II. INTERNATIONAL PAYMENTS

Negotiable instruments

1. *Working Group on International Negotiable Instruments; draft uniform law on international bills of exchange and promissory notes: report of the Working Group on the work of its first session (Geneva, 8-19 January 1973) (A/CN.9/77)* *

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* 30 January 1973.

INTRODUCTION

1. The United Nations Commission on International Trade Law decided at its fourth session "to proceed with work directed towards the preparation of uniform rules applicable to a special negotiable instrument for optional use in international transactions". To this end, the Commission requested the Secretary-General "to prepare a draft of such rules accompanied by a commentary".[1] In response to that decision, a report entitled "Draft uniform law on international bills of exchange and commentary" (A/CN.9/67) * was placed before the Commission at its fifth session. The draft was concerned with bills of exchange in the narrow sense of the term and did not include within its scope promissory notes and cheques. Throughout the preparatory stages leading up to the formulation of the draft, consultations were held with international organizations having a special interest in the matter and information on present-day commercial practices was obtained by means of questionnaires and interviews.

2. At its fifth session, the Commission took note of the result of inquiries made by the Secretariat amongst banking and trade circles concerning the use and importance of promissory notes in international trade and requested the Secretary-General "to modify the draft uniform law on international bills of exchange with a

[1] Report of the United Nations Commission on International Trade Law on the work of its fourth session, *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17* (A/8417), para. 35 (UNCITRAL Yearbook, vol. II: 1971, part one, II, A). For a brief history of the subject up to the fourth session of the Commission, see A/CN.9/53, paras. 1 to 7.

* UNCITRAL Yearbook, vol. III: 1972, part two, II, 1.

view to extending its application to international promissory notes". The Commission requested that the draft uniform law so modified be submitted to the Working Group [2] which it established at that session.[3]

3. The Working Group on International Negotiable Instruments consists of the following eight members of the Commission: Egypt, France, India, Mexico, Nigeria, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

4. Under the Commission's decision, the terms of reference of the Working Group are:

(1) "To prepare a final draft uniform law on international bills of exchange and international promissory notes", and

(2) "To consider the desirability of preparing uniform rules applicable to international cheques and the question whether this can best be achieved by extending the application of the draft uniform law to international cheques or by drawing up a separate uniform law on international cheques, and to report its conclusions on these questions to the Commission at a future session."

5. The Working Group held its first session in the United Nations Office at Geneva from 8 to 19 January 1973. With the exception of India, all the members of the Working Group were represented. The session was also attended by observers from the following members of the Commission: Austria, Argentina, Brazil, Iran, Japan, Kenya and Romania, and by observers from the International Monetary Fund, Hague Conference on Private International Law, International Bank for Economic Co-operation, International Institute for the Unification of Private Law (UNIDROIT), Bank for International Settlements, Commission of the European Communities and International Chamber of Commerce.

6. The Working Group elected the following officers:

Chairman .... Mr. Moshen Chafik (Egypt)
Rapporteur... Mr. Roberto Luis Mantilla-Molina (Mexico)

7. The Working Group had before it a report of the Secretary-General entitled "Draft uniform law on international bills of exchange and international promissory notes, and commentary" (A/CN.9/WG.IV/WP.2) * which was prepared in response to the above-mentioned decision of the Commission taken at its fifth session. The Working Group also had before it a working paper prepared by the Secretariat (A/CN.9/WG.IV/R.1).

Deliberations and conclusions

8. With regard to its working methods, the Working Group decided that it would, at its first session, concentrate its work on the substance of the draft uniform law. The Group requested the Secretariat to prepare a revised draft of those articles in respect of which its deliberations would indicate modifications of substance or of style. The Group also decided to postpone consideration of the scope of application of the uniform law until a later stage of its work and it commenced its discussion of the provisions of the draft uniform law with part three of the draft (transfer and negotiation). In the course of its session, the Working Group considered articles 12 to 40 of the draft uniform law and articles 5 and 6 (interpretation) in so far as they relate to those articles. A summary of the Group's deliberations in respect of these articles and its conclusions are set forth in paragraphs 10 to 135 of this report.

9. At the close of its session, the Working Group expressed its appreciation to the Secretariat for the highly competent draft and commentary embodied in document A/CN.9/WG.IV/WP.2 and observed that this material provided the Group with an excellent basis for its work. The Working Group also expressed its appreciation to the representatives of international banking and trade organizations that are members of the UNCITRAL Study Group on International Payments. The experience and judgement made available by the Study Group to the Secretariat has helped to place the draft on a sound and practical basis. The Working Group expressed the hope that the members of the Study Group would continue to make their services available to the Working Group and to the Secretariat during the remaining phases of the current project.

A. *Transfer and negotiation (articles 12 to 22)*

Article 12

The transfer of an instrument vests in the transferee the rights to and upon the instruments that the transferor had.

10. The draft uniform law makes a distinction between the transfer of an instrument and its negotiation. Under article 12, the effect of the transfer of an instrument, with or without endorsement, is that the transferee has the same rights to and upon the instrument as the transferor. It follows from this provision that a transferee has the rights of a holder or of a protected holder if his transferor was a holder or a protected holder.

11. During the consideration of article 12, it became apparent that the implications of the rule set forth in that article can only be fully ascertained in the context of other provisions of the draft uniform law in which the concept of transfer is relevant. Therefore, the comments referred to below are of a preliminary nature, and the Working Group will reconsider article 12 at a later stage of its work.

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* For the text of the draft uniform law on international bills of exchange and international promissory notes, see next section (part two, II, 2).

[2] Report of the United Nations Commission on International Trade Law on the work of its fifth session, *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17* (A/8717), para. 61 (2) (*c*) (UNCITRAL Yearbook, vol. II: 1971, part one, II, A).

[3] *Ibid.*, para. 61 (1) (*a*).

12. There was considerable support in the Working Group for the view that the uniform law should deal only with the legal effects of the transfer of an instrument by endorsement, or by mere delivery in the case of an instrument on which the last endorsement is in blank. Under this view, the effects of a transfer without endorsement and the effects of an assignment should be left to the applicable national law.

13. The opinion was expressed that the Secretariat should consider the possibility of eliminating from the draft the concept of transfer without endorsement and instead should seek to achieve the principal results of article 12 in another way and in the context of other articles. The following specific solutions were suggested for incorporation into other articles of the draft:

(*a*) If an instrument is transferred by a holder without the necessary endorsement, the transferee would have the rights of a holder, even where the transferor refuses or is unable to make the endorsement;

(*b*) If an instrument is paid by the drawer and the drawer receives the instrument without endorsement, such drawer should be able to transfer his rights to another person;

(*c*) If an instrument is endorsed by a protected holder to a person who is not himself a protected holder, such person should have the rights of a protected holder, subject to the provision of article 25 (2), according to which such endorsee shall not have the rights of a protected holder if he "has participated in a transaction which gives rise to a claim to, or a defence upon, the instrument".

Article 13

(1) An instrument is negotiated when it is transferred
  (*a*) By endorsement and delivery of the instrument by the endorser to the endorsee, or
  (*b*) By mere delivery of the instrument but only if the last endorsement is in blank.

(2) Negotiation shall be effective to render the transferee a holder even though the instrument was obtained under circumstances, including incapacity or fraud, duress or mistake of any kind, that would subject the transferee to claims to the instrument or to defences as to liability thereon.

14. Under article 13, an instrument is negotiated when it is endorsed by the holder and delivered by him to the endorsee or, if the last endorsement is in blank, when it is delivered. Under paragraph (2) of article 13, an instrument is negotiated even though negotiation is effected by a person without capacity, etc.

15. The Working Group found itself in agreement with the substance of the article, but made a number of suggestions designed to improve clarity.

16. It was pointed out that this article, in combination with the definition of holder in article 5 (*b*), should make clear that any person in possession of an instrument of which the last endorsement is in blank (e.g. a finder or a thief of a bearer instrument) is a holder. Further, it should be made clear that negotiation is not the only way by which a person can become a holder; for instance the payee of an instrument is a holder although the instrument is not negotiated to him.

17. It was also suggested that an attempt should be made to eliminate from the draft the terms "negotiate" and "negotiation" and to employ instead the concepts of endorsement and delivery.

18. The question was raised whether the uniform law should give the effects of negotiation to an endorsement made after maturity. In this connexion, it was suggested that the uniform law should follow the approach of article 20 of the Geneva Uniform Law of Bills of Exchange.[4]

Article 14

Where an instrument is transferred without an endorsement necessary to make the transferee a holder, the transferee is entitled to require the transferor to endorse the instrument to him.

19. The lack of a necessary endorsement would seriously impair the rights of the transferee and would prevent further negotiation of the instrument. The purpose of this article is to confer on the transferee a statutory right to require the transferor to make the necessary endorsement. The procedures for enforcement of such right is left to national law.

20. Various comments were made concerning this article. The view was expressed that the uniform law should not grant a statutory right to the transferee to require an endorsement from his transferor, but that this question should be governed by the contractual relationship of the parties outside the instrument. According to another view, article 14 would only be effective if it specified the sanctions in the case of non-compliance by the transferor. For instance, the transferor might be made liable to pay compensation for any damages sustained by the transferee; such damages could be presumed to be the amount of the instrument, to be reduced by whatever the transferor could show by way of mitigation.

21. It was pointed out that uniform law should specify that a transferee who had obtained the required endorsement should become a holder only at the time when the endorsement was made.

22. It was noted that article 14 did not impose an excessive burden on the transferor since he may fulfil his obligations under the article by endorsing the instrument "without recourse". It was further noted that the advantage of article 14 was twofold:

[4] "An endorsement after maturity has the same effects as an endorsement before maturity. Nevertheless, an endorsement after protest for non-payment, or after the expiration of the limit of time fixed for drawing up the protest, operates only as an ordinary assignment.

"Failing proof to the contrary, an endorsement without date is deemed to have been placed on the bill before the expiration of the limit of time fixed for drawing up the protest."

(i) In some countries, in the absence of statutory rules, there may be no effective remedy for a refusal to make the necessary endorsement;

(ii) It would be reasonable to imply a promise to supply a necessary endorsement. Article 14 is useful in giving a statutory right that would be equivalent to a contractual right based on such an implied promise.

23. The view was expressed that article 14 could provide that the transferee would be entitled to sign the endorsement as an agent of the transferor, but only in the case where there is an established agency relationship between the parties, such as between a depositary bank and its client.

24. It was suggested by one representative that the Secretariat give consideration to the question whether a bailee or agent should have the right to compel an endorsement when he has not given value.

Article 15

The holder of an instrument endorsed in blank may convert the blank endorsement into a special endorsement by indicating therein that the instrument is payable to himself or to some other person.

25. The purpose of article 15 is to make clear that a holder may convert a blank endorsement into a special endorsement, without an additional signature but by the mere addition of the name of a person to whom the instrument is payable.

26. It was pointed out that article 14 of the Geneva Uniform Law on Bills of Exchange sets forth, in addition to the provision of article 15 of the Draft Uniform Law, two further provisions, namely, the holder may (*a*) re-endorse the instrument in blank, or to some other person, and (*b*) transfer the instrument to a third person without filling up the blank, and without endorsing it. It was suggested that consideration be given to including the substance of these provisions.

Article 16

When the drawer, the maker or an endorser has inserted in the instrument or in the endorsement, words prohibiting transfer, such as "not transferable", "not negotiable", "not to order", or words of similar import, the instrument cannot be negotiated except for purposes of collection.

27. Article 16 enables the drawer, the maker or an endorser to prevent negotiation of the instrument by the person who took the instrument from him.

28. The view was expressed that the basic objective of this article might be achieved by providing that, when an instrument is marked "not negotiable", parties subsequent to the party who took such an instrument would not have the status of "holder". In this connexion it was suggested that, if possible, the objective of the article should be achieved without stating that the instrument cannot be "negotiated".

29. According to another view, article 16 should make separate provision for the effect of "not negotiable" clauses added by (1) the drawer or the maker, and (2) an endorser.

30. It was felt that article 16 should specify the legal effects of an endorsement made contrary to a stipulation prohibiting negotiation.

31. One representative took the view that article 16 should not be retained; if it were retained, the article should state explicitly that an instrument containing words prohibiting negotiation cannot be endorsed.

Article 17

An endorsement purporting to negotiate an instrument subject to a condition shall be effective to negotiate the instrument irrespective of whether the condition is fulfilled.

32. Under article 17, an endorsement which makes the negotiation of an instrument subject to a condition is effective as an endorsement even though the condition may not be fulfilled.

33. Under one view, article 17 should state clearly, as a matter of policy, that an endorsement must be unconditional; if an endorsement was nevertheless made subject to a condition, the condition should be deemed not to be written. It was pointed out, in this connexion, that such wording could be interpreted to mean that the condition was ineffective between the endorser and his immediate endorsee; this was held to be undesirable. Any such formulation should be qualified: a conditional endorsement is deemed not to be written except as between the endorser and his endorseee.

34. The Working Group decided that the uniform law should take into account the following objectives:

(*a*) The fact that a remote holder knew about the non-fulfilment of the condition, or did not inquire whether or not it was fulfilled, shall not prevent such holder from being a protected holder if he otherwise so qualifies.

(*b*) The non-fulfilment of the condition cannot be raised as a defence by the party who endorsed conditionally against a remote holder, even if such holder is not a protected holder.

(*c*) A party who endorsed conditionally may assert the non-fulfilment of the condition against his immediate endorsee.

Article 18

An endorsement purporting to transfer only a part of the sum payable shall be ineffective as an endorsement.

35. This article would render ineffective endorsements such as "Pay one half of the sum due to A" or "Pay one half to A and one half to B".

36. The Working Group expressed agreement with article 18. Under one view the Secretariat should specify in the commentary to the article that an endorsement to two or more endorsees together (pay A and B) or in the

alternative (pay A or B) is not a partial endorsement. The question whether the endorsement of an instrument paid in part for the unpaid residue is a partial endorsement was left open.

Article 19

Where there are two or more endorsements, it shall be presumed, unless the contrary is established, that each endorsement was made in the order in which it appears on the instrument.

37. The legal relationships amongst endorsers may depend on the sequence in which the endorsements were added. (See articles 41 and 78 (1).) In view of this circumstance, article 19 establishes a presumption of fact as to the time sequence amongst endorsements appearing on an instrument, namely that each endorsement was made in the order in which it appears.

38. It was suggested that article 19 should contain a further provision establishing a presumption that the endorsers are liable to one another in the order in which they have in fact endorsed.

39. The view was also expressed that a provision under which endorsers would be required to number their endorsement in a consecutive order might clarify the factual issue. The question was raised, however, whether it would be practicable to develop an appropriate sanction for non-compliance with such a rule.

40. Under one view, the uniform law should state explicitly that endorsements would appear on the back of the instrument only. The Working Group agreed to consider this question in connexion with the provisions governing guarantee (articles 43 to 45).

Article 20

(1) Where an endorsement for collection contains the words "for collection", "for deposit", "value in collection", "by procuration", or words of similar import, authorizing the endorsee to collect the instrument, the endorsee

(*a*) May only endorse the instrument on the same terms; and

(*b*) May exercise all the rights arising out of the instrument and shall be subject to all claims and defences which may be set up against the endorser.

(2) The endorser for collection shall not be liable upon the instrument to any subsequent holder.

41. This article deals with the endorsement for collection. The basic assumption is that the endorsee for collection acts as an agent of his endorser. It follows from this that:

(*a*) The endorsee for collection has the same rights as his endorser (i.e. he cannot be a protected holder in his own right);

(*b*) The endorser for collection is not liable on the instrument to his endorsee;

(*c*) The endorsee for collection cannot further endorse the instrument, except for collection.

42. There was general agreement that when an endorsee for collection endorsed an instrument without indicating that the endorsement was for collection, the earlier endorsement, indicating that the instrument should only be handled for collection, would govern the further endorsement.

43. It was also agreed that the commentary to the article should specify that the provision that the endorsee "may exercise all the rights arising out of the instrument" included, unless otherwise agreed, the right to bring an action on the instrument in court.

44. It was understood that if the endorsee for collection paid, before collection, the amount of the instrument to his endorser, this fact would not result in the endorsee's becoming a protected holder. However, it was noted that if the instrument was dishonoured, the provisions of the law would not impair whatever contractual rights might exist outside the instrument between the principal and his agent (the endorsee for collection).

45. A drafting suggestion was made concerning the opening phrases of paragraph (1) of article 20, namely that the concept of an endorsement for collection should be identified before reference is made to "an endorsement for collection".

46. The question was raised whether a collecting bank which before collecting an instrument has credited the account of the endorser would be governed by article 20. It was noted that this would indeed be the case, but that the collecting bank could protect itself by bringing an action against the endorser for reimbursement or it could have asked for a full endorsement. In the latter event, the bank could qualify as a protected holder and would have rights on the bill against the endorser.

Article 21

Where an instrument is transferred or negotiated to a prior party, he may, subject to the provisions of this Law, re-issue or further transfer or negotiate the instrument.

47. This article permits a drawer who received the instrument to re-issue the instrument to the payee or, if the instrument was endorsed to the drawer, to endorse it to another person. Similarly, any party prior to the holder who paid the instrument may further transfer and, if the instrument was endorsed to him, transfer or endorse it.

48. It was recalled that the question whether an instrument can be negotiated after protest for non-payment, or after payment, had not yet been settled by the Working Group; the Group reserved its decision on this point. It was noted that under the approach followed by the draft uniform law, a holder who took the instrument after protest for non-payment could become a protected holder.

49. Doubts were raised in the Working Group whether the use of the terms "transfer" and "transferred" in article 21 was advisable. The Group decided to reconsider this question in the context of article 12.

50. The view was expressed that article 21 should provide that the drawee cannot negotiate the instrument after maturity.

Article 22

(1) A person who acquires an instrument through what appears on the face of the instrument to be an uninterrupted series of endorsements shall be a holder even if one of the endorsements was forged or was signed by an agent without authority, provided that such person was without knowledge of the forgery or of the absence of authority.

(2) Where an endorsement was forged or was signed by an agent without authority, the drawer or the maker or the person whose endorsement was forged or was signed by an agent without authority shall have against the forger or such agent and against the person who took the instrument from the forger or from such agent the right to recover compensation for any damage that he may have suffered because of the operation of paragraph (1) of this article.

(3) Subject to the provisions of article 28 (*a*) and (*b*), a forged endorsement or an endorsement by an agent without authority shall not impose any liability on the person whose signature was forged or on behalf of whom the agent purported to act when endorsing the instrument.

51. Under this article, a forged endorsement or an endorsement signed without authority is effective as an endorsement, provided that such an endorsement is part of what appears on the face of the instrument to be an uninterrupted series of endorsements. Consequently, the person who so acquired the instrument becomes the "holder". Under article 23, persons who sign the instrument undertake to pay the "holder"; a "holder" may acquire the status of "protected holder", and take the instrument free of claims and defences in accordance with the rules of article 25. In addition, under article 70 a party is discharged of liability when he pays, *inter alia*, a "holder". Thus, by virtue of article 22, a person whose endorsement is forged may lose his rights to and upon the instrument. However, the article, in paragraph (2), confers on the drawer or maker or the person whose endorsement was forged, a statutory right to recover compensation not only from the forger but also from a person who took the instrument from the forger. As a result, the financial risk consequent upon forgery is borne by the forger or, more significantly, by the person who took from the forger. (The latter, in international transactions, is usually a bank.) The article thus preserves the substance of the maxim "know your endorser", whilst giving protection to most of the parties who take an instrument that is regular on its face.

52. The Working Group expressed agreement with the general policy underlying article 22. In its view, the article constitutes a reasonable compromise between the sharply diverging approaches to the problem of forged endorsements at present found in the various legal systems. The observations made by members of the Working Groups and by observers were therefore mainly directed to clarification and improvement of the basic approach embodied in the draft.

53. The question was put as to the result achieved in the following case. The payee endorses the instrument in blank, the instrument is stolen and subsequently negotiated by the thief to A by means of a forged signature. On these facts it was pointed out that both the thief and A are holders, not because of article 22 but because they comply with the definition of a "holder" given in article 5 (*b*). Article 22 was intended to apply only to cases where the person who takes from the forger is not a holder because he did not take the instrument through an uninterrupted series of authentic endorsements, as required under article 5 (5) and (6). Article 22 must be considered as an exception to the definition of "holder" set forth in article 5 (5) and (6).

54. Attention was directed to the closing clause of paragraph (1): "provided that such person was without knowledge of the forgery . . .". The following case was put: following a forgery, an instrument is endorsed to A, who qualifies as a "holder" under article 22. A then endorses to B, who knew of the forgery. It was suggested that the above language barred B from being a "holder", and that this was undesirable since B should succeed to the status of "holder" held by his endorser, A. In response, it was noted that article 22 (1), standing alone, would lead to this result. However, the person B who took with knowledge of the forgery would, under article 12, have the rights of a holder because his endorser A was a holder. The Working Group concluded that such a person should be a holder in his own right.

55. It was also noted that if the proviso concerning lack of knowledge should be retained, it should be made clear that this proviso related only to lack of knowledge at the time at which a person took his instrument; knowledge acquired at a later time was irrelevant.

56. Under one view, article 22 (1) should distinguish between the case of an endorsement forged by a thief and an endorsement made by an agent without authority. In the first case, the thief usually could not easily be found or, if found, would be insolvent, whilst in the second case the agent could be easily identified. It was noted that, under the draft uniform law, the agent acting without authority would not only be liable to pay compensation under article 22 (2), but also would be liable on his own signature to any subsequent party. The risk of the forgery would thus be borne by the agent.

57. The Working Group also agreed that it should be made clear that article 22 is subject to the rule obtaining under article 28 (a) and (b), according to which a forged signature on an instrument imposes liability on the person whose signature was forged if such person ratified the signature or behaved in such a way as to represent expressly or by implication to the holder that the signature is genuine. Secondly, the commentary to article 22 should point out that the compensation to which paragraph (2) establishes a right is subject to the rules of the applicable national law under which compensation may be reduced in the case of negligence by the claimant.

58. The Working Group was agreed that the provisions set forth in article 22 (3) were fully covered by articles 28 and 30 and should therefore be deleted.

59. The Working Group requested its secretariat to consider relocating article 22 at a more appropriate place in the draft uniform law.

B. *Holder and protected holder: definition and rights (articles 5, 6, and 23 to 26)*

I. *Definition of "holder"*

Article 5 (5) (a) *and 5 (6)*

(5) (*a*) "Endorsement" means a signature, or a signature accompanied by a statement designating the person to whom the instrument is payable, which is placed on the instrument by the payee, by an endorsee from the payee, or by any person who is designated under an uninterrupted series of such endorsements. An endorsement which consists solely of the signature of the endorser means that the instrument is payable to any person in possession thereof;

(6) "Holder" means the payee or the endorsee of an instrument who is in possession thereof.

60. Under the draft uniform law, the concept of "holder" is relevant in, *inter alia*, the following contexts:

(*a*) Being a holder is a necessary element of the status of a protected holder (article 5 (9)),

(*b*) A person signing an instrument undertakes to pay to the holder therof (article 23);

(*c*) A party to an instrument is discharged by payment to the holder (article 70 (1)).

Under article 5 (6), a holder is the payee or an endorsee (see article 5 (5) (*a*)) in possession of the instrument.

61. The Working Group was agreed that the definition of "holder" should include the possessor of an instrument on which the last endorsement was in blank. It was noted that the present draft was designed to reach this result by means of the definition of "endorsement", but that this definition was not linked with sufficient certainty to the concept of "endorsee" in article 5 (6). The Group decided that a more explicit provision was needed.

62. The Working Group considered whether the definition of "holder" should include also a "guarantor" (article 43) who has paid the instrument and is in possession thereof. The Group concluded that the definition of "holder" should not be expanded in this manner, since the guarantor should not be given the right to endorse the instrument. The only rights of a guarantor who has paid should be to require payment from the person whose payment he guaranteed and parties liable to that person. Such is explicitly provided in article 45. The Working Group concluded that this was the most acceptable approach to the problem.

63. The Working Group also considered whether a drawer who pays the instrument and who acquires the instrument without an endorsement to him should be a "holder". For reasons similar to those stated in the preceding paragraph, the Group concluded that the definition of "holder" should not be expanded to include this situation.

64. The Working Group considered that, since the definition of "holder" included the "endorsee" in possession of the instrument, the draft uniform law would gain in clarity if it included a definition of "endorsee".

II. *Definition of "protected holder"*

Article 5 (9)

(9) "Protected holder" means the holder of an instrument which, on the face of it, appears to be complete and regular and not overdue, provided that such holder was, when taking the instrument, without knowledge of any claims or defences affecting the instrument or of the fact that it was dishonoured.

Article 6

For the purpose of this law, a person is considered to have "knowledge" of a fact if he has actual knowledge thereof [or if the absence of knowledge thereof is due to [gross] negligence on his part] [or if he has been informed thereof or if the fact appears from the face of the instrument].

65. Special protection is given under the draft uniform law to a "protected holder" (article 35). In general, a protected holder takes the instrument free from claims and defences. Under article 5 (9), a holder of an instrument will qualify as a protected holder if the instrument appears on its face to be complete and not overdue and if he took the instrument without knowledge of any claims or defences. Article 6 states when a person is considered to have "knowledge".

66. The Working Group was of the opinion that the present definition of protected holder might not deal adequately with the following case. The drawer draws a bill on the drawee payable to himself; the bill is accepted by the drawee. The underlying transaction is the future delivery of goods by the drawer to the acceptor. The drawer fails to deliver. It could be argued that under article 5 (*a*), the drawer-payee is a protected holder and that therefore the acceptor could not raise against him a defence based on the non-delivery of the goods. The Group concluded that this result would not be desirable. If the acceptor could not raise the defence of non-performance against the action by the drawer-payee on the bill, he would be obliged to pay the bill and bring a separate action on the underlying transaction outside the bill, The Working Group concluded that the rules applicable to a "protected holder" should not preclude defences, as in the above case, of persons with whom the holder has dealt.

67. The Working Group was agreed that the point of time relevant to the status of a protected holder is the moment at which a person acquires the instrument. If at that moment the instrument is not overdue and the person

has no knowledge of any claim or defences, the holder of the instrument qualifies as a protected holder; the fact that the instrument became overdue in the hands of a protected holder after he took it or the fact that, subsequent to the taking, he gained knowledge of a claim or defence does not affect his status. It was agreed that the language of article 5 (9) should be rephrased to express this rule with greater clarity.

68. It was pointed out that the draft uniform law' in article 5 (9) (definition of "protected holder"), requires that the protected holder be the holder of an *instrument*, i.e., a writing which complies with the formal requisites set forth in article 1 (2) or article 1 (3). In addition, article 5 (9) requires that the instrument appear to be *complete* on its face. The view was expressed that the latter requirement was unnecessary in view of the requirement that the writing be an *instrument* within article 1 (2) or article 1 (3). Consideration was given to the following case: an instrument is drawn payable at a specified date but the space for stating the date of issue is left blank. It was concluded that a person taking such instrument should be able to qualify as a protected holder although the instrument was not "complete" within the meaning of article 5 (9). With regard to the "date of issue", under one view the mention of that date should be included amongst the formal requisites set forth in article 1 (2) or article 1 (3). Under this approach, a person taking a writing which lacked such mention would not qualify as a protected holder since he is not the holder of an "instrument". The Working Group decided to deal with the question as to whether the date of issue should be a formal requisite in connexion with the consideration of article 1.

69. The Working Group agreed that the definition of "protected holder" should not be expanded to include the requirement that the holder must take the instrument "for value".

70. The Working Group considered the definition of "knowledge" in article 6. It was agreed that *actual* knowledge about claims or defences at the time of taking the instrument should prevent a holder from being a protected holder. The Group did not reach a consensus with regard to the question whether negligence or the absence of "good faith" should also prevent a holder from being a protected holder. The Working Group was of the view that this question presented difficult issues of policy and that consideration of the importance of negligence and good faith under the main legal systems would be helpful in reaching a final decision on the matter. The Group therefore requested the Secretariat to analyse such considerations for use by the Working Group in its further consideration of the advisability of including negligence or the absence of good faith within the definition of "protected holder".

71. The Working Group also concluded that if only the element of actual knowledge were retained, the definition of "protected holder" could conveniently refer to the requirement of actual knowledge. If this were done, there would be no need for a separate definition of "knowledge" in connexion with defining the status of "protected holder".

III. *The presumption that every holder is a protected holder*

Article 26

(1) Every holder is presumed to be a protected holder.

(2) Where it is established that a defence exists, the holder has the burden of establishing that he is a protected holder.

72. This article sets forth the presumption that a holder is a protected holder. It suffices therefore for a person to prove that he is a holder in order to benefit *prima facie* from all the rights to and upon the instrument. It follows that the burden to establish the existence of a claim or a defence rests upon the obligor. Under article 26 (2), when the obligor has established his claim or defence, the holder must prove that he is a protected holder.

73. The Working Group expressed agreement with the rule that every holder is presumed to be a protected holder, until the contrary is proved. However, the Working Group was divided on the question of who should bear the burden of proof if the obligor established the existence of a defence. Should it fall to the holder (plaintiff) to prove that he is a protected holder? Or should it fall to the obligor (defendant) to prove that the holder is not a protected holder? The first view, followed in paragraph 2 of the article, was opposed on the ground that it would be virtually impossible, under the procedure of civil law countries, for the holder to establish the "negative fact" that he took the instrument without knowledge of a claim or defence. The second view was opposed on the ground that the obligor would rarely be in a position to prove the existence of knowledge on the part of a remote holder resident in a distant country.

74. The Working Group, after discussing the above views and having considered the possibility of leaving to national law the question as to who should bring the proof that the holder is or is not a protected holder concluded that:

(*a*) Paragraph 1 should be retained but the words "until the contrary is proved" should be added;

(*b*) Paragraph (2) should be deleted;

(*c*) Paragraph 1 should be redrafted in such a way so as not to compel the conclusion that the burden of proof of the "negative fact" of absence of knowledge of a claim or defence should fall to the holder.

IV. *The rights of a protected holder*

Article 25

(1) The rights to and upon an instrument of a protected holder are free from:

(*a*) Any claim to the instrument on the part of any person; and

(*b*) Any defence of any party, except defences based on circumstances which render the obligation on the instrument of such party null and void; and

(*c*) Any defence based on discharge or on the absence of liability on the ground that the instrument was dishonoured by non-acceptance or by non-payment or was not duly protested.

(2) The transfer of an instrument by a protected holder shall not vest in the transferee the rights of a protected holder if the transferee has participated in a transaction which gives rise to a claim to, or a defence upon, the instrument.

75. Under article 25, a protected holder is free from any claims to the instrument and also is free from any defence as to his liability on the instrument, subject to limited exceptions defined in paragraph (1) (*b*). In nearly every case, the holder of an international bill of exchange or promissory note will clearly qualify as a protected holder (see the discussion of articles 5 (9) and 26 at paras. 64 to 73 *supra*). The strong protection which article 25 gives to the protected holder thus provides the foundation for the security of international transactions, which is a central objective of the uniform law.

76. Under paragraph (1) (*a*) of the article, a claim to the instrument cannot be brought against a protected holder. The Working Group approved of this rule. The Working Group was also in agreement with the basic rule of subparagraph (*b*) under which parties sued on the instrument cannot set up defences against the protected holder. Attention was directed to the exception set forth in subparagraph (*b*) with respect to defences which render an obligation on the instrument "null and void". The Working Group concluded that this provision did not make immediately clear what defences were involved and might be given an application that was too broad. The suggestion was made that the exception to the general rule set forth in paragraph (1) (*b*) should specifically enumerate the defences which cannot be overcome by a protected holder. To this end, the Group invited representatives to submit lists of defences available under their national law against a protected holder. The Working Group decided that it would reconsider subparagraph (*b*) in the light of the analysis of national rules on this question. The Working Group further requested the Secretariat, in redrafting article 25, to consider the view that there is no need for the provision in subparagraph (*c*) that the protected holder takes the instrument free from "any defence based on discharge", since this rule was implicit in the basic rule of subparagraph (*b*) that a protected holder takes the instrument free from "any defence of any party". The Working Group decided to postpone further consideration of the provision of subparagraph (*c*) on the failure to protest dishonour until its discussion of part five of the draft (articles 46-68) concerning presentment, dishonour and recourse.

77. Paragraph (2) of the article is based on the premise that the draft would contain a general rule that when a protected holder, A, negotiates the instrument to another person, B, B would receive the rights of the protected holder A (see article 12, *supra*, at paras. 10 to 13). The objective of such a "shelter" rule is to enable the protected holder to receive the full benefit of his protected status by being able freely to negotiate the instrument. Paragraph (2) of article 25 sets forth an exception to this "shelter" rule where the transferee "has participated in a transaction which gives rise to a claim to, or a defence upon, the instrument". The Working Group expressed agreement with the result which paragraph (2) seeks to achieve, namely, that a person who has participated in a transaction which gives rise to a claim to the instrument or to a defence thereon, should not benefit from the fact that he took the instrument from a protected holder. The suggestion was made that a further exception to the "shelter" rule should be added to prevent a person who took the instrument from a protected holder from enjoying the rights of a protected holder if, when a previous party to the instrument, he *knew* about a claim or a defence. The following example was given: P, by fraud, induces the drawer to draw an instrument payable to P; P endorses to A who knows about the fraud; A endorses to B who is a protected holder; B endorses to A. It was observed that such cases would be rare. The Working Group was of the opinion that special provision should not be made in paragraph (2) for this unusual situation.

78. The Working Group was unable to reach consensus as to the desirability of including the "shelter" rule in the uniform law. Under one view, the "shelter" rule should be retained since, as has been mentioned above, it enables a protected holder to negotiate the instruments freely and because it is necessary to complete the protection of the protected holder. According to the opposite view, the "shelter" rule should be eliminated and be replaced by a rule under which the rights of a person who takes an instrument should be ascertained independent from the rights of the person from whom he took the instrument. Under yet another view, the uniform law should, in so far as the application of the "shelter" rule is concerned distinguish between defences on the one hand and claims on the other. In respect of defences, the "shelter" rule should be retained. However in respect of claims to the instrument, the "shelter" rule should not be applicable and a person who had been dispossessed of an instrument should be able to claim the instrument from any person, including a person who took from a protected holder if he acquired the instrument in bad faith or with gross negligence.

V. *The rights of a holder*

Article 24

(1) The rights to and upon an instrument of a holder who is not a protected holder are subject to:

(*a*) Any valid claim to the instrument on the part of any person; and

(*b*) Any defence of any party which would be available under a contract or available under this Law.

(2) A party may not avoid liability to a remote holder on the ground that he has a defence against his immediate party if such defence is based on legal relations not connected with the instrument.

(3) A party may not avoid liability to a holder on the ground that a third person has a valid claim to the instrument unless such person himself has claimed

the instrument from the holder and informed such party thereof.

79. Article 24 deals with the rights of a holder who, for any one of various possible reasons (article 5 (9)), does not achieve the status of a "protected holder" (article 25). Such a holder, unlike the protected holder, does not take the instrument free from claims and defences. Paragraphs (2) and (3) of article 24 set forth two exceptions to this rule.

80. The Working Group, after discussion, agreed that the draft uniform law should contain an article concerning the rights of a holder on the lines of the proposed draft article.

81. The Working Group concluded that the exception in paragraph (2) with respect to defences "based on legal relations not connected with the instrument" might lead to misinterpretation, and requested the Secretariat to redraft article 24 so as to assure the following results:

(*a*) The party to an instrument should be able to interpose a defence in a case like the following: P, by fraud, induces the drawer to issue the instrument to the payee, P; P endorses the instrument to A, who is not a protected holder. Article 24 should make it clear that the drawer can interpose the defence of fraud in an action on the instrument by A.

(*b*) The party liable on the instrument should be able to interpose a defence based on the fact that the transaction underlying the instrument was not performed. The following example was given: the seller of goods (drawer) draws a bill of exchange on the buyer (drawee) payable to himself; the bill is accepted by the drawee pursuant to the contract of sale under which the seller undertook to deliver the goods at a future date; the goods are not delivered; the drawer-payee endorses the bill to A after the time for the delivery of the goods has passed. If A is not a protected holder, article 24 should make it clear that the acceptor can interpose the defence of non-performance of the underlying contract in an action on the bill by A.

(*c*) The party liable on the instrument should not be able to interpose a defence in situations illustrated by the following example: the drawer, D, issues an instrument to the payee, P, to pay for goods which P sold to D. Because of another transaction between P and D, P owes D an amount equal to that of the instrument. The payee, P, endorses the instrument to A, who is not a protected holder. Article 24 should make it clear that the drawer D, cannot interpose in an action by A the defence of set-off, which he could interpose, under some legal systems, in an action by the payee. It was noted that in this example the defence which D would attempt (unsuccessfully) to assert against the holder was not connected with either (*a*) the instrument held by P or (*b*) the underlying transaction that gave rise to the instrument.

82. The Working Group approved the substance of the exception in paragraph (3) restricting the right of one party, A, to avoid liability to the holder, B, on the ground that a third person, T, had a claim to the instrument (the defence of *jus tertii*).

C. *Rights and liabilities of the signatories of an instrument (articles 27 to 40)*

Article 27

(1) A person is not liable on an instrument unless he signs it.

(2) A person who signs in a name which is not his own shall be liable as if he had signed it in his own name.

(3) A signature may be in handwriting or by facsimile, perforations, symbols or any other mechanical means.

83. This article sets forth the basic principle that a person is not liable on an instrument unless he signs it. The article also provides that a signature, in order to be effective as a signature, need not be handwritten but may be a facsimile, perforation, symbol or by any other mechanical means.

84. The Working Group expressed agreement with paragraphs (1) and (2) of article 27, but suggested that paragraph (1) should specify that its provisions are subject to articles 28 and 30.

85. Opinions were divided on the question whether a signature could be other than handwritten. It was noted that, by virtue of paragraph (3), the Courts of Contracting Parties to the Convention setting forth the uniform law would be obliged to consider a signature as defined in paragraph (3) as adequate to impose liability on an international negotiable instrument. The uniform rule of the Convention would apply to such international instruments rather than any rule of national law. The Working Group concluded that it was important to establish a uniform rule as to what type of signature would be acceptable; in view of the large number of international instruments that must be handled, it was not practicable to apply varying local rules.

86. It was noted that article 27 (3) did not impose a duty on persons signing the international negotiable instrument to sign otherwise than in handwriting. It was also observed that a person would be free to refuse to take, accept or guarantee an instrument if he found that a signature on the instrument was not satisfactory to him because (for example) it was made by perforations or a facsimile rather than in handwriting. Whether a refusal to accept an instrument was wrongful depended on rules (such as the contract) that lay outside the uniform law.

87. There was general agreement that the law should provide that endorsements could be effected by facsimile, stamp or similar means that would expedite the process of executing large numbers of signatures. The suggestion was made that the privilege of signing by such mechanical means should be restricted to banks; on the other hand it was noted that it would be difficult to establish a definition of "bank" that would be capable of application in all countries.

88. Under one view, the signature of certain parties —the drawer, the acceptor, the guarantor and the maker— should only be valid if in handwriting. It was suggested

that these signatures were of special importance; requiring these signatures to be in handwriting provided some protection of authenticity. On the other hand, it was reported that in actual practice most signatures were unknown, except to the bank handling the instrument on behalf of the party signing, and often were illegible. In addition, more significant protection against possible forging was derived from the known responsibility of an immediate party on the instrument. In this connexion, attention was directed to the rules on the effect of forged endorsements in article 22. In addition, attention was drawn to the trend toward mechanical processing of documents, and it was suggested that the draft uniform rules should be sufficiently flexible to accommodate further development in this direction. The possibility of the electronic issuance of documents (as by teletype) should also be taken into account. Most representatives concluded that the rules of paragraph (3) should apply not only to endorsements, but also to the signatures of the acceptor, guarantor and maker.

89. One representative noted his reservation to the rule of paragraph (3), pending consideration of the feasibility of deviating from the current rule of his national law requiring that signatures be executed in handwriting.

Article 28

A forged signature on an instrument does not impose any liability thereon on the person whose signature was forged. Nevertheless, such person shall be liable:

(*a*) If he has ratified the signature;

(*b*) To a holder without knowledge of the forgery if, through his conduct he has given such holder or an intervening endorser reason to believe that the signature was his own or was made by an agent with authority.

90. This article states the general rule that a person whose signature was forged is not liable on the instrument. Under the article, this rule is subject to two exceptions:

(*a*) A person whose signature is forged is liable on the instrument if he ratified the signature;

(*b*) A person who behaved in such a way as to represent to a holder without knowledge of the forgery that the signature is genuine is liable on the forged signature.

91. The Working Group considered whether the provisions of this article should apply both to signatures that are forged and to signatures made by an agent without authority. The Group was of the opinion that the application of the exceptions to agency raised questions which were part of the general law of agency, for example, the scope of the agent's authority, the apparent authority of an agent, ways in which ratification takes place, etc. All such questions were dealt with in considerable detail in national laws on agency and it would, in the view of the Group, not be feasible to deal satisfactorily with them in a law on negotiable instruments. Therefore, the Working Group concluded that article 28 should apply only to forged signatures. For this reason, the Working Group requested the Secretariat:

(*a*) To redraft paragraph (*a*) so as to make it applicable to the "adoption" of a forged signature (as contrasted with "ratification"); and

(*b*) To delete in paragraph (*b*) the words "or was made by an agent with authority".

92. The Working Group further concluded that article 28 should also apply to cases where a signature was forged by the wrongful use of a stamp or facsimile.

93. The Working Group considered that paragraph (*b*) of article 28 raised the difficult question of what sanction should be applied in the case where a person, by his conduct, had deceived a holder into believing that the signature was genuine. According to one view, paragraph (*b*) was too rigid in making such person liable on the instrument for the amount of the instrument whilst exempting him from any liability on the instrument if the holder had knowledge of the forgery. Under this view, a more balanced approach would be to divide the risk consequent upon forgery between the person whose signature was forged and the holder in terms of the negligence of each. According to another view, the rule set forth in paragraph (*b*) was correct in that an action for damages outside the instrument would possibly fall short of the legitimate expectancy of the holder without knowledge to have rights on the instrument for the full amount of the instrument. On the other hand, a holder who had taken the instrument with knowledge of the forgery should not be able to impose any liability on the instrument upon the person whose signature was forged. However, under the same view, the rule set forth in paragraph (*b*) of the article should not be construed so as to prevent a person who took the instrument negligently from bringing an action for damages outside the instrument against the person who by his conduct had given the holder reason to believe that the signature was genuine. Thus, paragraph (*b*) of the article safeguarded the expectation of the holder without knowledge that he would have full rights on the instrument, whilst it also permitted an equitable division of risk based upon the behaviour of the parties.

94. The Working Group was agreed that the solution to be adopted eventually could be based upon a reference to the general law of negligence or estoppel or could find its place within the uniform law. The Secretariat was requested to draft a suitable formulation which would take into account the various views expressed within the Working Group.

Article 31

(1) Any party to a bill and any party to a note [except the maker] may exclude or limit his liability by an express stipulation on the instrument.

(2) Such exclusion or limitation of liability shall be effective only with respect to the party making the stipulation.

95. This article defines the circumstances under which a party may exclude or limit his liability by an express stipulation on the instrument.

96. One issue calling for decision is whether the drawer of a bill may exclude his liability in the event the

bill is not accepted or is not paid. The Geneva Convention (ULB) in article 9 provides that a stipulation by the drawer "by which he releases himself from the guarantee of payment is deemed not to be written (*non écrite*)". A contrary rule is set forth in the Bills of Exchange Act (article 16 (1) and in the United States Uniform Commercial Code (section 3-413 (2)).

97. As is explained more fully in the commentary on this article of the draft (A/CN.9/WG.IV/WP.2), inquiries amongst banking and trade institutions revealed that, although it is not common for bills to be drawn "without recourse", this practice is sometimes followed in international transactions, particularly under letters of credit which may permit bills drawn in this manner. For these reasons, article 31 of the draft uniform law does not prohibit the practice of drawing without recourse.

98. The Working Group approved this approach. Attention was drawn to the ICC Uniform Customs and Practice for Documentary Credits (1962 revision) [1] which in article 3 recognizes the use of without recourse drafts. It was also observed that a "without recourse" draft accompanied by documents controlling delivery of the goods (i.e., a bill of lading) was of commercial significance since the goods stood as security for intermediate parties if the draft should be dishonoured. However, it was noted that the proposed solution would modify considerably the banking practice of certain countries.

99. Somewhat different considerations are presented by the question whether the maker of a note can exclude or limit his liability. The Working Group concluded that there would be a basic inconsistency between the maker's unconditional promise to pay a definite sum of money, required under article 1 (3) (*b*) of the draft, and an attempt by him to exclude or limit the liability. Consequently the square brackets in paragraph (1) around the words "except the maker" should be removed. Various redrafting suggestions were made with regard to the limitation and exclusion by the different parties to an instrument of their liability. One of these suggestions was to the effect that article 31 of the draft should be eliminated and that the question as to whether a party can limit or exclude his liability should be dealt with in the articles governing the liability of each of these parties.

100. The Working Group was also agreed that the question of limitation of liability by an acceptor would not be dealt with in article 31, but would be handled under article 39, which deals with qualified acceptances. It was understood that an attempt by an acceptor to exclude his liability would be inconsistent with acceptance, and that a limitation of liability would be a qualified acceptance.

101. The Working Group agreed that the endorser could exclude or limit his liability. The effect of an endorsement on condition is governed by article 17.

[1] *Register of Texts of Conventions and other Instruments Concerning International Trade Law* (United Nations Publication Sales No. E.71.V.3), vol. I, chapter II, B.

102. The Working Group approved the approach of paragraph (2), whereby an exclusion or limitation of liability by one party would be effective only with respect to that party: the liability of other parties would not be affected. The following example was given: the drawer, D, draws a bill payable to P. The payee, P, endorses the bill to A "without recourse". A endorses the bill to B. The bill is dishonoured by the drawee, E. The holder, B, does not have a right of recourse against P, but does have a right of recourse against A and against D.

Article 29

(1) Where an instrument has been materially altered:

(*a*) Parties who have signed the instrument subsequent to the material alteration shall be liable thereon according to the terms of the altered text; and

(*b*) Parties who have signed the instrument before the material alteration shall be liable thereon according to the terms of the original text, provided that:

(i) A party who has himself made, authorized, or assented to, the material alteration shall be liable according to the terms of the altered text; and

(ii) A party who through his conduct facilitated the material alteration shall be liable to a holder without knowledge of the alteration according to the terms of the altered text.

(2) For the purpose of this law, any alteration is material which modifies the written undertaking on the instrument of any party in any respect.

103. Under article 29, a modification in the written undertaking on the instrument constitutes a material alteration. By virtue of this article, parties having signed after the alteration are liable on the instrument according to the altered text. Parties having signed before the alteration remain liable on the instrument according to the original text. The latter rule is subject to the two exceptions set forth in paragraph (1) (*b*) (i) and (ii).

104. It was noted that in international payment transactions cases of material alteration of instruments, made without the agreement of the parties involved, occurred only rarely in practice. Quite frequently, bills of exchange are accompanied by documents, such as bills of lading, insurance policies or invoices, which make an alteration of the terms of the bill immediately obvious. On the other hand, it happens quite often that the holder and the acceptor of an instrument agree to defer payment by a prorogation of the maturity date.

105. It was futher noted that for the purposes of article 29, the time at which the text of an instrument had been altered was of vital importance, but that it was not always easy to prove such point of time. In this connexion, the suggestion was made that, in re-drafting article 29, consideration should be given to the possibility of establishing a presumption under which, until the contrary is proved, every signatory of an altered instrument is presumed to have signed it before the material alteration.

106. The Working Group requested the Secretariat to point out, in the commentary on article 29, that the article does not apply to cases of forgery.

107. The Working Group considered this question: when it is asserted that a party has consented to an alteration and that he is liable in accordance with the altered text, may such consent be proved by evidence outside the instrument? Or, on the contrary, must the consent appear from the face of the instrument? The Working Group requested the Secretariat to consider this question when redrafting article 29. In this connexion, the suggestion was made that paragraph 1 (*b*) (ii) should be deleted.

108. The Working Group was agreed that paragraph (1) (*b*) (ii) of article 29 and article 28 (*b*) raised identical questions of policy and that therefore the modifications decided upon in respect of article 28 (*b*) should also apply in the case of paragraph (1) (*b*) (ii) of article 29.

Article 30

(1) An instrument may be signed by an agent.

(2) The signature on an instrument by an agent, with authority to sign, and showing on the instrument that he is signing in a representative capacity, imposes liability thereon on the person represented and not on the agent.

(3) The signature on an instrument by an agent without authority to sign, or by an agent with authority to sign but not showing on the instrument that he is signing in a representative capacity, imposes liability on the instrument on such agent and not on the person whom the agent purports to represent.

(4) An agent who is liable pursuant to paragraph (3) and who pays the instrument shall have the same rights as the person for whom he purported to act would have had if that person had paid the instrument.

109. Article 30 deals with the liability on an instrument of an agent or of the person whom the agent represents, or purports to represent, when the instrument has been signed by an agent.

110. The Working Group was in agreement with the results achieved by article 30. However, the Group concluded that paragraph (2) of the article should make clear that the person represented, rather than the agent, is liable only when the signature shows (1) that the agent is signing in a representative capacity, and (2) designates the person on behalf of whom he is signing. For example, a signature that merely states "A, as agent" would be insufficient to make the unnamed principal (rather than the agent) liable on the instrument, and the agent would be liable.

111. The Working Group considered the question of the liability of a person who signs an instrument without indicating that he signs in a representative capacity when his signature (without any designation that he is an agent) is written under or in the immediate vicinity of the name of a corporation. The following example was given: on the instrument, at the place where the signature of the drawer usually is put, the words "XYZ Corporation" appear in print or in perforation; under the name of the corporation the signature "John Jones" appears. The question arises whether John Jones has signed as an agent on behalf of XYZ Corporation or as a co-drawer. The Working Group concluded that in such a case there should be no statutory rule that the agent must add the words "director", "cashier", etc., in order to show that he had been signing in a representative capacity. Article 30 should make clear that whether the agent signs in a representative capacity was a question to be decided on the basis of the facts of the particular case as they appear from the face of the instrument; evidence outside the instrument would not be relevant.

112. The Working Group considered whether the provision set forth in paragraph (4) of article 30 should be retained and, if so, whether the provision should distinguish between an agent without authority who signed with knowledge of the fact that he was signing without authority and an agent who had no such knowledge. The following example was given: the agent of the payee endorses a bill of exchange without authority and knows that he signs without authority; the bill is dishonoured and the endorsee has recourse against the agent under paragraph (3) of the article; the agent pays the amount of the bill. This question arises: can the agent exercise a right of recourse against the drawer? The Working Group concluded that he should be able to do so and that, consequently

(*a*) Paragraph (4) of article 30 should be retained, and

(*b*) No distinction should be made between an agent signing innocently and an agent signing with knowledge of the fact that he signs without authority.

Article 32

A person signing an instrument shall be liable thereon as an endorser unless the instrument clearly indicates that he signed in some other capacity.

113. This article is concerned with the problems presented by signatures which from the face (front and back) of the instrument cannot be identified as the signature of a drawer, acceptor, or "guarantor" (*avaliste*) under article 43, or as a signature necessary to establish a chain of endorsements. An example of the latter is presented by the following series of endorsements following the issuance of a bill to P: (1) Pay to A, (Signed) *P*; (2) (Signed) *X*; (3) Pay to B, (Signed) *A*; (4) (Signed) *B*; (5) (Signed) *Y*; (6) Pay to D, (Signed) *C*. In this series of endorsements it will be noted that the signature of *X* is not necessary to establish the chain of endorsements leading to B, and the signature of *Y* is not necessary to establish the chain of endorsements leading to D. Such signatures, sometimes referred to as "anomalous endorsements", present various problems: to whom is the signer liable? What position in the sequence of liability on the instrument results from such a signature? What are the rights of such a signatory when he pays the holder?

114. It was agreed that such signatures present problems that are closely related to the problems posed by signatures that are accompanied by words such as

"guaranteed", "*aval*", "good as *aval*" or words of similar import. Signatures accompanied by such identifying words are dealt with in articles 43 to 45. The Working Group decided that the signatures embraced within article 32 should be dealt with in connexion with particles 43 to 45 and that the text of article 32 should be deleted. In this connexion, the Working Group decided further that the scope of articles 43 to 45 should be broadened by deleting from article 43 (2) the provision that a "guarantee" is effected only by a signature which is accompanied by the words "guaranteed", "*aval*", "good as *aval*" or by words of similar import. It was further agreed that, in the above example, the position of *Y* in the sequence of liability would be given further consideration under articles 43 to 45.

115. It was noted that dealing with the "anomalous" signatures, now governed by article 32, in connexion with articles 43 to 45 would make applicable the rule of article 45 that a guarantor, when he pays the instrument, shall have rights on the instrument not only against the party guaranteed but also "against those who are liable" on the instrument to the guaranteed party. It was agreed that this was the proper approach. The holder who has been paid by the guarantor should not be entitled to receive payment a second time. The only satisfactory solution is to transfer rights on the instrument to the person who pays the holder. (See also article 70 (2) (a person paying an instrument is entitled to receive the instrument).)

Article 33

(1) All drawers, acceptors, endorsers and guarantors of a bill are jointly and severally liable thereon.

(2) All makers, endorsers and guarantors of a note are jointly and severally liable theroen.

116. The above article was intended to make clear (1) that each of the stated parties to an international instrument is individually liable on the instrument and (2) that bringing an action against one of the parties does not prevent the bringing of an action against other parties.

117. It was pointed out that the expression "jointly and severally liable", although employed in article 47 (para. 1) of the Geneva Uniform Law (ULB), has connotations in some legal systems that are inconsistent with the rules prescribed elsewhere in the draft uniform law. For example, joint and several liability may imply that the party who pays has a right of contribution from all other parties; this right may be inconsistent with the rules of the uniform law establishing rights against prior parties to the instrument. In addition, it was suggested that this language of article 33 may be inconsistent with other provisions of the draft that liability is conditional upon presentment, dishonour, and protest as specified in part five of the draft. Consequently, it was agreed that the expression "jointly and severally liable" should not be employed in the revision of this article.

118. Attention was directed to the second and fourth paragraphs of article 47 of the Geneva Uniform Law (ULB). It was suggested that these paragraphs clearly express the results that were intended by the above draft article 33. It was agreed that in redrafting article 33 consideration should be given to these provisions of the Geneva Uniform Law.

Article 34

The drawer engages that upon dishonour of the bill by non-acceptance or non-payment and upon any necessary protest he will pay the amount of the bill, and any interest and expenses which may be claimed under article 67 (*b*) or 68, to the holder or to any party subsequent to himself who is in possession of the bill and who is discharged from liability thereon in accordance with articles 69 (2), 70, 71 or 76.

119. Article 34 lays down what is the liability of the drawer of the international bill of exchange. Under the article, the drawer is liable to the holder, upon dishonour of the bill and upon any necessary protest, for the amount of the bill and any interest and expenses.

120. The Working Group expressed provisional agreement with article 34. However, it was decided that the part of article dealing with the drawer's liability to parties subsequent to himself who are in possession of the bill and who are discharged of liability thereon, should be examined after consideration of the articles of the draft concerning discharge (part six).

Article 34 bis

The maker engages that he will pay to the holder

(*a*) At maturity, the amount of the note;

(*b*) After maturity, the amount of the note and any interest and expenses which may be claimed under article 67 (*b*) or 68.

121. Article 34 *bis* states the basic rules on the liability of the maker of an international promissory note. The maker's liability, like that of the acceptor, is a primary liability, i.e., his liability is not subject to presentment for payment or to any protest of dishonour for non-payment by a party subsequent to the maker.

122. The Working Group approved this article.

Article 35

(1) The drawee is not liable on a bill until he accepts it.

(2) The drawing of a bill or its endorsement does not of itself operate as a transfer or assignment to the holder of funds in the hands of the drawee.

123. Article 35 lays down the general rule that the drawee is not liable on the instrument until he accepts it. Paragraph (2) is intended to make clear that the drawing of a bill of exchange or its endorsement does not of itself operate as a transfer or an assignment to the holder of any funds in the hands of the drawee.

124. The Working Group was in agreement with the substance of article 35. With regard to paragraph (2), the Group decided that:

(*a*) Consideration should be given to whether the reference to "funds in the hands of the drawee" should be supplemented by language making clear that the drawing or endorsement of a bill does not of itself operate as a transfer or assignments of rights outside the instrument.

(*b*) The French text of paragraph (2) should be modified as follows:

(i) The word "*fonds*" should be replaced by another term indicating clearly that the drawing or endorsement of a bill shall not of itself transfer the rights to payment arising from the underlying transaction to the holder (*créance*).

(ii) The words "*ne vaut pas*" should be replaced by the words "*n'emporte pas de plein droit*".

(*c*) The provision should not be interpreted as preventing a drawer or an endorser from transferring or assigning the "funds" by a clause on the bill or by an agreement outside the bill. The effect of such a clause or agreement would be governed by the applicable national law. However, one observer suggested that it would still be necessary to consider whether the effect of an agreement outside the bill would be governed solely by the applicable national law.

Article 36

The acceptor engages that he will pay to the holder:

(*a*) At maturity, the amount of the bill;

(*b*) After maturity, the amount of the bill and any interest and expenses which may be claimed under article 67 (*b*) or 68.

125. Article 36 specifies that the liability of the acceptor is a primary liability, i.e. it is not subject to presentment for payment or to the making of a protest in the event of dishonour of the bill by him.

126. It was noted that article 36 should make clear that the acceptor is also liable to the drawer who paid the bill. Subject to this clarification, the Working Group expressed agreement with article 36.

Article 37

An acceptance must be written on the bill and may be effected either by the drawee's signature alone or by his signature accompanied by the word "accepted" or by words of similar import.

127. An acceptance must be in writing and may be effected by the signature of the drawee on the bill.

128. The Working Group expressed agreement with the provision set forth in article 37, subject to the amendment that an acceptance may be effected by the drawee's signature alone only if placed on the front of the instrument (*au recto*). In the view of the Group this amendment would clarify the rules governing the following case: the signature of the drawee is placed on the back of the instrument without any indication that it is an acceptance, the signature is not part of the regular chain of endorsements. In the view of the Group, as a result of its amendment, such a signature would be that of a guarantor ("*avaliste*").

Article 38

(1) A bill may be accepted

(*a*) Before it has been signed by the drawer, or while otherwise incomplete;

(*b*) Before, at or after maturity, or after it has been dishonoured by non-acceptance or non-payment.

(2) Where a bill drawn payable at a fixed period after sight is accepted and the acceptor has not indicated the date of his acceptance, the drawer, before the issue of the bill, or the holder may insert the date of acceptance.

(3) Where a bill drawn payable at a fixed period after sight is dishonoured by non-acceptance and the drawee subsequently accepts it, the holder shall be entitled to have the acceptance dated as of the date of presentment to the drawee for acceptance.

129. Under article 38, a signature will be effective as an acceptance although it has been made before the document became a bill. Under paragraph (2), the holder of a bill drawn payable at a fixed period after sight may insert the date of acceptance if the acceptor has omitted to do so. Under paragraph (3), on acceptance of such a bill after dishonour by non-acceptance the holder is entitled to have the acceptance dated as of the date of the first presentment.

130. The Working Group expressed agreement with the provision of article 38, subject to the following amendments:

(*a*) In paragraph (2) it should be specified that it is the duty of the acceptor to date his acceptance. On refusal by the acceptor, the drawer, before the issue of the bill, or the holder would have the right to insert the date of acceptance.

(*b*) Paragraph (3) should specify that the acceptance should be dated as of the date when the holder presented the bill first for acceptance.

Articles 39 and 40

Article 39

(1) An acceptance may be either general or qualified.

(2) By a general acceptance the drawee engages to pay the bill according to its terms.

(3) By a qualified acceptance the drawee engages to pay the bill according to terms expressly stated in his acceptance. An acceptance is qualified if, *inter alia*, it is

(*a*) Conditional, in that the acceptance states that payment by the acceptor will be dependent upon the fulfilment of a condition therein stated;

(*b*) Partial, in that the acceptance relates to only part of the amount of the bill;

(*c*) Qualified as to place, in that the acceptance indicates a place of payment other than the place of payment indicated on the bill or, in the absence of such indication, other than the address indicated on the bill as that of the drawee;

(*d*) Qualified as to time;

(*e*) An acceptance by one or more of the drawees but not by all.

Article 40

(1) The holder may refuse a qualified acceptance other than a partial [or local] acceptance. Upon such refusal the bill is dishonoured by non-acceptance.

(2) Where a holder takes a qualified acceptance other than an acceptance which is partial [or is qualified as to place], the drawer and any endorser and guarantor who do not affirmatively assent shall be discharged of liability on the bill.

(3) Where the drawee gives a partial acceptance, the bill is dishonoured by non-acceptance as to the part of the amount not accepted.

131. These articles provide that when the drawee refuses to give a general acceptance (i.e. an acceptance to pay the bill according to its terms), and the holder does not take the qualified acceptance offered by the drawee, the bill is dishonoured by non-acceptance. This rule is subject to the exception that, if the drawee offers to accept the bill for only part of its amount (partial acceptance), the holder must take the partial acceptance and the bill is dishonoured for the amount not accepted.

132. The Working Group, after discussion, concluded that articles 39 and 40 should be revised along the following lines:

(*a*) These articles should provide that an acceptance must be unconditional and that a conditional acceptance binds the acceptor on the bill according to the terms of his acceptance. However, a conditional acceptance must be considered as a dishonour of the bill by non-acceptance.

(*b*) A holder should not be obliged to take a partial acceptance. If he does not take the partial acceptance, the bill is dishonoured by non-acceptance.

(*c*) (i) In the case of a bill indicating the place of payment but not domiciled with an agent of the drawee in that place, an acceptance indicating such an agent in that place is not a qualified acceptance

(ii) In the case of a bill indicating the place of payment and domicilied with an agent of the drawee in that place, an acceptance indicating another agent within the same place is a qualified acceptance

(iii) In the case of a bill on which the place of payment is specified, an acceptance indicating a place other than the place so specified is a qualified acceptance

(iv) The results under (i) and (ii) should also obtain when by virtue of article 53 (*f*) (ii) or (iii) the place of payment is the address of the drawee or his principal place of business.

133. The Working Group was agreed that in all cases of qualified acceptance, the holder has the option either to take the qualified acceptance or to consider the bill as dishonoured by non-acceptance.

134. In formulating a revised draft based on the above objectives, the Secretariat was requested to give further consideration to the interpretation of the "place" of payment. It was suggested that in this connexion reference should be made to commercial practice with respect to such payment.

135. One representative suggested that article 39 be deleted in view of the fact that it was of little practical relevance.

Consideration of the desirability of preparing uniform rules applicable to international cheques

136. In response to the view expressed by some representatives during the fifth session of the Commission that uniform rules should be drawn up also for other negotiable instruments used to settle international transactions, the Commission further requested the Working Group "to consider the desirability of preparing uniform rules applicable to international cheques and the question whether this can best be achieved by extending the application of the draft uniform law to international cheques or by drawing up a separate uniform law on international cheques, and to report its conclusions on these questions to the Commission at a future session".

137. The Working Group decided to defer consideration of this question until a future session in order to permit inquiries to be made regarding the use of cheques in international payment transactions and the problems presented, under current commercial practice, by divergencies between the rules of the principal legal systems.

138. The Working Group requested the Secretariat to conduct such inquiries as might be appropriate to elicit the above information, and to present the results thereof and such recommendations as it may wish to make to the Working Group at a future session.

Future work

139. The Working Group gave consideration to the timing of its second session. The Group was of the unanimous opinion that in view of the progress achieved at the present session, its second session should be held as soon as possible. Some representatives expressed the view that the second session should be held in the course of 1973. Others were of the opinion that consideration of the time and place for the second session should be left for decision by the Commission at its forthcoming sixth session, which will convene on 2 April 1973.