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COUNCIL OF EUROPE
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Doc. 1023
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Payment of foreign money liabilities

Report
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Eduard WAHL, Germany

A. I . Draft Recommendation presented by the Legal Committee

The Assembly,

Considering that the Committee on Monetary Law of the International Law Association has prepared a draft Convention on the Payment of Foreign Money Liabilities, the text of which is appended hereto;

Considering there port of its Legal Committee (Doc. 1023) from which the importance of this problem is apparent,

Recommends to the Committee of Ministers :

1. that it should convene a Committee of Experts with instructions to study the draft Convention on the Payment of Foreign Money Liabilities prepared by the Committee on Monetary Law of the International Law Association and to consider the desirability of concluding a Europe a n convention on this subject ;
2. that it should inform t h e Assembly in due course of the results of this study.

B. II . Explanatory Memorandum by M. WAHL

1.

On 7th August 1958, Mr. Cunningham and others tabled a motion for a recommendation relating to a draft Convention on the Payment of Foreign Money Liabilities prepared by the Committee on Monetary Law of the International Law Association. This motion (Doc. 843) was referred by the Assembly on 10th October 1958 (Reference No. 219) t o the Legal Committee, which appointed a Sub - committee to examine the proposal.

On the basis of the work of this Subcommittee , the Legal Committee has studied the draft convention prepared by the International Law Association, the text of which is appended hereto, together with the explanatory memorandum of the Commitee on Monetary L a w which drafted it. The Committee agrees that it is desirable to establish, if possible, uniform rules to regulate the question of the payment of debats or other obligations expressed in foreign currency, i. e. in a currency other than that of the c untry where it is payable ; and i t is grateful to the Committee on Monetary Law for t h e work it has done in an attempt to find a solution to this problem. The purpose of t h e draft convention is, as stated by its authors , " to ensure that , if a s um of money shall be paid in a country the currency of which differs from that in which the sum of money is expressed, the creditor shall receive neither more nor less than he would receive if payment were made at the due place and date , in the currency in which the sum of money is expressed " (Doc. 843, p. 1).

The draft convention takes as its basic principle that , unless a contrary intention appears , the debtor may pay his debt in the currency of the place of payment , even though it is expressed in another currency; also that the creditor may require payment in the currency of the place of payment if the debt is expressed in another currency and the debtor alleges that he cannot pay therein . The conversion from one currency to anothe r shall be effected in accordance with the rate of exchange prevailing at the place and date of payment .

The complicated problems which arise if the debt is not paid on the due date and if a devaluation occurs before payment is effected are dealt with in Article 4 of the draft convention and explained in the attached memorandum .

In general, the Committee expressed its agreement with the proposals contained in the draft convention , which correspond broadly to the rules already applied in most continental systems of law. Indeed, th authors of the convention have themselves stated that its intention is to stabilise—and harmonise on points of detail—the law as alread y applied in most European countries. The Committee h a d doubts, however, whether these rules would be acceptable to the Common Law systems of jurisprudence , which lay such emphas is on the real or supposed intention of the parties. Moreover, the Committee was of the opinion that in a matter of this sort little useful purpose would be served by the conclusion of an international convention if it was not acceptable to the United Kingdom and also, preferably, the United States of America, since their preponderant role in international commerce is so great as to make their a greement indispensable in any attempt to unify the rules of commercial law.

The Committee therefore felt unable to state categorically that the solution proposed in the draft convention is necessarily the best one. At the same time, it was of the opinion that an attempt should be made to find a solutio n , and, in particular , to as certain whether the United Kingdom would be prepared to accept the ideas embodied in t h e draft convention prepared by t h e International Law Association. The best way of doing so would be for the Committee of Ministers t o convene a Committee of Experts with instructions to examine the draft convention and seek to reach agreement on these points . This is the intention of the draft Recommendation set out above.

Appendix 1 APPENDIX I

Draft Convention

Introductory

(a) The purpose of the following Articles is to ensure t h a t , if a sum of money shall be paid in a country the currency of which differs from t h a t in which the sum of money is expressed, t h e creditor shall receive neither more nor less t h a n he would receive if payment were made at t h e due place and date in the currency in which t h e sum of money is expressed.

(b) When incorporating the provisions of t h e following Articles into their respective subs t a n t i v e and procedural laws, Contracting States shall be at liberty so to adapt the wording of t h e Articles as to achieve the said purpose most effectively within the framework of their respective legal systems.

1. Payment

ARTICLE 1

If a sum of money is due in a currency which is not t h a t of t h e place of payment, such sum may, unless a different intention appears, be paid in t h e currency of t h e place of payment.

ARTICLE 2

If the debtor alleges t h a t it is impossible for h im t o pay t h e sum of money due in a currency which is not t h a t of the place of payment and if t h e debtor does not exercise t h e right conferred by Article 1, the creditor may require payment in the currency of the place of payment.

ARTICLE 3

If, in accordance with Articles 1 or 2, t h e debtor pays in the currency of the place of payment, the conversion shall be effected in accordance with the r a t e of exchange at the place and d a t e of payment.

ARTICLE 4

If t h e debtor does not p a y at t h e d a t e of m a t u r i t y , and if after such date the currency in which the sum of money is due depreciates in relation to the currency of the place of payment, t h e debtor, whether he pays in the currency due or in the currency of the place of payment as provided in the preceding Articles, shall pay an additional amount equivalent to the difference between the rate of exchange at the date of m a t u r i t y and the date of payment, unless the debtor shall prove t h a t his failure to pay results from 'force majeure' or default of the creditor or t h a t the creditor has not suffered any damage resulting from the delay.

ARTICLE 5

The preceding rules are without prejudice to the right, if any, of a p a r t y to claim from the other p a r t y such further or other damage or relief as t h e applicable law may justify.

2. Proceedings

ARTICLE 6

In case of proceedings i n s t i t u t e d t o recover a sum of money expressed in a currency which is different from t h a t of the forum, the creditor shall claim the sum of money so expressed and shall be entitled to claim also amounts due to him under Articles 2-5 in respect of the period up to t h e date of judgment.

ARTICLE 7

If and in so far as t h e Court gives judgment or makes an order in favour of the plaintiff, the judgment or order shall be for a sum of money as claimed in accordance with t h e preceding Article. I t shall be open to t h e law of t h e forum to provide t h a t the Court shall give the debtor the option t o pay the equivalent at the rate of exchange prevailing in t h e country of the forum at the date of actual payment.

ARTICLE 8

In the event of t h e depreciation, between t h e date of judgment and satisfaction of the judgment, of the currency in which the sum of money is due in relation to the currency of the forum, t h e provisions of Article 4 shall apply and t h e judgment shall not preclude the creditor from pursuing the claim so arising.

3. General

ARTICLE 9

The application of the preceding rules shall extend to all monetary liabilities irrespective of whether they were originally expressed in money or not.

ARTICLE 10

The place of payment referred to in the preceding Articles shall be t h e place where payment is due.

ARTICLE 11

Subject to any different intentions of the parties, the rate of exchange referred to in the preceding Articles shall be therate ordinarily and legitimately used for commercial transactions or for the particular type of transaction in question at the place of payment or, in default thereof, at such other place as may be reasonable in the circumstances or, in default thereof, such rate of conversion as may be reasonable in the circumstances.

Appendix 2 APPENDIX II

Explanatory Memorandum - of the Committee on Monetary Law of the International Law Association

1. The question of the payment of liabilities expressed in foreign money engaged t h e attention of the 34th Conference of the International Law Association held in Vienna precisely t h i r t y years ago (see Proceedings of the 34th Conference, p. 543 sqq.). The Report rendered by the Rate of Exchange Committee (as it was then called) and the discussion in Vienna under the chairmanship of M. Leopold Dor, whom we are privileged t o welcome as a member of our Committee, resulted in the adoption of t h e " Vienna Rules ". They have remained a dead letter. This is mainly due to the fact t h a t they were intended to be voluntarily adopted by contracting parties (see Report of t h e 34th Conference, pp. 565, 566 and passim) and were not put forward with the object of being jus cogens. No contract has become known t o us in which they were in fact adopted. Moreover, shortly after their adoption the Vienna Rules were subjected to weighty criticism, particularly by so great an authority as Arthur Nussbaum (Vertraglicher Schutz gegen Schwanhungen des Geldwertes (1928), p. 65 sqq.).

In the light of later experience it has become obvious that the study of the subject, begun in 1926, has t o be continued with a view to finding a solution of the numerous problems which, as a result of monetary disturbances in many countries, have arisen in practice. For these reasons we felt it necessary arid fitting to devote two meetings held in Strasbourg in May 1955, and in May 1956, to a renewed investigation of the subject.

2. We have, however, not found it necessary t o spend much time upon the elucidation of the practice as developed by t h e courts of t h e principal countries of the world. The material has been collected, analysed and compared by a number of authors. We have drawn upon, but do not propose t o re-state, the results reached by these

3. The decisions and the literature which we have studied have led us to reach one conclusion of p a r a m o u n t importance, which decisively influenced our work. Although the practice of t h e various countries differs in many points of detail, there exists a very large measure of uniformity of regulations and an almost complete identity in legal policy. It follows t h a t the subject does not give rise to many grave problems of policy. To a considerable extent it is of an almost technical and uncontroversial character. The further consequence is t h a t it lends itself pre-eminently to unifying legislation.

4. In these circumstances we have seen our task to be one of laying the foundations for a Convention which, if adopted by States, will eliminate such differences as now exist and are annoying rather than fundamental, and which, a t the same time, incorporates so much of the practice common to almost all countries as to s t a n d a chance of being in fact adopted by many of them. Our decision to take this course was facilitated by the encouragement given to us by certain of the organisations which are in charge of unifying legislation : we have some reason to t h i n k that, if the International Law Association produces a practicable text of a draft convention, this will stimulate action with a view to having some such convention accepted by States.

5. After these introductory remarks we propose to comment shortly upon the provisions included in our draft convention. We shall confine ourselves to indicating the broad ideas underlying them and shall, in particular, deal with the suggestions and criticism which some of the branches have been good enough to make and which to some extent have led us to reformulate the 1955 Draft and to submit a revised draft scheduled hereto in English and in a French translation.

6. The payment of foreign money liabilities requires consideration from two points of view. In the first place there arises the question of the parties' rights and duties independently of proceedings. Secondly, we shall have to deal with t h e influence of the institution of proceedings upon the rules of substantive law which arc normally applicable. Our draft convention, therefore, is divided into two main parts headed " P a y m e n t" and " Proceedings " respectively. We may say at once t h a t it is our view t h a t the rules applicable in the case of proceedings should be so framed as to ensure that the amount payable under the judgment will be neither more nor less t h a n the amount due in t h e absence of a judgment.

In a third part we suggest certain rules of a general character, which are intended to apply to both the preceding parts.

7. Experience has shown that differences of legal conceptions and difficulties of translation have frequently delayed or prevented the adoption of uniform legislation, inasmuch as States were reluctant to introduce into their own law the specific text of a convention. We have, therefore, thought it advisable to preface our draft convention by an introduction which, on the one hand, defines its overriding purpose and, on the other hand, allows liberty to alter t h e formulation if this is necessary to achieve t h a t purpose.

8. Article 1 expresses a rule which may fairly be said to be of universal application: normally it is open to the debtor to discharge his obligation by paying in the currency of the place of payment. Thus an American debtor who owes sterling in Geneva may, at his option, pay either sterling or Swiss francs. This does not apply where a different intention appears, e.g. in the case of what, in certain countries, is known as an effective clause.

9. However, it may be impossible for the American debtor to procure sterling in Geneva. At the same time he may refuse to exercise his right to pay in Swiss francs, though they ;would be available to him. In this case equity demands t h a t the creditor should be able to insist upon t h e payment of Swiss francs which, ex hypothesi, t h e American debtor can pay. This is t h e situation envisaged by Article 2. We deal only with the case in which the debtor in fact alleges impossibility ; if he fails to do so and remains silent, there is no reason why the creditor should have any right to change the money of account.

Nothing contained in Article 2 is intended t o suggest that impossibility would ever be a good defence in the case of a monetary debt or that the debtor could be discharged as a result of impossibility.

10. Article 1 is based upon the fact that in the normal case the creditor does not mind whether he receives the currency to which he is entitled under the contract or the currency of the place of payment. What he is interested in is to ensure that he receives the real equivalent of what is owed to him. He receives that equivalent if he is paid such sum of the moneta loci solutionis as corresponds to the agreed sum according to the rate of exchange at the place and date of payment (Article 3).

11. Article 4 deals with the problems which arise if the debtor fails to pay on the due date and a depreciation of t h e money of account occurs after such date. The Uniform Laws on Bills of Exchange and Cheques, which were adopted in Geneva in 1930 and 1931 and which, we believe, are now in force in over fifteen countries have solved these problems by conferring upon the creditor the right to payment in the moneta loci solutionis and to choose between the rate of exchange of t h e date of maturity and that of the date of payment. In our view, the Geneva Rules (which, of course, are designed to apply only to t h e strict obligations arising from negotiable instruments) are in some respect too inflexible to be adopted as a general rule. We have attempted to formulate what we believe are more equitable rules, as appears from the following examples:

a. £100 is due in Geneva on t h e 15th September 1949. The debtor can pay £100 or the Swiss franc equivalent as at t h a t date (Article 1 and Article 3). If sterling depreciates before that d a t e t h e creditor must bear t h e loss. The Geneva Rules lead to the same result.

b. £100 is due in Geneva on t h e 15th September 1949, b u t is not paid. On the 18th September 1949, t h e Swiss franc depreciates, so that t h e rate changes from £1 = S.frs. 18 to £1 = S.frs. 24. Under the Geneva Rules the creditor will be able to obtain £100 or S.frs. 2,400. Under our proposals (Article 1 and Article 3) he receives £100.

c. £100 is due in Geneva on t h e 15th September 1949, but is not paid. On the 18th September 1949, sterling depreciates, so t h a t the r a t e falls to £1 = S.frs. 12. Under the Geneva Rules the debtor would have to pay S.frs. 1,800. According to our proposals (Article 4) t h e debtor will likewise have to pay S.frs. 1,800, unless he succeeds in proving t h a t his failure to pay arose from 'force majeure' or t h e default of the creditor or that, in the particular circumstances of the case, t h e creditor is not prejudiced bythe delayed payment.

We believe that the exceptions so suggested do not require explanation. They are intended to eliminate the rigidity which characterises the Geneva laws.

These rules will apply irrespective of whether the debtor pays in the currency which is due or in the currency of t h e place of payment. To that extent, therefore, our draft provides for a measure of revalorisation. This, of course, involves a question of policy. But the solution suggested by us is supported not only by the ideas underlying the Geneva Conventions on Bills of Exchange and Cheques, but also by such strong considerations of fairness and equity t h a t we do not hesitate in recommending what to some may appear as a substantial change of the law.

Our draft does not prescribe the currency in which the additional sum due under Article 4 will have to be paid. This is a question of minor practical importance, which, in our view, can safely be answered by the Courts.

We do not deal with the case in which t h e money of account appreciates. In t h a t case t h e debtor is obviously not entitled to any relief, since it is inherent in the nominalistic principle t h a t , irrespective of changes in value, he must pay what he has promised to pay.

12. Article 5 is intended to make it clear that the rules suggested by us do not exclude either party' s right t o claim such further or other damage or relief as may be recoverable under the appropriate legal system. Thus we do not wish to preclude the creditor from claiming additional damage suffered as a result of the necessity for obtaining credit. It is also conceivable that, if the creditor has refused to accept payment, the debtor may have a remedy against the creditor.

13. Article 6 is the first of a series of provisions dealing with the peculiar difficulties arising in those cases in which proceedings become necessary. These difficulties exist mainly in the Anglo- American countries by reason of the fact that, in these countries, the plaintiff cannot claim and t h e Court cannot award any sum of money other t h a n a sum of moneta fori. Article 6 a n d Article 7 propose t o abolish this rule by providing t h a t the plaintiff must claim and the Court must, in principle, award the specific amount of foreign currency which is due.

The reasons which render the compulsory conversion demanded by the Anglo-American practice unsatisfactory have frequently been explained and need not be repeated by us.

If before the judgment the money of account depreciates, the plaintiff is entitled to t h e rights given to him by Articles 2-5 and can claim accordingly in the proceedings (see Article 6).

If the moneta fori depreciates, the plaintiff is protected as a result of the fact that his claim as well as the judgment is primarily expressed in terms of t h e money of account.

14. It is clear, however, that , after the plaintiff has recovered judgment in the money of account due to him, conversion into the moneta fori may become inevitable. Thus a bailiff who is charged to enforce the judgment must be put i n to a position in which he can take from the debtor the appropriate amount of moneta fori. The Committee believes t h a t sufficient guidance is given by the provision in Article 7 according to which t h e Court will be able to give the defendant t h e right of paying in t h e moneta fori at therate of exchange of the date of payment. This is in accordance with the practice prevailing in a number of countries.

15. It remains to deal with the case in which t h e money of account depreciates between judgment and satisfaction. We are of t h e opinion t h at t h e authorities in charge of the execution of a judgment cannot be entrusted with the decision whether, and to what extent, the plaintiff is, in such circumstances, entitled to relief. Fresh proceedings may, therefore, be necessary in the course of which the plaintiff will be entitled to make a claim in accordance with Article 4. The proposed Article 8 is merely intended to make it clear that any such further claim is not precluded by t h e existence of a judgment.

16. It is also obvious that special rules have to be laid down to deal with t h e case of bankruptcy proceedings or other proceedings involving the distribution of a fund. The reason is t h a t in order to permit distribution of the fund all claims must be converted on a uniform basis. Your Committee does not think that these problems can usefully be dealt with within the framework of t h e present draft convention, which is of a limited character. For the time being these problems will have to be solved on a national basis.

17. Article 9 expresses a rule which, we believe, has not been questioned on t h e Continent, where claims for damages are treated as moneta r y obligations. This is not altogether t h e position in England or, probably, in the United States of | America. In these countries damages appear to i be payable in sterling and dollars respectively, and, if an item of damage has arisen in another currency, the amount has to be converted into t h e moneta fori. We propose the abolition of this rule (Article 9).

18. The words " place of payment" are ambiguous in that they may contemplate the place where payment ought to be made or the place where payment is in fact made. Article 10 suggests that the expression should be given the former meaning.

19. We have not found it easy to define the appropriate type of rate of exchange which should be employed wherever a process of conversion becomes necessary. Very many different types of rates of exchange exist and so large a variety of circumstances have to be considered that it would be dangerous to lay down too inflexible a rule. After much reflection and discussion we suggest in Article 11 a rule which, we hope, will be found adequate in practice and which is intended to leave to the national law the possibility of defining the rate more closely (middle rate, etc.).

20. We realise that a convention on the payment of foreign money liabilities could deal with numerous further questions which our draft ignores. Our reasons for limiting t h e field covered by the draft Convention are twofold. In the first place, we feel t h a t too ambitious a scheme could prejudice the chance of a convention derived from the International Law Association's Draft being p u t forward and adopted b y States. Secondly, many of the problems disregarded by our draft do not readily lend themselves to statutory regulation. This applies, for instance, to t h e whole field of the determination of the money of account, where the variety of

circumstances and the need for flexibility are such as to render statutory regulation impossible or at least unsatisfactory. However, we are convinced that, even within the limited field covered by our Draft, uniform legislation would be of considerable importance, for we are not aware of any legal system which has entirely satisfactorily solved all the problems considered by our draft, and, while we do not by any means put it forward as an altogether ideal solution, we hope that it involves some progress.

21. The Members of our Committee who participated in t h e t w o meetings held in May 1955, and May 1956, were Professor M. Gutzwiller (Chairman), Dr. F . A. Mann (Convener), Professor Konrad Duden, M. Madsen-Mygdal and Dr. A. F . Schnitzer. Professor Ascarelli and Professor G. van Hecke were present only in May 1955, while Dr. H. Guisan and Professor Gyselynck were present only at t h e second meeting in May 1956.

Strasbourg, 29th May 1956.

On behalf of t h e Monetary Law Committee :

M. GUTZWILLER (Chairman)

F. A. MANN (Convener)

W. Harvey MOORE (Hon. Secretary-General)