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ATUALIDADES

THE NEW BRAZILIAN CHEQUES ACT OF 1985 AND THE GENEVA UNIFORM LAW ON CHEQUES

GREGOR HEINRICH

In September 1985 Brazil enacted a new Cheques Act.¹ It is based on the Uniform Law of Cheques pursuant to the Geneva Conventions of 1930-31. This new codification is of great practical interest for commercial and financial transactions with Brazil since it puts an end to a period of uncertainty as to the rules applicable to cheques in that country.

I. Historical background

As early as 1912 Brazil had enacted a Law of Cheques.² It contained only a few provisions particular to the cheque and otherwise referred to the law on Bills of Exchange which had been enacted in 1908.³ Brazil did not participate in the negotiations on the Geneva Convention on a Uniform Law of Cheques — concluded on 19.3.31 — but it did participate in the negotiations for a convention on a Uniform Law of Bills of Exchange — concluded on 7.6.30 — of which Brazil was also a signatory state. However, ratification of the Geneva Conventions on both cheques and Bills of Exchange did not occur until 26.8.42 by declaration of adherence at the League of Nations.⁴

It was not until 1964 that the Brazilian Parliament consented to the conventions and more than a year later in 1966 the conventions were promulgated by decree and it was ordered that the text of the Geneva Conventions should be "acted upon and observed" subject to the reservations made by Brazil.⁵ No national codification on the subject of cheques and Bills of Exchange was published in Brazil.

For a long time — until a leading case of the Brazilian Supreme Court in 1971 — there were differences of opinion as to whether the rules of the Uniform Law had to be applied in Brazil.⁶ Nevertheless, the Supreme Court ruled that the Uniform Law had replaced the national statutes only to the extent that Brazil had not declared specific reservations in accordance with Annex II to each of the relevant conventions. In practice, two different statutes had to be consulted: as a principle the rules of the Geneva Uniform Laws, but also the rules of the old national statutes, whenever a certain question was covered by a reservation or was not dealt with by the Uniform Laws.

The old national law of cheques being only rudimentary, it was therefore more than natural that there had been frequent proposals for a new codification of the law of cheques throughout the years.⁷

The new Act closely follows the Geneva Uniform Law but some considerable differences to exist. These could originate from the fact that Brazil has declared all but seven of the possible 31 reservations. Thus, some of the provisions of

the old national codes have been incorporated in the Act. Some of the clauses of the Act seem to have been influenced by the French law on cheques, and for this reason aspects of the Act will be compared with the Uniform Law as adopted in France and in Germany⁸ as well as with French and German particularities.

II. Some new provisions of the Act

1. It seems that the *French concept of "provision"* has clearly influenced the Brazilian Act. The uniform law specifies in Article 3 that "a cheque must be drawn on a banker holding funds at the disposal of the drawer...". No mention is made as to the precise moment when the funds must exist. While the wording seems to imply that the funds have to be available at the time the cheque is drawn, it is accepted practice in Germany that the funds must be available at the time when the cheque is presented for payment.⁹ In France, on the other hand, there exists a fairly unique concept in the rules of "provision":¹⁰ according to Art. 3,1, the funds must be at the disposal of the drawer at the time the title is created. These funds are subsequently set aside and are governed by special rules. Brazil has not adopted this concept. On the contrary, possibly with the intention of making a clear distinction from the French law, the Brazilian Act is more precise than the Uniform Law and states in Art. 4, § 1 of the Act that "the existence of the funds is verified at the time of presentation of the cheque for payment".

On the other hand, Brazil has introduced other rules which are clearly derived from French concepts on "provision" and which do not exist in the Uniform Law. For instance, Art. 7 of the Act stipulates in a similar way to Arts. 4,2 and 12-1 of the French law that the drawee may put a visa or a certification on the cheque with the effect that the sum payable by the cheque will be retained; after the expiry of the limit of time for presentation, the amount will be credited to the drawer.

The certification of a cheque — a concept also known in common law countries — does not normally exist in Germany. Under German jurisprudence, a certified cheque would conflict with the rule that a cheque cannot be accepted¹¹ (Art. 4,1 of the German and French Uniform Law; Art. 6 of the Brazilian Act).

The Brazilian Act also defines what is to be considered "funds at disposal": according to Art. 4, § 2, these are credit balances of current accounts with banks, the balance of which may be demanded out of a current account and the sum deriving from an opening of credit.

2. As to *drawing, form of a cheque and negotiation*, the Uniform Law does specify whether the signature of the drawer has to be in handwritten form. Despite the tremendous increase in the number of cheques in circulation and the recent progress made in automation, the signature of the drawer has to be written by hand in both Germany and France; the Brazilian Act is more modern in this respect and has adopted a concept not unknown to Anglo-American law: Art. 1, § 1 allows for a "signature" by mechanical imprint or equivalent means, subject to specified legislation.¹²

Similarly, the signature required for the negotiation of a cheque by endorsement may also be appended by mechanical means; in this respect Art. 2, § 2 uses the same formulation as Art. 1, § 1. While France has introduced a similar

provision into Art. 16 of its Law on Cheques in 1966,¹³ an endorsement in Germany requires a handwritten signature.¹⁴

On the other hand, so far as certified cheques are concerned, the Brazilian law is not consistent because it merely requires that the certification has to be provided with a date and a signature (Art. 7) and the law makes no declaration as to possible mechanical means. In France, however, the law — since 1975 — requires that the text of the certification be put on the cheque by a mechanical procedure; it seems that this obligation does not extend to the equally necessary date and signature.¹⁵ A similar provision was not included in the Brazilian Act.

The Brazilian Act — going beyond the Uniform Law — further stipulates that the signatures required for drawing or endorsement may be performed by an agent of the drawer or endorser (Art. 16, § VI and Art. 19, first sentence).

3. *Presentment and payment* of cheques are regulated in Arts. 32-42 of the Brazilian Act. In comparison with the corresponding chapter of the Uniform Law (Arts. 32-42), a number of differences can be noted.

As to the period within which a cheque has to be presented for payment, both in France and in Germany Art. 29 stipulates a period of eight days for cheques payable in the country in which it was issued, and a period of 20 days for cheques payable in another country of the same continent, and 70 days if the place of payment is in a different continent. Brazil, which had made the respective reservation permitted pursuant to Art. 14 Annex II, now has a different provision in Art. 33: a period of 30 days applies for cheques payable at the place of issue, and a period of 60 days for all other cheques, that is for cheques payable in Brazil or in any other country. This constitutes quite a change with respect to the former regulation in force in Brazil, where the periods were one month and 120 days respectively.¹⁶ For the UNCITRAL draft for uniform rules applicable to international cheques, a period of 120 days was recommended (Article 53, f)¹⁷ — the former Brazilian ruling.

Once an endorsable cheque is presented for payment, the drawee who pays the cheque is bound to verify the regularity of the series of endorsements (Art. 35 of the uniform Law). In Art. 39 of the Act, this obligation is expressly extended to the bank which presents a cheque at a clearing house. Such provisions seem quite adequate, since nowadays with the growing volume of cheque transactions, most cheques are paid through a bank by presentation at a clearing house. In France there exists at least a principle established by jurisprudence, that if the cheque is presented by a bank, the drawee may rely on the bank's regular verification of the endorsements.¹⁸

Art. 39, § 1 of the Brazilian Act further establishes a liability for the bank which pays a forged cheque, unless the customer of the account, the endorser or the beneficiary can be held liable. In this context, the French ruling of Art. 35, 1, according to which the person who pays a cheque without any opposition is presumed validly discharged, was not incorporated into the Brazilian Act.

4. In cases where a person has been *dispossessed of a cheque*, the present holder — according to Art. 24 of the Act — is only bound to give up the cheque if he has acquired it in bad faith. In the Uniform Law, however, this is also the case when the holder has been guilty of gross negligence (Art. 21).

It is further established in Art. 24, § 1 of the Act that the rules of law regarding annulment and substitution of bearer instruments¹⁹ are also to be applied in the case of loss, theft, robbery or unjustified appropriation of a cheque.

In French law, Art. 36a), 2 establishes that a person may ask for and receive payment of a lost cheque by judicial decree if the property of the cheque can be proved by means of his accounting records. In Brazil, a similar rule was proposed in Art. 43. This provision was, however, vetoed in the legislative process. A reason given was that such a process was entirely beyond the Brazilian System of Law for Civil Procedure.²⁰ In the Act itself the numbering was maintained, but instead of the text of Art. 43 — and of another cancelled article²¹ — there is only the statement "vetado" (vetoed).

6. *Crossed cheques and cheques payable in account* are both regulated in the Uniform Law (Arts. 37-39). By means of making the corresponding reservation according to Art. 18 of Annex II it was possible for the signatory states to opt for one or other form of cheque. France has opted for the crossed cheque and it is the only form regulated by its Law of Cheques. The German *Scheckgesetz* corresponds to the Uniform Law and it contains the rules on both forms of cheques. But because of the German reservation, a crossed cheque is not valid in Germany and a crossed cheque, issued abroad will be treated as a cheque payable in account.²²

In Brazil, both forms are regulated in the new Act; yet according to Art. 45, a cheque which is crossed generally may only be paid by credit to an account. The old law provided only for the crossed cheque.²³ So even after the promulgation of the Geneva Conventions in 1966, cheques payable in account were declared invalid by a fairly recent decision of the Supreme Court which held that because of the reservation according to Art. 18 Annex II the old Brazilian system had to be maintained "because of the principle of continuity of the legal order".²⁴ Before this leading case some financial institutions had admitted cheques payable in account.²⁵ It remains to be seen whether this form of cheque will now become popular in Brazil.

7. The rules on *recourse for non-payment and terms of limitation* show some notable differences to the Uniform Law.

For instance, a rule of the old Brazilian law²⁶ was taken over, according to which a holder who does not present the cheque in good time or who does not evidence the refusal to pay in due form²⁷ loses his right of recourse against the drawer, if the drawer had funds at his disposal during the period of presentation but has lost them in the meantime for reasons which have no connection with the drawer (Art. 47 § 3).

Also in Brazil the formal instrument of protest must contain the evidence that a demand for payment has been made to the drawer and other liable parties;²⁸ but if the drawer cannot be traced at his usual address (domicílio), the Brazilian Act further stipulates that the demand for payment must be made in the press (Art. 48 § 2). This rule had already existed under the old law.²⁹

As in Art. 45 and 46 of the Uniform Law, the Brazilian Act defines what the holder who exercises his right of recourse, or a party who takes up and pays a cheque, may claim and recover. Apart from listing the amount of the cheque, interest and expenses, the Brazilian Act is very innovative in that it expressly includes compensation for the loss of purchasing power of the currency until the claimed amounts are actually recovered (Arts. 52, IV and 53, IV).³⁰ Such a clause is clearly influenced by Brazil's experience as a country of high inflation with indexed currencies.³¹

However, while under the Uniform Law actions of recourse by the holder are barred after six months as from the expiry of the limit fixed for presentation,³² a claim may still exist for unjustified enrichment of the drawer. In Brazil, this claim is only barred after at least two and a half years as from the drawing of the cheque (Art. 6i),³³ whereas in Germany, such action is barred after one year as from the drawing of the cheque (Art. 58 SchG). The French law on cheques has not established such a time limitation in its Art. 52, 4.

III. Conclusions

The new Brazilian Cheques Act has tried to incorporate some innovative clauses into the Uniform Law of the Geneva Convention, stemming both from technical innovations made since, as well as obviously from adaptations of rules found in the French law on cheques. Although the Geneva Convention has been criticised for having found many adherents,³⁴ the recent Brazilian codification along the lines of the Uniform Law shows that the Geneva law is not yet outdated.³⁵

FOOTNOTES

1. Lei 7357, of 2.9.85 (DOU 3.9.85). Reprinted with German translation in Schettler/Büeler, *Das Wechsel — und Scheckrecht aller Länder* (Looseleaf; Köln) "Brasilien".
2. Dec. 2591 of 7.8.12. Reprinted in Franco da Rosa, *Cheque — Comentários à lei uniforme*⁴ (1982) 161-163.
3. Dec. 2044 of 31.12.08. Reprinted in Franco da Rosa, *ob. cit.* note 2, 147-160. German translation in Schettler/Büeler, *ob. cit.* note 1; Italian translation in Ferreira, "Il diritto cambiario brasiliano e la legge uniforme di Ginevra", *Rev. Fac. São Paulo* 54 (1959) 46-75 (55-70 N. 10).
4. LNTS 204 (1941-43) Annex LI p. 459 f. (Cheque) and p. 460 f. (Bills of Exchange).
5. Dec. 55.595 of 7.1.66 (Cheque) and Dec. 57.663 of 24.1.66 (Bills of Exchange), *Coleção das Leis, Poder Executivo II* (1968) 56 and 309.
6. STF 19.5.71 *Revista Trimestral de Jurisprudência (RTJ)*, Brazil. 58 (1973) 74; 20.6.73 *RTJ* 66 (1973) 200. On the legal problems in Brazil with respect to the introduction of the Uniform Law cf. Heinrich, "Die neuere Entwicklung des Wechsel — und Scheckrechts in Brasilien", *RabelsZ* 48 (1984) 372-387. The validity of the promulgation of the Geneva law has been unsuccessfully challenged even recently: cf. STF 28.8.84, *Revista dos Tribunais* (RT, Brazil) 590 (1984) 263 (265).
7. Cf. References in Heinrich, *ob. cit.* note 6, footnotes 25 and 26 and *Gazeta Mercantil* (Rio de Janeiro), 3.9.85, p. 23.
8. France: décret-loi du 30.10.35 with amendments; Germany (Federal Republic of): *Scheckgesetz* of 14.8.33.
9. Baumbach/Hefermehl, *Wechselgesetz und Scheckgesetz*¹⁴ (München 1984), Art. 3 SchG No. 2. Also in Switzerland, the corresponding Art. 1103 OR is interpreted in this way: Jaggi/Druey/von Greyerz, *Wertpapierrecht* (Basel 1985) 273 ff.
10. Cf. Saha, "Incidences de la provision du chèque en droit interne et en droit international", *Rev. trim. de droit commercial et de droit économique* 38 (1985) pp. 427-465.
11. Baumbach/Hefermehl, *ob. cit.* note 9, Art. 4 SchG No. 8. Only the *Bundesbank* may certify a cheque and is thereby liable out of the cheque to the holder, the endorser and the drawer: § 23 *Bundesbankgesetz*; cf. Baumbach/Hefermehl, *ob. cit.*, note 9, Art. 4 SchG, No. 8-11.
12. Germany: Baumbach/Hefermehl, *ob. cit.* note 9, Art. 1 SchG No. 7; France: Dalloz, *Répertoire de droit commercial* (Paris) "Cheque", No. 41. On signatures by "rubber stamp" in English law, cf. Megrah/Ryder, *Byles on Bills of Exchange* (London 1979) 11; for American law cf. Jähanchen-John, *Des Wechsel — und Scheckrecht der Vereinigten Staaten von Amerika* (Berlin 1976) 30.

13. Loi 66-380 16.6.66.
 14. Baumbach/Hefermehl, *ob. cit.* note 9, Art. 16 SchG No. 1, Art. 13 WG No. 1, Art. 1 WG No. 13.
 15. Art. 29, 1, Déc. 75-903 of 3.10.75; Dalloz, *ob. cit.* note 12, No. 193; Cabrillac, *Le chèque et le virement* (Paris 1980) 115.
 16. Dec. 22.924 of 12.7.33. Until that date the periods were 5 and 8 days (Art. 3, Dec. 2591/12).
 17. A/CN9/WG IV(X)/CRP1/Add.3 (9.1.81) p. 6 f.
 18. Dalloz, *ob. cit.* note 12, No. 294 with reference to Orléans, 17.9.72, J.C.P. 1972 No. 207.
 19. Arts. 907-913 CPC (L. 5869 of 11.1.73).
 20. Cf. *Gazeta Mercantil*, *supra* note 7.
 21. Art. 5 was supposed to contain a rule of responsibility of the banks, who are to verify the existence of funds in the process of presentation of a cheque; such a ruling would have been difficult to police (*Gazeta Mercantil*, *supra* note 7).
 22. Art. 1, 1, second sentence EGSchG; Baumbach/Hefermehl, *ob. cit.* note 9, Uebersicht vor Art. 37 SchG.
 23. Art. 12, Dec. 2591/12.
 24. STF 23.4.80, RTJ 98 (1981) 1176; RT 551 (1981) 258; *Revista de Direito Mercantil* (RDM, Brazil) 45 (1982) 51 annotated by *de Lucca*.
 25. Cf. judgement of Supreme Court Judge Peixoto, STF 23.4.80. RTJ (*supra* note 24) 1182.
 26. Art. 5 Dec. 2591/12.
 27. Cf. in France the new regulation of the "attestation de non-paiement" (L. 85-695 of 11.7.85, J.O. 12.7.85).
 28. Cf. for France: Art. 55; for Germany: Arts. 55, III SchG, 80 WG.

INSTITUTO BRASILEIRO DE DIREITO COMERCIAL
 COMPARADO E BIBLIOTECA TULLIO ASCARELLI
 "PRÊMIO TULLIO ASCARELLI" — 1986

PHILOMENO J. DA COSTA *

1. Vai-se tornando costume, ou melhor, num cenáculo de juristas, preferíamos dizer, vai-se tornando *praxe* a reunião ordinária do nosso *Instituto Brasileiro de Direito Comercial Comparado e Biblioteca Tullio Ascarelli*, para outorgar os prêmios concedidos a monografias de direito mercantil, que se apresentam no concurso por ele promovido anualmente.

Dissemos que a reiteração dessa solenidade já caminha para um conceito de costume. Mais do que isto, estaríamos desejando que essas pugnas de saber jurídico se considerem na realidade como uma *praxe*. Sabemos que a repetição consentida de um ato cria o carisma da crença da sua verossimilhança, a saber, acabamos por nos submetemos ao ritual desse mesmo ato. É o costume. Mas a genética da obediência por um grupo a uma solenidade estabelece para os seus componentes (ou como dizem apropriadamente os franceses, para os seus *ressortissants*) um grau maior do respeito. Na superfície jurídica o costume considera-se mais forte, quando o respeito se caracteriza como *praxe*; esta, podemos afirmar, já é aplicação invariável da solenidade.

A nossa mensagem introdutória consiste em asseverar na verdade, aos que nos ouvem, que esta entrega de prêmios aos ganhadores no concurso anual de monografias inéditas de direito comercial já representa um respeito impositivo das atividades deste Instituto Tullio Ascarelli.

Como *praxe* — que queremos que seja esta solenidade — devemos então falar sobre o concurso deste ano, referindo-nos aos dois trabalhos premiados. Depois devemos rememorar a figura inolvidável e inigualável de Tullio Ascarelli. Finalmente aludiremos ao projeto do concurso de 1987.

2. Devemos assinalar de início que, apesar de termos divulgado os editais e regulamento do "Concurso Tullio Ascarelli-1986" já no final do primeiro trimestre deste ano, apareceram somente três concorrentes; os seus pseudônimos e trabalhos foram: 1 — Tibério Graco, "Reflexos das transações internacionais no processo falimentar"; 2 — Ninfa Grega, "A experiência brasileira com as novas formas de investimento estrangeiro"; 3 — Tício, "Anotações sobre contratos plurilaterais".

Encerradas as inscrições, a Comissão Examinadora das monografias recebidas ficou constituída dos professores titulares de direito comercial, Fábio Konder Comparato, Mauro Brandão Lopes e por nós, como presidente do Instituto Tullio Ascarelli. No dia 7 do mês em curso os três reuniram-se na sala das becas desta Faculdade de Direito. Decidiram, sem divergência, que não se outorgasse o pri-

* Discurso proferido por ocasião da entrega do "Prêmio Tullio Ascarelli", em 1986.

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