CHAPTER V

General Inernational Problem

BY
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A large number of developing countries, lacking adequate resources for rapid development, depend upon foreign trade for necessary finance. (This is evident from the following table.)[1]

Ratio of Exports to Gross Domestic Product 1963-65

over 35%—African countries like Kenya, Lebanon, Liberia-Saudi Arabia, Iraq.
30-35%—Uganda, Venezuela, Algeria.
25-30%—Congo, El Salvador, Ceylone, Ghana.
20-25%—Iran, Morocco, Phlippine, Persia.
15-20%—Sudan, Thailand, United Arab Republec, Syria,
10-15%—Mexico, Argentina, Jordan, Burma, Columbia.
5-10%—India, Brazil, Pakistan.

The role of foreign trade in accelerating development has increased in view of the uncertainty in the inflow of foreign capital from abroad. Despite conscious efforts to improve their position, the share of the developing countries in World trade has declined from 31% in 1950 to 19·1% in 1966.[2] This is frustrating for them, as it leaves them with no alternative but to accept a slower rate of growth. Moreover, many of the products exported by the developing countries have been subject to a high degree of price instability and a few have suffered continuing adverse, price trends in the last decade. This in turn has resulted in scarcity of foreign exchange for payment purposes. In addition, regulatory measures such as exchange control, restrictions on trade imposed by various developed countries mainly the U.S.A. and the U.K., by limiting the supply of key currencies, have added to the payment problems of the developing countries.

While efforts have been made by various international institutions to ease the supply of key currencies, considerable importance is also attached to problems surrounding various credit instruments utilised in

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1. UNCTAD, E/Conf. 46/14, Vol. III (New York, N.Y., 1966), p. 153.
2. *Report on Second UNCTAD* (New Delhi, 1968). p. 114.

transactions between nations, which will be the subject of our study. In this chapter, attention will be confined to defining the legal problem with regard to the use of these instruments in general and the efforts made so far to solve these problems.

A. Need for Credit Instruments

Before the development of modern transport and communication, a merchant sending goods overseas faced a number of problems for which the then prevailing institutions did not provide satisfactory solutions. Apart from the perils of the long and circuitous voyages on the seas in primitive conditions, traders had to cope with the uncertainties associated with the transfer of titles to property. It was equally important to evolve ways and means for the fulfilment of financial obligations of the buyers. Upon conclusion of a formal agreement between a buyers and a seller, the latter wished to retain legal title and or control over the goods until such time as the former paid for them, or until the buyer made a binding and enforceable promise to pay. The buyer would be reluctant to pay or promise to pay unless he was reasonably sure of the possession of the goods in the not-too-distant a future.

A solution to this conflicting requirements of buyers and sellers was found in the creation of instruments which secured the privileges and enforced the obligations of both the parties. Bills of exchange, promissory notes, and other instruments, used in trade today, were the resultant innovations in response to the conditions and the requirements of that age. Each national economy evolved various financial institutions, and laws to govern the activities of these institutions in order to safeguard the interests of their economy.

B. Factors hindering the Promotion of International Trade Law

However, the laws and practice of these institutions differ from country to country depending upon the development or the requirements of each economy. This diversity naturally impedes international business activity. Many of the problems which confront the international trader today stem from these differences in the rules. The General Assembly in the preamble to resolution 2102 (xx) has recognised that "conflicts and divergencies arising from the laws of different states in matters relating to international trade constitute an obstacle to the development of world trade." Moreover, the legal diversities concerning international trade are not best suited to meet the aspirations of world community which is striving to raise its standard of living.

This sentiment was also echoed in the speech made by the chairman of UNCITRAL in its second session thus : "While international economic relations were expanding rapidly, the relevant law was not developing at the same rate and the shortcomings of legal regulations were retarding the

3. See the Report of the Secretary General 6th Committee A/6396 Add. 1/2.

world's economic advance."[4] However, he added, countries can overcome this obstacle "by escaping from the bounds of municipal law and of their own countries particular legal system and the world advancement can be fostered by devising a truly international legislation."[5]

The necessity to formulate a uniform law which would promote trade amongst countries was stressed also by the Secretary General of U.N. in his report in these words : "the modern commercial life which has been affected by the technological advances with respect to travel and transport and by the rapprochement of different economic systems tends to require to a great extent harmonisation and unification on a broad scale with respect to the law of international trade."[6] The unification and harmonisation of law with regard to payments was considered to be one of the means to ficilitate and promote trade transactions between nations. This task was entrusted to the United Nations Commission on Trade Law (UNCITRAL), which rather than making a comprehensive study of international payment as a whole, decided to confine its attention to problems regarding the following instruments separately (*a*) negotiable instruments, (*b*) banker's commercial credit and (*c*) guarantees and securities.

C. Existing International Instruments and Formulations :

Before embarking on a study of UNCITRAL'S approach to the problems of unification and harmonisation of the law of international payments, it is necessary to examine briefly the international conventions and formulations that exist with regard to these instruments and assess the extent of their success in promoting the objective of uniformity in trade practices.

Geneva Conventions

As early as 1930, three conventions on the unification of the law relating to bills of exchange were signed at Geneva; and in March 1931, three more conventions on the unification of the law relating to cheques were signed in the same venue under the auspices of League of Nations. The most important of these conventions are the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes, and the Convention Providing a Uniform Law for Cheques. The others deal with conflict of laws, rules and provisions of national stamp legislation relating to these types of negotiable instruments, etc.

The Geneva conventions have achieved, to some extent, the unification of the law relating to negotiable instruments and the law enunciated therein has been incorporated into the municipal legislation of sixteen countries, *viz.*, Brazil, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Japan, Morocco, Netherlands, Norway, Poland, Portugal,

4. A/CN. 9/5.26, p. 7.
5. *Ibid.*
6. See, *supra* note 3, at 21.

Sweden and Switzerland. In addition, Australia, Belgium and the U.S.S.R. have accepted the Uniform Law on Bills of Exchange only and Nicaragua has adopted the Uniform Law on Cheques only. However, Common Law countries did not participate in this effort, nor has any of these countries given effect to these uniform laws in its territory.

D. The Uniform Customs and Practice for Documentary Credits :

This is one of the major contributions of the International Chamber of Commerce (ICC) whose objective is to ascertain trade customs and formulate them in a generally acceptable form. This formulation, revised in 1962, is considered to be a successful example of unification of modern practices in international trade. Prepared by the Commission on Banking Technique and Practice of the ICC, the formulation first sets out general provisions and definitions relating to Banker's Commercial Credit, then deals with the term and the notification of credit, the documents to be presented to the correspondent bank, various miscellaneous provisions, and finally the transfer of credit.

While the earlier version of 1951 had already been widely accepted and used for the opening and the execution of banker's commercial credits, since the revision of 1962 which came into operation on 1st July 1963, the British and Common Wealth Banks have adhered to the Uniform Customs. Today the Uniform Customs is accepted in 173 countries and territories with different economic systems. Since commercial credit is the most important and most frequently employed mechanism for the payment of purchase price in export transactions, the importance of this unifying formulation of the ICC cannot be overemphasised.

E. Difficulties Encountered in Devising Uniform Laws for Payment :

The progress that has been made by way of unification of subjects like Bills of Exchange and Banker's Commercial Credit, is slow in relation to the amount of time and effort expended on it. This is also reflected in the observation of Garrigues, a representative of Spain at the first session of UNCITRAL: "the work which had led eventually to the signing of the 1930 Convention providing a Uniform Law for Bills of Exchange and Promissory Note and the 1931 Convention providing a Uniform Law for Cheques had begun in 1912. The states were often unwilling to abandon their own national laws as was demonstrated by the lack of uniformity among certain laws relating to trade recently adopted by various countries of E.E.C."[7]

The Secretary-General in his report attributes this slow progress to several factors[8] :

Firstly are the difficulties inherent in any attempt to bring about

7. A/CN 9/S.R. 1-25, I Session, p. 14.
8. See, *supra* note 3, at 22.

changes in national legislation and practices and the limited membership and authority of formulating agencies. As a consequence the completion of technical work of preparing draft conventions or uniform laws has often failed to culminate in the adoption of uniform legislation where conventions are adopted, only a small percentage of the present members of the U.N. have become parties.

The developing countries which attained independence recently have little opportunity in this task of harmonisation and unification. Yet those are the countries which require legislation for ensuring fair transactions in international trade. Hence, the delegation from Kenya expressed in the I session of UNCITRAL that since the developing countries did not have any opportunity to participate as independent and sovereign states in the negotiation of instruments, they need to be reviewed before the developing countries can accede to them.

Moreover, none of the formulating agencies commands worldwide acceptance; none has a balanced representation of countries of free-enterprise economy, and those with centrally-planned economy; or developed and developing countries. The agencies have a membership confined either to countries of centrally-planned economies, as the (CMEA) or to countries of free-enterprise economies as the International Chamber of Commerce. In the case of UNIDROIT, although there is no geographical limitation on membership, the present membership is predominantly European. Also, there has been insufficient co-ordination and co-operation among the formulating agencies. Therefore, their activities have tended to be unrelated and a considerable amount of duplication has resulted.

While these factors have affected progress in the direction of unification of international trade law as such, they have greater relevance to the law concerning international payments. Therefore UNCITRAL has rightly taken into consideration these factors in its attempt at progressive unification of law of payments.

F. Approch by UNCITRAL

1. *Suggestions of members of UNCITRAL*

There was agreement amongst members of UNCITRAL that the main task before the Commission with regard to the problem of international payment should be the progressive unification and harmonisation of the law. The delegate from Spain expressed the view that the Commission should make an effort to secure wider acceptance of the Geneva Conventions among non-signatory states and of signatory states which have not incorporated the uniform laws into their municipal legislation.[9] But the delegate from Belgium suggested that the Commission should

9. A/CN. 9/SR1-25, I Session, p. 90.

prepare a new uniform law on bills of exchange, promissory notes and cheques since many states have not yet found it possible to adopt the Geneva Conventions.[10] However, according to the representative of UNIDROIT,[11] the non-acceptance of the two Conventions by Common Law countries is due not so much to substantial differences in the use of negotiable instruments as to differences in banking and commercial practices. He believed that UK was satisfied with its present system of negotiable instruments and had no wish to change it drastically. He suggested that the introduction of a new instrument in addition to those that are in current use, operating in accordance with a uniform system would be advantageous. For this would result in a new convention, which would have both Common Law and the Geneva group countries with their respective systems but at the same time would establish a link between them through the new international payment instrument. This was supported by US delgate who requested that a study be carried out to determine the feasibility of establishing a new negotiable instrument for use in international transactions.[12] Similarly the delegate of Chile believed that the disputes resulting from the differences between legal systems could best be solved through the creation of such an instrument rather than through the unification of national legislation.[13]

However, the representative of Mexico suggested that the problem of harmonisation and unification of international trade law with regard to international payments should be approached simultaneously from all the three points of view securing wider acceptance of the Geneva Conventions of 1930 and 1931, revising those conventions, and creating a new convention on negotiable instruments, since all these three are interrelated.[14] He further suggested that "UNCITRAL should try to solve the problem at both the regional and world level in that order. It should first try to secure wider acceptance of the Geneva Conventions of 1930 and 1931 by holding out the conventions as a prototype to any country which, for economic and political reasons has not yet ratified them, even if the system they follow is based to a greater or lesser extent on the former *Code Nepolean*, and even if they have already modelled their payment legislation on the Geneva Conventions. The Common Law Countries for their part will seek to unify their system on the basis of Bills of Exchange Act. The UNCITRAL, then can take up the task of unification proper".[15] He felt that "owing to the vast differences in custom and judicial practices between the two systems, full unification will be extremely difficult. However, a partial unification on the basis of a new negotiable instrument will be feasible and as a tem-

10. A/CN. 9/4 (Comments By Member States, Organs and Organisations), p. 17.
11 A/CN. 9/SR. 29. (II Session) p. 41.
12. A/CN. 9/SR. 31, II Session 1969, p. 64.
13. A/CN. 9/SR. 1-25, I Session, p. 187.
14. A/CN. 9/SR. 39, 3rd March 1969, II Session, p. 134.
15. *Ibid.*

porary solution pending satisfication of the Geneva Conventions by a greater number of countries and the creation of a new negotiable instrument, legislation should also be elaborated on conflicts of laws so as to eliminate the disputes arising from divergencies between existing systems."[16] While several members held that the parallel unification of the two main systems was not a feasible solution due to wide differences between the two systems the Syrian delegate voiced the view that the disparities in levels of development were also one of the main obstacles hindering the efforts at unification and suggested that UNCITRAL, in its attempt to unify the rules of international trade law, mnst aim at a justice that abhorred exploitation of the inferior status in which the less developed countries found themselves.[17] The same opinion was held by the Tunisian representative who requested that the Commission while dealing with the question of international payment should seek ways of establishing a fairer system that would conform more closely to the wishes of the developing countries.[18]

With regard to I.C.C. Rules the Japanese delegate pointed out that the Rules were generally limited to transactions between bankers and customers and did not apply to legal relations between sellers and buyers in sales transactions. Art. I of the Rules, it was pointsd out as an instance, dealt with circumstances in which issuing banks had the right to revoke the credit at any time unless the party requesting credit specified that irrevocable credit was desired. In ordinary sales transactions between buyers and sellers, sometimes the party wanting to have irrevocable credit failed to make that clear in the request. But in such cases as for as sales were concerned. the argument ran, it was necessary to hold that the credit agreed upon was irrevocable, since a revocable credit was merely a letter of introduction written by a bank. However, there were differences between banking and sales, which the Commissions should keep in view while dealing with this problem.[19]

It was also suggested that the Commission should study the problem of long-term credit and of deliveries made on such a facility with a view to intensification of international trade by the establishment of adequate legal rules. In this regard it was felt by Guest of U.K. that there existed no urgent problems with regard to letters of credit, on which rules established by I.C.C. had already been adopted by a number of states.[20] In his view, the problem to be tackled was guarantees and securities. According to him, "the problem of guarantees and securities arose in case of long-term credits when financing was required for major projects and the method of bills of exchange and documentary credits could not be used to guarantee payment. The creditor would tnen insist on a guarantee

16. See, *supra* note 14, at 134.
17. A/CN. 9/SR. 1-25, 8th meeting, I Session, p. 68.
18. A/CN. 9/SR. 29, p. 44.
19. A/CN. 9/SR. 31, p. 66.
20. A/CN. 9/SR. 1-25, 8th Meeting, 7th February 1968, I Session, p. 70.

from a third party or a real security. That was an important problem since development was based on credit which in turn depended on the guarantee offered. The Commission while taking note of the provisions of the Brussels Convention on Maritime Liens and Mortgages (1926) and the Geneva Convention on Rights in Aircraft (1945) should study the problem of guarantees and securities in the context of trade relations."[21]

2. Methods to be used by the Commission in the promotion, harmonisation and unification in general :

Several countries supported the method indicated in section II, para 8, of the General Assembly Resolution 2205 (XXI) for furthering the progressive harmonisation and unification of the law of international trade in the following words :[22]

> "The commission shall further the progressive harmonisation and unification of the law of international trade by
> (*a*) Co-ordinating the work of organisations active in this field and encouraging co-operation among them.
> (*b*) Promoting wider participation in existing international conventions and wider acceptance of existing models and uniform laws.
> (*c*) Preparing or promoting the adoption of new international conventions, model laws and uniform laws, and promoting the codification and wider acceptance of international trade term provisions of customs and practices in collaboration where appropriate with the organisations operating in this field.
> (*d*) Promoting ways and means of ensuring a uniform interpretation and appllcation of conventions and uniform laws in the field of the law of intérnational trade.
> (*e*) Collecting and disseminating information on national legislation and modern legal developments including case law in the field of law of international trade.
> (*f*) Establishing and maintaining a close collaboration with the U.N. Conference on Trade and Development.
> (*g*) Maintaining liaison with other United Nations organs and specialised agencies concerned with international trade.
> (*h*) Taking any other actions it may deem useful to fulfill.

3. Suggestions by other Countries

Some additions and modifications to the above were suggested by some member countries. Austria suggested extension of the application of existing instruments to new geographical areas, adopting existing instruments so as to make them acceptable to a larger number of states, working out new treaties on the basis of existing drafts or on the basis of prepara-

21. See *supra* note 20, at 75.
22. A/CN. 9/4 Add. 1, December 1967, p.

tory work already done. Combodia proposed that with respect to important subjects where international codification had reached an advance stage, it would be desirable to promote the harmonisation of substantive rules; and with respect to the important question and in those areas where the laws of different countries are basically divergent, it would be desirable to resolve conflicts by establishment of rules as to the applicable law. Hungary felt that the Commission should recommend that the states should :

(*a*) accede to international conventions or adopt uniform laws;
(*b*) harmonise conventions in cases where the same subject is covered by different and divergent international conventions;
(*c*) adopt conventions and uniform laws;
(*d*) systamatize, publish and apply more extensively trade customs and practices, model contracts, trade terms and provisions established and put into practice by international and national organisations and institutions. Several other countries (Belgium, Denmark, Hungary, Finland) and organisations (ILA, BIRPI, UNIDROIT) suggested that the Commission should revise the existing conventions in the field of international trade law and promote wider acceptance by states especially by those which did not take part in the preparation of these conventions.

In the preceeding pages thus, an attempt has been made to define the problem in general and also desicribe the efforts made so far by various international institutions to solve the problems relating to international payments. In order to make this study more meaningful efforts will be made in the ensuing chapters to examine the problem with regard to each instrument separately in detail with particular reference to India, and some suggestions would be offered to make the law in this regard more acceptable to nations and the business community.