a contract *sui generis*.

28. *The payment relationship*. The contract between the traveller and, for example, an hotel or a shop, does not usually limit itself to the traveller's cheque. It may be a contract of hotel accommodation or sale of movables. This contract will normally be governed by the law of the seat of the hotel or the shop. It seems to be reasonable to subject the extracambial obligations involving traveller's cheques to the same law. Thus, the promise of an hotel that the traveller will be allowed to pay his bill by means of a traveller's cheque should be interpreted and given effect according to the law governing the hotel accommodation contract. The same law determines the effect of a sign displaying such words as "XZ Traveller's Cheques Welcome". This law should also be applied as to the right of the acceptor to demand a fee from the traveller for cashing the cheque. Questions of exchange rate, too, should be discussed on the basis of that

law. The same legal system should also determine whether the traveller guarantees that the countersigned cheques will be redeemed by the issuer. This *extracambial* responsibility based on the interpretation of the contract must be distinguished from the *cambial* responsibility based on the legal rules governing negotiable instruments and relevant in the case of an endorsement of the cheque by the traveller.

29. *The coverage relationship.* This is the relationship between the acceptor, for example an hotel, and the issuer. Let us, first of all, discuss the rare situation where there is a contract between the issuer and the acceptor,[1] according to which the acceptor is obliged to accept countersigned cheques issued by the issuer. The validity of this contract, with the exception of the questions of legal capacity and form, as well as the contracts's interpretation, is governed by its own proper law. This law will even determine whether the contract gives direct rights to third parties, for example whether a traveller may invoke it *vis-à-vis* the acceptor. If the contract is only a part of a larger contract, for example a contract of permanent representation or agency, it should be governed by the same law. The issuer and the acceptor have, of course, the possibility of choosing the applicable law. If they do not do so, it seems that the most suitable law is the law of the acceptor's residence or seat.[2] The performance of the acceptor is the "typical" performance in this contract and it seems to be the current view that contracts of mandate—and this is a kind of mandate—are governed by the law of the mandatary or by the law of the place where the mandate is to be carried out, these usually being the same law.[3] Nevertheless, even here it is necessary to distinguish the rights and obligations emanating from the negotiable instrument from extracambial rights and obligations based on the contract.

Usually, there is no contract between the issuer and the acceptor prior to the acceptance of the traveller's cheque by the latter. The rights of the acceptor against the issuer can here be based solely on his possession of the countersigned cheque. There is thus no extracambial contract, and the rights of the acceptor *vis-à-vis* the issuer are governed by the law regulating the duties of the issuer as such (see section 23 *supra*).

30. *Relationship between the issuer and his commercial agents.* It has been mentioned that issuers usually sell the cheques via agents, for example

[1] E.g. the agent selling traveller's cheques assumes, towards the issuer, the obligation to accept countersigned cheques presented by the public.

[2] Heinichen, *op. cit.*, p. 106, prefers the law of the issuer's seat.

[3] *Restatement,* vol. 1, pp. 623–7; Kegel, *op. cit.*, pp. 257–60; Rabel, *op. cit.*, vol. 3, Ann Arbor 1950, pp. 194–8.

banks or travel agencies, in various countries. The legal relationship between the issuer and such agents can be qualified as a relationship between the principal and his commercial agent (representative). Two aspects of this contract must be distinguished. First of all, there is the *internal* relationship between the principal and the agent, concerning such questions as the remuneration (commission) of the agent, his duty to protect loyally the interests of the principal, the manner in which the money for sold cheques is to be forwarded to the principal, the responsibility of the agent for the cheque forms entrusted to him, etc. There is, on the other hand, also the *external* aspect of the contract, i.e. the agent's capacity of binding the principal in contracts with third parties.[4]

It is submitted that the two aspects of the contract need not be governed by the same law. The protection of third parties concluding contracts with the principal through the agent requires that the power of attorney given to the agent by the principal shall be governed by a law determined by a conflict rule known to the third parties and not by a law agreed upon by the principal and the agent.

The internal relationship between the issuer and his agents should be governed by its own proper law, preferably the law chosen by the parties. If the parties fail to choose the applicable law, it seems that the private international law of most countries will usually lead to the application of the law of the agent's permanent residence or of the law of the place where he carries on his business activities, these usually being the same law.[5] This appears to be a reasonable rule in most cases. It must, however, be remembered that the contracts are usually concluded on forms provided by the issuer and that the conditions are in most cases dictated by the issuer. These conditions are normally the same for all the agents of the issuer, regardless of the country where they represent him. Should this lead to an application of the law of the issuer, in order that all these contracts shall be subjected to the same law? The answer is no. This situation cannot be compared to the usual concept of contracts concluded *en masse* where one party—for example a bank, a transporter or a department store—concludes contracts of identical contents with a large number of more or less anonymous persons. The issuer knows very well in each individual case whom he is appointing as his agent and the number of such contracts is not

[4] The view that the two aspects should be handled separately is usually adhered to in the civil-law countries, with the possible exception of France. In Anglo-American law, the two aspects are not clearly distinguished. Nevertheless, Anglo-American law knows the distinction as far as conflicts of laws are involved. *Restatement*, vol. 2, pp. 267–79; Dicey and Morris, *op. cit.*, pp. 869–71.

[5] Schmitthoff, "Agency in International Trade", 129 *Recueil des Cours*, pp. 105–202 (1970), at pp. 172–4; Lando, *Journal of Business Law* 1966, p. 89; Loussouarn and Bredin, *op. cit.*, pp. 722–4.

so great that the issuer could not be expected to give personal attention to each contract. It is the representative whose performance is typical for the contract, just as it is also more burdensome and complicated; it is thus only logical to apply his law, at least if the relationship as a whole does not clearly show a closer connection with the law of the seat of the issuer. As an example of such a conceivable closer relationship to the country of the issuer, we can mention the situation where the issuer, a New York bank, concludes the agency contract with a French subsidiary of another New York bank, the contract being concluded in New York.

As to the external aspects of the relationship between the principal and the agent, i.e. as to the authority of the agent to bind the principal, the view prevailing among legal scholars[6] favours the law of the place where the agent is acting.[7] It is submitted that this predominant view is correct. It is also suggested that the issuer and the agent should not be free to choose another law to govern this question. The interests of third parties must be protected. Besides, one might even ask whether the granting of a power of attorney is an act directed by the principal towards the agent or whether it is not rather an act directed to third parties. Here too, there are also consumer interests to consider. A Swedish private citizen should be able to rely upon the Swedish bank from which he buys the cheques being a representative of the issuer if it is a representative under the laws of Sweden. Normally, the authority of the agent will not lead to any legal disputes. It is, nevertheless, quite conceivable that the agent should promise the traveller more than the agency contract allows for and the question may arise whether such promises bind the issuer.

31. *Relationship between the traveller and the issuer's agent.* The fact that the agent acts on behalf of the issuer and that his acts directly bind the issuer does not, as has already been shown (section 11 *supra*), exclude the existence of a separate contract between the traveller and the agent. If the existence of such a separate contract is established, for example if the traveller's bank not only sold him the cheques but also provided, at the traveller's request, information as to which brand of cheques was the most

[6] Batiffol and Lagarde, *op. cit.*, pp. 257 f.; Kegel, *op. cit.*, pp. 243–6; Philip, *op. cit.*, p. 286; Karlgren, *Kortfattad lärobok i internationell privat- och processrätt*, 5th ed. Lund 1974, p. 92; *Restatement*, vol. 2, pp. 275–9. Further, Dicey and Morris, *op. cit.*, p. 872, write: "Hence, if P in one country authorizes A to act for him as regards certain matters, e.g. the sale and purchase of goods, in a specified or unspecified number of countries, A has authority to act in each country in accordance with the laws thereof." This is also the view of Cheshire, *op. cit.*, pp. 242 f.

[7] At least if the agent is a permanent representative of the principal. The opposite case, where the agent has only the authority to conclude one particular contract, is hardly of practical interest for the situation under scrutiny here.

suitable for the journey, this contract should be governed by its own proper law. Since the traveller will usually buy cheques from an agent in his own country, it will be the law of this country that will have the closest and most relevant connection with the contract. But if the traveller buys cheques in a country other than his own, for example an American tourist purchases cheques from a Swedish bank in Sweden, it is submitted that the law of the agent should prevail. In the same way as the tourist must expect to obey local laws when shopping or eating in a restaurant, he must expect that the local laws will be applied when he drops into a bank or travel agency. There remains, of course, the possibility that the parties will choose the applicable law in their contract, but it is hardly probable that this will happen.

Presuming, again, that the traveller wants to hold the agent liable for extracontractual damages, for example because the agent consciously gave him wrong instructions as to the use of the cheques, it seems only reasonable to apply the law of the place where the agent committed his wrongful act, i.e. the *lex loci delicti.*

32. *Relationship between the acceptor and his bank.* The acceptor of a countersigned traveller's cheque will not usually turn directly to the issuer and demand that the cheque shall be redeemed. In the majority of cases, the acceptor, for example an hotel, will sell the cheque to his bank.[8]

Some of the obligations of the parties are cambial, for example the liability of the acceptor who endorsed the cheque. But there are also extracambial aspects, for example the right of the bank to remuneration in the form of a deduction from the face value of the cheques. The acceptor and his bank usually have their seats (residence) in the same country where the contract is concluded and there is thus no doubt that it is the law of that country that governs their mutual relations. The same will be true if the bank does not buy the cheques but only assumes a mandate to present them to the issuer for redemption on behalf of the acceptor.

33. *Relationship between the issuer and the person presenting the cheque for redemption.* We have already discussed the situation where the acceptor himself presents the cheques to the issuer for the redemption (section 29 *supra*). Let us now consider the case where the acceptor has sold the countersigned cheque to his bank. The position of the bank *vis-à-vis* the issuer will here be identical with the position of the acceptor and it will thus be governed by the law governing the issuer's cambial responsibilities

[8] The situation is, of course, different when the acceptor himself is a bank.

(section 23 *supra*). Nevertheless, it is quite conceivable that there should be a preceding extracambial contract between the issuer and the bank, for example to the effect that the bank shall gather all the cheques cashed in its country and forward them to the issuer. Such a contract will have its own proper law and the rights of the parties, for example the right of the bank to remuneration from the issuer, will be governed by it. In the absence of a choice of law in the contract, it seems that the law of the seat of the bank should be applied (see section 30 *supra*).[9]

If the bank has undertaken only to present the cheque to the issuer on behalf of the acceptor, there will normally be no legal relationship at all between the bank and the issuer.

It must be stressed that in practice the legal relationships involved may be much more complicated than is described here. Thus, a Swedish bank which has bought countersigned German traveller's cheques from a Swedish hotel will often not send them direct to the issuer. Instead, it may sell them to a German bank which, in turn, will present them to the issuer for redemption.

34. *Relationship between the holder of a credit card and the giver of credit.* When the giver of credit, for example an hotel, honours the credit card, it does so within the framework of a wider contract, for example a contract of hotel accommodation. It seems reasonable to consider this larger contract, including the question of credit, as an entity subject to the same legal system. The applicable law will normally be the law of the credit giver, since it is practically a matter of course that a contract of hotel accommodation or a contract of sale in a shop will be governed by local law. This is also in accordance with the expectations of the traveller and is thus not unfair to him.

35. *Relationship between the credit giver and the issuer.* One might expect that the parties to this contract, both being merchants, would often choose the law applicable to their mutual obligations. This is, however, not the case.

If the contract is concluded by a subsidiary of the issuer in the country of the giver of credit, the law of the seat of the latter seems to be the most relevant connection. But let us consider, for example, the contracts concluded between the American Express Company and Swedish hotels, shops, etc. The printed contract is in Swedish, but the address of the issuer indicated in the contract is that of his European headquarters in England. The amount of commission is fixed in Swedish kronor, but with amounts

[9] This seems to be also the view of Heinichen, *op. cit.* pp. 107 f.

in U.S. dollars within brackets. The signed copies of the contract are, according to instructions printed on it, to be sent to the issuer's representative in Stockholm, a Swedish travel agency.

It is submitted that here, too, the contract between the credit giver and the issuer should be governed by the law of the seat of the former. Even if the contract may show a significant connection with the country of the issuer, the need to protect the credit givers is an argument in favour of applying their law. The owner of a small shop or restaurant in Stockholm should be able to rely on his rights and obligations under the contract being governed by the local law, especially as the contract is usually signed in the country of the credit giver, where the negotiations between him and the local representative of the issuer also take place.

36. *Relationship between the issuer and the traveller.* The traveller being a private citizen, the need to protect him is undoubtedly an argument in favour of applying the law of his country of residence, at least if he applied for the card there. We may again take as an example the application forms of the American Express Company used in Sweden. The application form is, this time, in English and the address in England of the issuer is indicated. All amounts of money are expressed in U.S. dollars. The name and address of the Swedish travel agency representing the issuer are, nevertheless, also indicated.

Regardless of the undoubtedly strong connection with the law of the issuer, it is submitted that the law of the traveller's residence should be the proper law of the contract. The issuer can be expected to inform himself about the legal system of the country where he intends to market his card and he may even adapt the conditions of the contract accordingly. It is the issuer who dictates the conditions and it is thus the traveller who, as a consumer and as the weaker party, should be protected against the application of a legal system he does not know.

The situation is different if the traveller obtains the card in a country other than the country where he resides. In such circumstances, there will be strong reasons for applying the law of the issuer or the law of the country where the traveller negotiated with the issuer's representative.