II. INTERNATIONAL PAYMENTS

A. Report of the Working Group on International Negotiable Instruments on the work of its seventh session (New York, 3-12 January 1979) (A/CN.9/157)*

CONTENTS

INTRODUCTION

1. In response to decisions by the United Nations Commission on International Trade Law (UNCITRAL), the Secretary-General prepared a Draft Uniform Law on International Bills of Exchange and International Promissory Notes, with commentary (A/CN.9/WG.IV/WP.2).[1] At its fifth session (1972), the Commission established a Working Group on International Negotiable Instruments.[2] The Commission requested that the above draft uniform law be submitted to the Working Group and entrusted the Working Group with the preparation of a final draft.[3]

2. The Working Group held its first session in Geneva in January 1973. At that session the Working Group considered articles of the draft uniform law relating to transfer and negotiation (arts. 12 to 22), the rights and liabilities of signatories (arts. 27 to 40), and the definition and rights of a "holder" and a "protected holder" (arts. 5, 6 and 23 to 26).[4]

3. The second session of the Working Group was held in New York in January 1974. At that session the Working Group continued consideration of articles of the draft uniform law relating to the rights and liabilities of signatories (arts. 41 to 45) and considered articles in respect of presentment, dishonour and recourse, including the legal effects of protest and notice of dishonour (arts. 46 to 62).[5]

4. The third session was held in Geneva in January 1975. At that session the Working Group continued its consideration of the articles concerning notice of dishonour (arts. 63 to 66). The Group also considered provisions regarding the sum due to a holder and to a party secondarily liable who takes up and pays the instrument (arts. 67 and 68) and provisions regarding the circumstances in which a party is discharged of his liability (arts. 69 to 78).[6]

5. The fourth session of the Working Group was held in New York in February 1976. At that session the Working Group considered articles 79 to 86 and articles 1 to 11 of the draft uniform law, thereby completing its first reading of the draft text of that law.[7]

6. At the fifth session of the Working Group, held in New York in July 1977, the Working Group commenced its second reading of the draft uniform law (retitled at that session "draft convention on international bills of exchange and international promissory notes") and considered articles 1 to 24.[8]

7. The sixth session of the Working Group was held at the United Nations Office at Geneva from 3 to 13

* 29 January 1979.

[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 (Yearbook ... 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.

[2] UNCITRAL, report on the fifth session (A/8717), para. 61 (1) (*a*) (Yearbook ... 1972, part one, II, A).

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

[4] Report of the Working Group on International Negotiable Instruments on the work of its first session (Geneva, 8-19 January 1973), A/CN.9/77 (Yearbook ... 1973, part two, II, 1).

[5] Report of the Working Group on the work of its second session (New York, 7-18 January 1974), A/CN.9/86 (Yearbook ... 1974, part two, II, 1).

[6] Report of the Working Group on the work of its third session (Geneva, 6-17 January 1975), A/CN.9/99 (Yearbook ... 1975, part two, II, 1).

[7] Report of the Working Group on the work of its fourth session (New York, 2-12 February 1976), A/CN.9/117 (Yearbook ... 1976, part two, II, 1).

[8] Report of the Working Group on the work of its fifth session (New York, 18-29 July 1977), A/CN.9/141 (Yearbook ... 1978, part two, II, A).

January 1978. At that session, the Working Group, continuing its second reading of the text of the Draft Convention on International Bills of Exchange and International Promissory Notes, considered articles 5 and 6 and articles 24 to 53.[9]

8. The Working Group held its seventh session at the United Nations Headquarters in New York from 3 to 12 January 1979. The Working Group consists of the following eight members of the Commission: Egypt, France, India, Mexico, Nigeria, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America. With the exception of Egypt, all the members of the Working Group were represented at the seventh session. The session was also attended by observers of the following States: Afghanistan, Argentina, Australia, Austria, Brazil, Canada, Chile, Cuba, Czechoslovakia, Djibouti, German Democratic Republic, Ghana, Japan, Morocco, Sierra Leone, Swaziland, Thailand and United Republic of Tanzania, and by observers from the International Monetary Fund, the European Banking Federation and the Hague Conference on Private International Law.

9. The Working Group elected the following officers:

Chairman .....Mr. René Roblot (France)

Rapporteur .....Mr. Roberto Luis Mantilla-Molina (Mexico)

10. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.11): draft uniform law on international bills of exchange and international promissory notes, with commentary (A/CN.9/WG.IV/WP.2): draft uniform law on international bills of exchange and international promissory notes (first revision) (A/CN.9/WG.IV/WP.6 and Add.1 and 2): draft convention on international bills of exchange and international promissory notes (first revision) articles 5, 6, 24 to 45, as reviewed by a drafting party (A/CN.9/WG.IV/WP.9): draft convention on international bills of exchange and international promissory notes (first revision) articles 46 to 68, as reviewed by a drafting party (A/CN.9/WG.IV/WP.10): draft convention on international bills of exchange and international promissory notes (first revision) articles 24 and 68 to 86, as reviewed by a drafting party (A/CN.9/WG.IV/WP.12) and the respective reports of the Working Group on the work of its first (A/CN.9/77), second (A/CN.9/86), third (A/CN.9/99), fourth (A/CN.9/117) fifth (A/CN.9/141) and sixth (A/CN.9/147) sessions.

Deliberations and decisions

11. At the present session the Working Group continued its second reading of the text of the draft Convention on International Bills of Exchange and International Promissory Notes as revised by the Secretariat on the basis of the deliberations and decisions of the Working Group as recorded in its report on the work of its six previous sessions.

12. The text of each article as revised appears at the beginning of the report on the deliberations relative to that article.

13. In the course of this session, the Working Group considered articles 24, 53 and 54 to 70. The text of the articles as approved by the Working Group is set forth in the annex to this report.

14. At the close of its session, the Working Group expressed its appreciation to the observers of Member States of the United Nations and to representatives of International Organizations who had attended the session. The 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 for the assistance they had given to the Working Group and the Secretariat. The Working Group expressed the hope that the members of the Study Group would continue to make their experience and services available during the remaining phases of the current project.

A. *Articles 54 to 56 (presentment for payment)*

Article 54

15. The text of article 54, as considered by the Working Group, is as follows:

"(1) Delay in making presentment for payment is excused when the delay is caused by circumstances which are beyond the control of the holder and which he could neither avoid nor overcome. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

"(2) Presentment for payment is dispensed with:

"(*a*) If the drawer, the maker, an endorser or a guarantor has waived presentment [expressly or by implication] such waiver shall bind only the party who made it;

"(*b*) If an instrument is not payable on demand, and the cause of delay in making presentment continues to operate beyond 30 days of maturity;

"(*c*) If an instrument is payable on demand, and the cause of delay continues to operate beyond 30 days after the expiration of the time-limit for presentment of payment;

"(*d*) If the drawee, the maker or the acceptor has no longer the power freely to deal with his assets, or is a fictitious person or a person not having capacity to make payment, or if the drawee, the maker or the acceptor is a corporation, partnership, association or other legal entity which, under the applicable law, is in liquidation or has ceased to exist;

"(*e*) As regards a bill, if the bill has been protected for dishonour by non-acceptance;

"(*f*) (deleted previously)

"(*g*) If there is no place at which the instrument must be presented in accordance with article 53 (*g*)."

[9] Report of the Working Group on the work of its sixth session (Geneva, 3-13 January 1978), A/CN.9/147 (Yearbook ... 1978, part two, II, B).

Paragraph (1)

16. A number of issues were discussed in relation to this paragraph. Firstly, it was queried whether it was desirable to retain a provision on delay in making presentment in view of the decision of the Working Group at its last session to delete a similar provision with respect to presentment for acceptance.[10] Deletion of the provision would not only maintain the appearance of consistency of the text, but would simplify it. However, the Group was of the opinion that it was justified to distinguish, in this respect, between presentment for acceptance and presentment for payment. Because of the system of fixed time-limits for presentment for acceptance, adopted in the draft Convention, such presentment should be dispensed with if, with the exercise of reasonable diligence, it could not be effected (in those cases where presentment was necessary) within those time-limits. Article 49 (2) (*b*) sets forth a provision to that effect. No such time-limits existed in respect of presentment for payment. Under the draft Convention, an instrument, except a demand instrument, must be presented for payment on the date of maturity or on the first business day which follows. A provision excusing delay because it was caused by circumstances beyond the control of the holder was thus justified. The Working Group therefore decided to retain paragraph (1) of article 54.

17. Another question raised concerned the drafting of this paragraph. It was observed that the wording would seem to cover not only objective external factors preventing presentment (e.g. strike at the bank where presentment was to be effected) but also subjective factors personal only to the holder, such as his illness. It would not be desirable to admit of such subjective factors in the operation of this provision. On one view it was even to be doubted whether the fact that the holder had been kidnapped should be considered an excuse under this provision. It was noted in this context that recognition was expressly denied such subjective factors under the comparable provision (art. 54) of the Uniform Law on Bills of Exchange and Promissory Notes annexed to the Geneva Convention of 1930, although that provision has not itself been free of problems of interpretation.

18. On the other hand, it was pointed out that the Working Group, on first reading of the text, had specifically instructed the Secretariat to conform the wording of this provision to that employed in the Prescription Convention (Convention on the Limitation Period in the International Sale of Goods), which the Secretariat had done. It was not desirable to reopen the matter at this stage. Furthermore, the comparable provisions of both the English Bills of Exchange Act (art. 46 (1)), and the American Uniform Commercial Code (sect. 3-511 (1)) were cast in similar language and one should be careful about departing too far from texts which had worked well so far and from which the present provision had been derived.

[10] A/CN.9/147, para. 126.

19. The Working Group, after deliberation, decided to retain this paragraph in its present form.

Paragraph (2), subparagraph (a)

20. The Working Group decided to delete "the maker" from this provision, on the ground that since, as with the acceptor, presentment to the maker was not necessary in order to render him liable, it was inappropriate to speak of a waiver of such presentment by the maker.

21. The Working Group considered in detail the kinds of waiver to be recognized—whether express or implied and whether on or off the instruments and the effect of such waivers—who should benefit from them and who was bound by them.

22. During discussion of the question of whether a waiver could be made by implication or must be express the consensus emerged that, at least as far as waivers off the instrument were concerned, there was juridically speaking no difference between an implied and an express waiver, putting aside questions of proof which were a matter for national law to decide. Consequently the Working Group focused its attention on the question of whether a Waiver must appear on the instrument or could be off it.

23. There was considerable support for the requirement that waivers be expressed on the instrument. This would not only simplify matters, avoiding uncertainty and difficult evidentiary questions, but would be fully consonant with the nature of a negotiable instrument as a more-or-less self-contained embodiment of rights and obligations. It was argued that while such an approach would be sound policy for any negotiable instruments legislation, it was critical for a régime for international instruments where the parties in interest might all be in different countries.

24. Under another view, however, the draft Convention should recognize expressly that a waiver outside the instrument had legal effect. It was noted that negotiable instruments were often used between merchants who have an ongoing business relationship and who often are in communication with one another. It was not uncommon in such situations for a waiver to be asked for and given, for example, by telex or even by letter. It would be unrealistic and impractical not to recognize the effect of such a waiver—at least as between immediate parties. It was further observed that in certain jurisdictions, a judge might well find it awkward to ignore an express waiver given in a letter by the defendant to the holder, bearing in mind in particular the fact that to do so might render the waiver unenforceable since, as an independent promise, it might lack the requisite consideration for its enforceability. Such a situation could hardly be conducive to justice between the parties.

25. The observation was made that the issue involved might on closer analysis be found to be not so much whether a waiver must be on the instrument or could be off it, but rather the effect to be given to a waiver, whether on or off the instrument, as regards the parties bound and the parties benefited. This was so

because it might be supposed that under virtually all legal systems, an express waiver outside the instrument, say, by letter between two merchants, would in the end be given effect either as a separate promise under an independent cause of action or, as in some systems, by the invocation of a doctrine such as estoppel, by which a party to be charged would be precluded from setting up the defence of non-presentment against the holder in whose favour he had given the waiver. It was only when one moved from these immediate parties to subsequent holders and to persons becoming parties to the instrument after the waiver was given that one encountered difficulties.

26. The Working Group considered the effect of waivers in terms of those it should benefit and those it should bind. There was general agreement that a waiver should in principle bind only the person who has given it. However, it was reasoned that since the drawee is the party who creates the instrument and is the one ultimately liable on it, it was fitting that he should be able to lay down the conditions under which subsequent signatories might become parties to the instrument. The Group therefore concluded that a waiver by the drawer, if made on the instrument, was binding on all subsequent parties.

27. As to who could benefit from a waiver, the Working Group adopted the basic approach that any holder of the instrument should be able to benefit from a waiver made on the instrument, whereas a waiver off the instrument should in effect benefit such holder or holders as are contemplated by the terms of the waiver.

28. The following text was then considered by the Working Group:

"(2) Presentment for payment is dispensed with:

"(*a*) If the drawer, an endorser or guarantor has waived presentment expressly or by implication; such waiver:

"(i) If made on the instrument by the drawer, binds any subsequent party and benefits any holder;

"(ii) If made on the instrument by a party other than the drawer, binds only that party but benefits any holder;

"(iii) If made outside the instrument, binds only the party making it and benefits only a holder in whose favour it was made."

29. With regard to the wording of the proposed text a question was raised as to how there could be an implied waiver on the instrument. In response, it was admitted that the concept was somewhat difficult to apprehend; nevertheless one could not say that such a fact-situation never arose. Thus the example was given of a decision of one Supreme Court by which a waiver was implied where a party had written on the instrument "I remain obliged". The Working Group decided that since the notion could be useful in situations which might not necessarily be foreseen at this point, the possibility of an implied waiver on the instrument should be recognized. It was further agreed that the words "a holder in whose favour it was made" in subparagraph (*a*) (iii) was meant to cover not just the particular holder to whom the waiver may have been given, but all those contemplated by the waiver, as where the endorser writes to the holder saying, "I hereby waive presentment by any holder of the bill".

30. The Working Group then adopted the text proposed as it appears in paragraph 28 above.

31. One representative expressed reservations in respect of the rule in paragraph (2) that a waiver could be made by implication.

Paragraph (2), subparagraph (b)

32. The Working Group adopted this subparagraph without change.

Paragraph (2), subparagraph (c)

33. The Working Group adopted this subparagraph without change.

Paragraph (2), subparagraph (d)

34. The Working Group decided to conform the drafting of this provision to the comparable provision of article 49 (2) (*a*) with respect to presentment for acceptance (see A/CN.9/147, paras. 127-133; Yearbook ... 1978, part two, II, B). It was, however, decided not to retain death of the drawee, the maker or the acceptor as a dispensing event in the case of presentment for payment on the ground that the decision whether or not to accept was personal to the drawee; in the case of payment, however, successors might have reason to want to make payment on the instrument because of the particular business transaction involved and there was no reason not to give them such opportunity.

35. The Working Group adopted this subparagraph subject to the following changes designed to conform it with article 49 (2) (*a*): insertion of the words "by reason of his insolvency" between the words "assets" and "or" in the second line and deletion of the words "under the applicable law, is in liquidation or" in the last two lines.

36. One representative was of the opinion that the words "to make payment" should be replaced by the words "to incur liability on the instrument".

Paragraph (2), subparagraph (e)

37. It was observed with respect to this subparagraph that it was inappropriately placed within paragraph (2). Since under article 56 (1) (*c*) there was constructive dishonour by non-payment in the cases enumerated in article 54 (2), this was tantamount to saying as regards subparagraph (*e*) that there was dishonour by non-payment of an instrument which had already been protested for dishonour by non-acceptance: a double dishonour concept. Not only was it unnecessary to have such a concept, but its existence might even raise the argument that the holder under subparagraph (*e*) was also required to make protest for dishonour by non-payment, which would have been unacceptable.

38. In the light of the foregoing observations, the Working Group decided to put the substance of subparagraph (*e*) into a new paragraph (3) of article 54 to read as follows:

"(3) Presentment for payment is also dispensed with as regards a bill, if the bill has been protested for dishonour by non-acceptance."

Paragraph (2), subparagraph (f)

39. The Working Group reconsidered this provision which it had decided, on first reading, to delete (A/CN.9/86, para. 91; Yearbook . . . 1974, part two, II, 1). The deleted text had read as follows:

"(*f*) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to pay the bill and the drawer has no reason to believe that the bill would be paid if presented."

40. The Working Group was of the opinion that this text was of doubtful application in the case of bills and notes and decided not to reintroduce this provision into the draft Convention.

Paragraph (2), subparagraph (g)

41. The Working Group adopted this subparagraph without change.

Article 55

42. The text of article 55, as considered by the Working Group, is as follows:

"(1) If a bill is not duly presented for payment, the drawer, the endorsers and their guarantors are not liable thereon.

"(2) If a note is not duly presented for payment, the endorsers and their guarantors are not liable thereon.

"(3) Presentment of an instrument for payment is not necessary in order to render the acceptor or the maker or his guarantor liable thereon."

Paragraph (1)

43. The Working Group adopted this paragraph without change.

Paragraph (2)

44. The Working Group adopted this paragraph without change.

Paragraph (3)

45. The point was raised that this paragraph as currently worded was superfluous in that it stated the obvious; an acceptor became liable on the instrument as soon as he placed his signature on it and it could therefore not be said that an acceptor was not liable until presentment for payment had been made. In defence of the provision, it was observed that it was designed to correct precisely such a misapprehension which was sometimes encountered even among legal petitioners not familiar with negotiable instruments law.

46. The Working Group decided to retain the substance of this provision but to reword it as appears in paragraph 52 below.

47. The Working Group then took up consideration of a second issue raised in connexion with this paragraph, namely, the legal situation of the guarantor of the drawee: specifically, it was asked whether prior presentment for payment to the drawee was a prerequisite to the liability of his guarantor. The answer, it was agreed, depended on what the status of such a guarantor was in terms of negotiable instruments principles: was he primarily liable (like an acceptor) or was he only secondarily liable (like an endorser)?

48. A strong argument was made in favour of treating the guarantor of the drawee as a secondary party. It was recalled that the legal status of such a guarantor was only admitted by the Working Group at its last session after protracted debate in which strong doubt was expressed as to the juridical soundness of such a concept (see A/CN.9/147, paras. 91-97; Yearbook . . . 1978, part two, II, B). In view of this fact, one should be cautious about making such a guarantor into a party primarily liable in the system created by the draft Convention. It was further argued that to make the guarantor in this case liable before presentment had been made to the drawee would be inconsistent with the guarantor's undertaking in article 44 (2), as approved by the Working Group at its sixth session, that he will "pay the bill when due, if the drawer does not pay or does not accept and pay the bill". Under this view, the intent of article 44 (2) was, therefore, to make the guarantor of the drawee more like an endorser—a secondary rather than primary party.

49. Against this approach, it was argued that great practical difficulties would ensue if the guarantor of the drawee were treated as a secondary party. Not only would it require that formal presentment first be made to the drawee, but dishonour by the drawee would also trigger the formal process of protest, notice and recourse, which would be undesirable. In support of this position it was pointed out that the practice itself of putting the words "payment guaranteed" on the instrument, which the Working Group at its last session deemed to make the signer a guarantor of the drawee, was common in the United States. In this connexion it was noted that the relevant provision of the Uniform Commercial Code (S-3-416) expressly states that "presentment, notice of dishonour and protest are not necessary to charge" the guarantor.

50. As to the article 44 (2) argument, it was observed that it was necessary to draw a distinction between formal presentment, which was the matter in issue, and the fact simply of requesting and obtaining payment. Article 44 (2) should not be construed as contemplating the sort of formal presentment envisaged in article 55 (3) but had reference merely to the fact of payment by the drawee. Hence, there was no conflict between the concept of the guarantor of the drawee as a primary party and his undertaking as contained in article 44 (2).

51. The Working Group, adopting the foregoing reasoning, decided to treat the liability of the guarantor of the drawee as being of a primary nature in the context under consideration. Hence, the Group concluded that presentment to the drawee was not necessary in order to render the drawee's guarantor liable under paragraph (3) of article 55, and decided to amend the paragraph accordingly by the insertion of the words "or the guarantor of the drawee".

52. The text of paragraph (3) as adopted by the Working Group was therefore as follows:

"(3) Failure to present an instrument for payment does not discharge the acceptor or the maker or their guarantors or the guarantor of the drawee of liability thereon."

Article 56

53. The text of article 56, as considered by the Working Group, is as follows:

"(1) An instrument is considered to be dishonoured by non-payment:

"(*a*) When, under due presentment, payment is expressly refused or cannot with reasonable diligence be obtained;

"(*b*) When the holder cannot obtain the payment to which the terms of the instrument entitle him under this Convention;

"(*c*) If presentment for payment is dispensed with pursuant to article 54 (2) and the instrument is overdue and unpaid.

"(2) If a bill is dishonoured by non-payment, the holder may, subject to the provisions of article 57, exercise an immediate right of recourse against the drawer, the endorsers and their guarantors.

"(3) If a note is dishonoured by non-payment, the holder may, subject to the provisions of article 57, exercise an immediate right of recourse against the endorsers and their guarantors."

Paragraph (1), subparagraphs (a) *and* (b)

54. Several observations were made with regard to these subparagraphs: the drafting could be simplified by combining both provisions into one; no sound reason appeared for the requirements of due presentment and due diligence in subparagraph (*a*) but not in (*b*); and there was little, if any, substantive difference between the two subparagraphs as they now read since the same fact-situations could fall under either provision. It was also argued that the concept of due diligence was not relevant here: what was important was due presentment. If due presentment had been made and there was no payment, then there was dishonour pure and simple without the complicating inquiry into diligence. In the view of one representative it would be desirable if paragraph 1 (*a*) read as follows:

"When the acceptor or the drawee, upon due presentment, expressly refuses to pay the instrument or payment cannot be obtained with reasonable diligence."

55. Based on the foregoing observations, the Working Group decided to return to the earlier wording of these subparagraphs as presented to the Working Group at its second session (A/CN.9/86, paras. 95-97; Yearbook . . . 1974, part two, II, 1). That text read as follows:

"(1) An instrument is dishonoured by non-payment:

"(*a*) When payment is refused upon due presentment or when the holder cannot obtain the payment to which he is entitled under this Convention;"

Paragraph (1), subparagraph (c)

56. The Working Group adopted this subparagraph without change.

Paragraph (2)

57. A question was raised as to the logical compatibility of the word "immediate" in this provision with the requirement in article 57 that the holder first make protest before he can exercise his right of recourse against parties liable to him.

58. The Working Group decided to delete the word "immediate" from this paragraph on the ground that it could give a misleading impression to one not familiar with the usage of the term "immediate right of recourse" in Anglo-American jurisprudence from which it was borrowed.

59. The question was raised in this context whether, in the event of a dishonour by the drawee's refusal to accept or to pay, the holder must first go against the drawee's guarantor before he can go against the endorsers.

60. The Working Group decided to defer consideration of this issue until its next session.

61. The Working Group adopted this paragraph, subject to deleting the word "immediate" and changing the article preceding it from "an" to "a".

Paragraph (3)

62. The Working Group adopted this paragraph with the same changes as in paragraph (2).

B. *Articles 57 to 68 (recourse)*

Article 57

63. The text of article 57, as considered by the Working Group, is as follows:

"If an instrument has been dishonoured by non-acceptance or by non-payment the holder may exercise a right of recourse only after the instrument has been duly protested for dishonour in accordance with the provisions of articles 58 to 61.

64. The Working Group adopted this article without change.

65. One representative was of the view, however, that it would be desirable to deal in this article with the question of the right of recourse before maturity in the event of stoppage of payment by, or bankruptcy of, the drawee, the acceptor or the maker.

Article 58

66. The text of article 58, as considered by the Working Group, is as follows:

"(1) A protest is a statement of dishonour drawn up at the place where the instrument has been dishonoured and signed and dated by a person authorized to certify dishonour of a negotiable instrument by the law of that place. The statement must specify:

"(*a*) The person at whose request the instrument is protested;

"(*b*) The place of protest; and

"(*c*) The demand made and the answer given, if any, or the fact that the drawee or the acceptor or the maker could not be found.

"(2) A protest may be made:

"(*a*) On the instrument itself or on a slip affixed ('allonge'); or

"(*b*) As a separate document, in which case it must clearly identify the instrument that has been dishonoured.

"(3) Unless the instrument stipulates that protest must be made, a protest may be replaced by a declaration written on the instrument and signed and dated by the drawee or the acceptor or the maker, or, in the case of an instrument domiciled with a named person for payment, by that named person; the declaration must be to the effect that acceptance or payment is refused.

"(4) A declaration made in accordance with paragraph (3) is deemed to be a protest for the purposes of this Convention."

Paragraph (1)

67. The Working Group adopted this paragraph without change.

Paragraph (2)

68. The Working Group adopted this paragraph without change.

Paragraph (3)

69. The question was raised whether the drawee, the acceptor or the maker who had refused to make payment would be willing to oblige by providing the requisite declaration. In response it was pointed out that the drawer in the ordinary case would be a bank and that banks were generally willing to give reasons for their refusal to honour a bill. It was also noted that under the Geneva Uniform Law States were permitted by declaration to provide for an informal method of protest (annex II, art. 8 of the Geneva Convention) and this had worked reasonably well in those countries which had provided such facilities. A second question raised with respect to informal protest was whether, in a case where the facility was available, a holder who nevertheless opted for the formal protest method could recover the cost of such formal protest. The view was expressed that such costs should nevertheless be recoverable. In this connexion one observer reported that in his country the cost of protest actually made was recoverable even when protest was not required.

70. A question was raised as to how the rules relating to protest could be applied in the case of presentment and dishonour by mail. Specifically, where was the place of dishonour at which according to article 58 (1) protest had to be drawn up?

71. It was noted in response that the issue of presentment by mail had been exhaustively discussed both by the Working Group (for example, in connexion with art. 48, A/CN.9/147, para. 124) and by the UNCITRAL Study Group on International Payments. A questionnaire circulated by the Secretariat on the matter revealed little or no usage of this method of presentment in international transactions largely because of the practical difficulties involved. The usual practice was to make presentment through a bank or other local agent in the foreign country, who would then see to the making of protest if this became necessary.

72. The Working Group, after discussion, adopted this paragraph without change.

Paragraph (4)

73. The Working Group adopted this paragraph without change.

Article 59

74. The text of article 59, as considered by the Working Group, is as follows:

"(1) Protest for dishonour by non-acceptance of a bill must be made on the day on which the bill is dishonoured or one of the two business days which follow.

"(2) Protest for dishonour by non-payment of an instrument must be made on the date of maturity or on one of the two business days which follow."

Paragraph (1)

75. A number of questions were raised as to the interpretation of the words "business days", in particular whether these words excluded public holidays or simply meant week-days. It was noted that Saturday was in some countries a business day but not in others and that in some countries (for example, federated States) one day might be a holiday in one part of the country but not in another. The suggestion was made that the draft Convention include an express definition of "business days".

76. It was pointed out in response that it was all but impossible to provide a general definition that would be applicable to the situation in every State under every circumstance. Furthermore, most States had special statutes in the form of Interpretation Acts which regulated such matters. The Working Group concluded that it was best for these reasons to leave this question to local law and practice. The most that could be done here was to have the matter discussed in the Commentary to the draft Convention.

77. To the question whether the "two business days" provision applied also to the informal protest provided

for under article 58 (3), the Working Group answered in the affirmative.

78. One representative was of the view that protest for dishonour by non-acceptance of a bill should be made within the time-limit fixed for presentment for acceptance under article 48, but that if the presentment took place on the last day of that time period, protest should be made on one of the two business days which follow.

79. The Working Group, after discussion, adopted this paragraph.

Paragraph (2)

80. It was noted that the use of the word "maturity" meant that the situation of a note payable on demand was excluded from regulation since the definition of "maturity" in article 5 (9) had reference only to demand bills. Secondly, it was noted that the prescribed period for protest—the date of maturity plus two business days following—might fall within the period of intervening delay excused under article 54 (1). Consequently, a holder might find that, upon making presentment at the expiration of the delay period and being refused payment, he could no longer meet the time period for protest allowed under the Convention. Such a result was clearly not intended.

81. As regards these two problems, the Working Group decided that they would be alleviated by making the time for protest run from the date of actual dishonour rather than of maturity and therefore decided to amend the paragraph to read as follows:

"Protest for dishonour of an instrument by non-payment must be made on the day on which the instrument is dishonoured or on one of the two business days which follow."

82. A third problem discussed in connexion with this paragraph was that noted by the Working Group at its second session, on the first reading of this text (A/CN.9/86, paras. 115-117; Yearbook . . . 1974, part two, II, 1). i.e. that if the time periods allowed for presentment, protest and notice of dishonour were put together, an unacceptably long period could transpire between the date of maturity of the instrument and notice given to the party to be charged.

83. As regards this problem, the Working Group, after considerable discussion, agreed on the following solution for the three time periods involved: a two-day period allowed for each of protest and notice of dishonour would be retained, but the period of grace for making presentment would be cut back from two business days to one. The Working Group decided that article 53 (*e*) should accordingly be amended to read as follows:

"(*e*) An instrument which is not payable on demand must be presented for payment on the date of maturity or on the first business day which follows."

84. In the view of one representative protest for dishonour by non-payment of an instrument should be made within the time-limit fixed for presentment for payment under article 53 (*e*) and (*f*); but if presentment of an instrument payable at sight took place on the last day of the time period specified in article 53 (*f*), then protest should be made on the first business day which follows.

Article 60

85. The text of article 60, as considered by the Working Group, is as follows:

"(1) If a bill which must be protested for non-acceptance or for non-payment is not duly protested, the drawer, the endorsers and their guarantors are not liable thereon.

"(2) If a note which must be protested for non-payment is not duly protested, the endorsers and their guarantors are not liable thereon.

"(3) Protest of an instrument is not necessary in order to render the acceptor or the maker or his guarantor liable thereon."

Paragraphs (1) and (2)

86. The question was raised whether it would not be preferable in these two paragraphs to state that the parties mentioned there are exempt or exonerated from liability upon the failure of the holder to make protest rather than to say that they are "not liable": legally the parties were liable from the time they signed the instrument and became parties.

87. It was pointed out in response that while this may be so on strict negotiable instruments principles, the concept employed throughout the draft Convention was that a party was not liable unless certain conditions were fulfilled.

88. The Working Group decided to retain the two paragraphs in their present form.

Paragraph (3)

89. The Working Group decided to conform the drafting of this paragraph to the new wording of article 55 (3) for the reasons stated in paragraphs 45 to 50 above.

90. Accordingly, the paragraph as adopted reads as follows:

"(3) Failure to protest an instrument does not discharge the acceptor or the maker or their guarantors or the guarantor of the drawee of liability thereon."

Article 61

91. The text of article 61, as considered by the Working Group, is as follows:

"(1) Delay in protesting an instrument for dishonour is excused when the delay is caused by circumstances which are beyond the control of the holder and which he could neither avoid nor overcome. When the cause of delay ceases to operate, protest must be made with reasonable diligence.

"(2) Protest for dishonour by non-acceptance or by non-payment is dispensed with:

"[(*a*) If the drawer, an endorser or a guarantor has waived protest expressly or by implication; an express waiver on the instrument, if made by the drawer, is also operative in respect of all subsequent parties; if

made by any other party, it is operative only in respect of that party;]

"[(*a*) If the drawer, an endorser or a guarantor has waived protest expressly, whether on or outside the instrument; an express waiver on the instrument, if made by the drawer, is operative in respect of all subsequent parties; an express waiver outside the instrument, whether made by the drawer or by any other party, is operative only in respect of the party making it;]

"[(*a*) If the drawer, an endorser or a guarantor has waived protest expressly on the instrument; such waiver, if made by the drawer, is operative in respect of all subsequent parties; if made by any other party, it is operative only in respect of that party;]

"(*b*) If the cause of delay in making protest continues to operate beyond 30 days after the date of maturity;

"(*c*) As regards the drawer of a bill, if the drawer and the drawee or the acceptor are the same person;

"(*d*) (deleted)

"(*e*) If presentment for acceptance or for payment is dispensed with in accordance with article 49 (2) or 54 (2);

"(*f*) If the person claiming payment under article 80 cannot effect protest by reason of his inability to produce the instrument."

92. The Working Group considered a proposal to make each of the articles of this paragraph into a separate article on the ground that they each dealt with a separate issue. The same would apply to article 54. The Working Group did not, however, adopt this proposal for the reason that the present arrangement of the provisions was thought to be more conducive to their understanding, particularly in light of the fact that paragraph (2) (*b*) makes express reference to the content of paragraph (1).

Paragraph (1)

93. The question was raised whether this provision should also apply to informal protest as contemplated under article 58 (3). It was noted in this connexion that the Working Group at first reading had taken the position that the benefit of the provision should be extended only to the holder making a formal protest (A/CN.9/86, para. 127; Yearbook . . . 1974, part two, II, 1): the effect of article 58 (4) was, however, to extend it to both forms of protest.

94. Three possible fact situations were analysed:

(i) Where *force majeure* prevents the making of both the formal and informal protest;

(ii) Where *force majeure* prevents the making of the formal, but not the informal, protest;

(iii) Where *force majeure* prevents the making of the informal, but not the formal protest.

It was only the third situation which raised any question.

95. The Working Group, after discussion, decided to support the present wording of both article 58 (4) and article 61 (1), the combined effect of which was to excuse delay in the circumstances specified regardless of the form of protest involved.

96. Attention was drawn in this connexion to the fact that under the terms of this paragraph only *force majeure* operating on the holder appeared to be recognized; yet under article 58 (3) it was not the holder but the party from whom payment was demanded who had to furnish the informal declaration. Should not such parties be mentioned in article 61 (1)?

97. In response, the view was expressed that the wording of this paragraph was broad enough to cover both situations—the important point was whether the holder was in fact precluded by circumstances beyond his control from making protest. On one view, however, it was not relevant to even speak in this context of *force majeure* affecting anyone but the holder since the alternative of formal protest was always open to the holder.

Paragraph (2), subparagraph (a)

98. The Working Group adopted the same view with respect to the situation regulated by this subparagraph as it had done with regard to article 54 (2) (*a*) for the reasons discussed in paragraphs 21 to 29 above.

99. The Working Group, after consideration, adopted the following text of subparagraph (2) (*a*):

"Protest for dishonour by non-acceptance or by non-payment is dispensed with:

"(*a*) If the drawer, an endorser or guarantor has waived protest expressly or by implication; such waiver:

"(i) If made on the instrument by the drawer, binds any subsequent party and benefits any holder,

"(ii) If made on the instrument by a party other than the drawer, binds only that party but benefits any holder;

"(iii) If made outside the instrument, binds only the party making it and benefits only a holder in whose favour it was made."

Paragraph (2), subparagraph (b)

100. The Working Group adopted this subparagraph, subject to substitution of the word "dishonour" for "maturity" in keeping with its earlier decision regarding the date from which time for protest begins to run (see para. 81 above).

Paragraph (2), subparagraph (c)

101. The Working Group adopted this subparagraph without change.

Paragraph (2), subparagraph (d)

102. The Working Group confirmed that this subparagraph was properly deleted.

Paragraph (2), subparagraph (e)

103. The Working Group adopted this subparagraph without change.

Paragraph (2), subparagraph (f)

104. The question was raised as to the relationship between this provision and article 83, which provides a substitute method of effecting protest in the case of lost instruments. Allusion was also made to the practical difficulties of reconstructing the contents of a lost instrument.

105. The Working Group was agreed that an express link should be made in the text between the two provisions and, accordingly, amended subparagraph (*f*) to read as follows:

"(*f*) If the person claiming payment under article 80 cannot effect protest by reason of his inability to satisfy the requirements of article 83."

Article 62

106. The text of article 62, as considered by the Working Group, is as follows:

"(1) The holder, upon dishonour of a bill by non-acceptance or by non-payment, must give due notice of such dishonour to the drawer, the endorsers and their guarantors.

"(2) The holder, upon dishonour of a note by non-payment, must give due notice of such dishonour to the endorsers and their guarantors.

"(3) An endorser or a guarantor who received notice must give notice of dishonour to the party immediately preceding him and liable on the instrument.

"(4) Notice of dishonour operates for the benefit of any party who has a right of recourse on the instrument against the party notified."

107. The Working Group considered this article as a whole. The main question discussed was the possibility of unnecessary duplication of notices by reason of the requirements in paragraphs (1) and (3) that both the holder and the endorser give notice. The case was put of a bill drawn by A in favour of B. B transfers the bill to C who transfers it to D. Upon presentment by D to the drawee, there is dishonour. D, in accordance with paragraph (1), must give notice to A, B and C. Similarly, an endorser such as C must also give notice to his immediate endorser (if liable on the instrument), in this case B who already had received notice from D. What purpose was served by C's notice in such a case? What would be the legal consequences of C's failure to give notice to B, especially in light of the provisions of paragraph (4) by which notice operates for the benefit of all parties who have a right of recourse against the parties notified?

108. In response, it was pointed out that the entire system was designed to ensure that a party against whom recourse might be sought had a reasonable assurance of receiving prompt notice, even if this could lead to a duplication of notices; it was preferable to receive several notices than not to receive any at all or to receive it too late to protect one's interest. Reliance on only the endorsee to give notice to his endorser, as in the Geneva Uniform Law (art. 45) meant that the interest of a series of endorsers could be jeopardized by the act of omission of one of the parties in the chain.

109. As to the legal consequences of a failure by one person to give notice when notice is in fact received through another person, there was ordinarily no damage suffered by the party to be notified. The one possible exception would be where notice was received too late to enable the endorser to take steps to protect his interest, as when his own endorser had become insolvent in the intervening period between when he would have received notice if it had been given directly by the one person and the time when he actually received notice from the other person. Thus in the example given in paragraph 107, except in the case of prejudicial delay just noted, C would ordinarily incur no liability to B for failing to give the latter notice and similarly D should incur no liability for failure to give B notice under paragraph (1) where C in fact notifies B.

110. In response to a question raised as to the desirability of including a provision similar to article 45 (3) of the Geneva Uniform Law respecting unknown addresses, the Working Group was agreed that the situation was adequately regulated by article 65 (2) of the draft Convention.

111. The Working Group adopted article 62 without change.

Article 63

112. The text of article 63, as considered by the Working Group, is as follows:

"(1) Notice of dishonour may be given in any form whatever and in any terms which identify the instrument and state that it has been dishonoured. The return of the dishonoured instrument is sufficient notice, provided it is accompanied by a statement indicating that it has been dishonoured.

"(2) Notice of dishonour is deemed to have been duly given if it is communicated or sent to the person to be notified by means appropriate in the circumstances, whether or not it is received by that person.

"(3) The burden of proving that notice has been duly given rests upon the person who is required to give such notice."

Paragraph (1)

113. In answer to a question as to why it was necessary for the returned instrument to be accompanied by a statement of dishonour, it was pointed out that an instrument might be returned to a party for any number of reasons not connected with dishonour. Furthermore, the requirement here was not for a formal statement—a simple notation on the instrument would do.

114. The Working Group decided to retain this paragraph as at present drafted.

Paragraph (2)

115. The Working Group adopted this paragraph.

Paragraph (3)

116. The Working Group adopted this paragraph without change.

Article 64

117. The text of article 64, as considered by the Working Group, is as follows:

"Notice of dishonour must be given within the two business days which follow:

"(*a*) The day of protest or, if protest is dispensed with, the day of dishonour; or

"(*b*) The receipt of notice given by another party."

118. The Working Group adopted this article, noting that it had already approved the principle underlying the article in connexion with its consideration of article 59 (see para. 83 above).

Article 65

119. The text of article 65, as considered by the Working Group, is as follows:

"(1) Delay in giving notice of dishonour is excused when the delay is caused by circumstances which are beyond the control of the holder and which he could neither avoid nor overcome. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

"(2) Notice of dishonour is dispensed with:

"(*a*) If the drawer, an endorser or a guarantor has waived notice of dishonour expressly or by implication; such waiver is operative only in respect of the party who made it;

"(*b*) If after the exercise of reasonable diligence notice cannot be given;

"(*c*) As regards the drawer of a bill, if the drawer and the drawee or the acceptor are the same person;

"(*d*) (deleted)"

Paragraph (1)

120. The Working Group adopted this paragraph without change.

Paragraph (2), subparagraph (a)

121. The Working Group decided to adopt the same rule with respect to notice as it had with respect to both presentment for payment (paras. 21-30 above) and protest for dishonour (paras. 98 and 99 above) and, accordingly, adopted the following text of subparagraph (*a*):

"Notice of dishonour is dispensed with:

"(*a*) If the drawer, an endorser or guarantor has waived notice of dishonour expressly or by implication; such waiver:

"(i) If made on the instrument by the drawer, binds any subsequent party and benefits any holder;

"(ii) If made on the instrument by a party other than the drawer, binds only that party but benefits any holder;

"(iii) If made outside the instrument, binds only the party making it and benefits only a holder in whose favour it was made."

Paragraph (2), subparagraph (b)

122. The Working Group discussed the concept of reasonable diligence imposed by this subparagraph, with specific reference to the extent to which the person seeking to give notice must go in ascertaining the address of the party to be notified.

123. One of the views expressed was that the concept of diligence imported a duty to inquire from known sources, such as the endorsee or endorser of the party whose address is unknown. On the other hand, it was observed that in no event should there be a duty to go beyond immediately available and accessible sources to ascertain an address, having regard in particular to the possibly international nature of the inquiry and the time-limit imposed for giving notice under the draft Convention.

124. The Working Group adopted this subparagraph, noting that it was impossible to lay down a hard and fast rule as to what constituted reasonable diligence: this was a matter best determined by the courts on a case-by-case basis.

Paragraph (2), subparagraph (c)

125. The Working Group adopted this subparagraph without change, approving also a suggestion that the commentary to the text deal with the question of countermanded orders.

Article 66

126. The text of article 66, as considered by the Working Group, is as follows:

"Failure to give due notice of dishonour renders a person who is required to give notice under article 62 to a party who is entitled to receive such notice liable for any damages which that party may suffer directly from such failure, provided that such damages do not exceed the amount due under article 67 or 68."

127. The Working Group adopted this article without change.

Article 66 bis

128. The text of article 66 *bis*, as considered by the Working Group, is as follows:

"The holder may exercise his rights on the instrument against any one party, or several or all parties, liable thereon and is not obliged to observe the order in which the parties have become bound."

129. The Working Group adopted this article without change.

Article 67

130. The text of article 67, as considered by the Working Group, is as follows:

"[The holder may recover from any party liable;

"(*a*) At maturity: the amount of the instrument;

"(*b*) After maturity: the amount of the instrument, interest due at (2) per cent per annum above the official money market rate effective in the main domestic centre of the country where the instrument was payable at maturity, to be calculated from the date of the maturity on the basis of the number of days and in accordance with the custom of that market, and any expenses of protest and of the notices given;

"(*c*) Before maturity: the amount of the bill subject to a discount from the date of making payment to the date of maturity, to be calculated on the basis of the number of days at the official money market rates effective on the date when the recourse is exercised at the place where the holder has his habitual residence or seat of business.]"

Paragraph (a)

131. It was observed that there was some ambiguity about the phrase "the amount of the instrument". Did or did it not include interest, as may be stipulated by the instrument? It presumably was intended to include such interest, but this was not immediately apparent from the wording.

132. The Working Group decided to redraft this provision so as to leave no doubt that interest, where provided for by the instrument, was to be recoverable.

Paragraph (b)

133. Discussion of this paragraph by the Working Group revolved around three main issues; what the interest rate should be and how it was to be expressed; the place with reference to which such rate was to be ascertained; and the amount to which such interest rate was to be applied.

134. As to the first issue, there was considerable discussion of the formula employed in the text and specifically of the concept of "official money market rate". Several short-comings were pointed out in the concept: it was difficult to apply to the situation of the non-market economies such as the centrally-planned economies of socialist States where there was no money market as such; similarly, it was difficult to speak of a "money market" with reference to the situation in many developing countries where the financial sector had not yet attained this level of sophistication; and even in a highly-developed capitalist economy such as in the United States, it was by no means clear what the "official money market rate" referred to since there were usually a number of rates which could be so described each applying to a different kind of transaction.

135. It was observed, however, with reference to this formula that it had been drafted in consultation with the Study Group on International Payments most of whose members were from banking circles, although there had also been some divergence of views within that Group as to the suitability of the formula.

136. Numerous suggestions and proposals were made in the course of the discussion aimed either at improving upon the existing formulation or at replacing it with some other. Among these were: to base the calculation on a rate determined by the Central Bank of the State in whose currency the instrument is to be paid; to base it on a rate determined by a neutral body such as the International Monetary Fund; to base it on the prime interest rate at the relevant place; to have a fixed rate as is done under the Geneva Uniform Law (art. 48 (2)), either as the only rate or as an alternative to whatever other rate may be specified; to employ a very general formulation such as "the prevailing commercial lending rate" at the place in question, leaving the actual rate to be determined on the facts of each case; and making provision in the Final Clauses of the Convention for each State to declare what the appropriate rate would be if the rate were to be determined with reference to a place located in that State.

137. Considerable discussion ensued with respect to the merits of each of the foregoing proposals and suggestions, with no one idea being completely acceptable to all representatives. A number of broad principles, however, appeared to underlie the views expressed by most representatives. Thus, there was agreement that whatever formulation was adopted care had to be exercised to ensure that it could be applied in practice to the situation in every State, having regard to the divergent economic systems involved and the varying levels of commercial sophistication. There was also a widely-shared view that the formula should provide a reasonable degree of certainty so that parties would have a fair idea of their exposure and entitlements, while it should at the same time contain a measure of flexibility to cope with future developments in the commercial world.

138. A further view generally shared by representatives was that nothing in the provision should preclude parties from expressly stipulating for a rate of interest to be paid after maturity. Such a stipulated rate of interest should then apply instead of the rate provided for in paragraph (*b*).

139. The Working Group requested the Secretariat to redraft and present to the Group this paragraph in the light of the comments and views expressed in the discussion. The text as redrafted by the Secretariat appears in paragraph 149 below.

140. With respect to the place with reference to which the rate should be determined, a number of proposals were considered by the Working Group: the place of business or habitual residence of the payee; the place of business or habitual residence of the drawee; the country in whose currency the instrument was expressed; the place at which payment can be enforced; and the place where the instrument was payable, as provided for in the text.

141. The Working Group, after discussion, decided to retain the reference to the place where the instrument was payable on the ground that it was there that the holder expected to receive payment and it was, therefore, not unreasonable to assume that he would borrow funds there to substitute for that which he should have received.

142. As regards calculation of the interest payable in the after-maturity situation, the issue was whether the amount on which the interest provided for in paragraph

(*b*) should be based was the sum of the principal and interest stipulated in the instrument or simply the principal alone. The view was put forward that since analytically the debt owed after maturity was the principal plus interest, it was on this amount that the interest provided for in paragraph (*b*) should be based, the intent of the paragraph being to compensate the holder for the period during which he was out of the amount due him, namely, principal and interest.

143. The Working Group, adopting the foregoing reasoning, decided that the redrafted version of this paragraph should make clear that the interest provided for in the paragraph was to be a function of the total amount due on the instrument, including interest, if any. Reservations were, however, expressed by some representatives as to the desirability of such a compound interest approach.

Paragraph (c)

144. A question was raised as to the justification for the discount provided for under this paragraph. A suggestion was made in this connexion that in the case where a bill stipulated the payment of interest the amount due upon payment before maturity should simply be the principal plus interest accrued up to the date of payment, thus avoiding the concept of discount.

145. In response, it was pointed out that the party who was receiving funds before maturity was in effect getting unanticipated use of the money for the period between the date of payment and the date of maturity and it was not unreasonable to discount the amount he receives by a factor representing the value of such accelerated availability. It was exactly as if the holder had discounted the bill at a bank in anticipation of the maturity date. As to the suggested method of calculation based on the accumulated interest idea, this would not always work, for example, where the interest payable was not expressed in the form of a rate but as a lump sum or was included in the amount of the principal.

146. The Working Group discussed the reference to the "habitual residence or seat of business" of the holder. One representative expressed concern that the wording might be understood to provide an option in the case of an individual who might have both a place of business and a habitual residence, each in a different place. In response, it was pointed out that it had become customary in international conventions to employ this expression, the understanding being that "habitual residence" refers to an individual while the reference to "seat of business" pertains to corporations or other business entities.

147. On the basis of this explanation the Working Group decided to retain these two references, approving also a suggestion that the commentary to the text indicate the understanding. The Working Group decided, however, that the terminology should be conformed to that used in article 53 (*g*) (iii) and, accordingly, changed the reference to "seat of business" to read "principal place of business."

148. Some representatives expressed the view that the reference to "bill" in this paragraph should be changed to "instrument" to cover the conceivable case of a note whose payment had become accelerated.

149. The text of article 67, as redrafted by the Secretariat and reconsidered by the Working Group, is as follows:

Article 67

"(1) The holder may recover from any party liable:

"(*a*) At maturity: the amount of the instrument with interest, if interest has been stipulated for;

"(*b*) After maturity:

"(i) The amount of the instrument with interest, if interest has been stipulated for, to the date of maturity;

"(ii) If interest has been stipulated for after maturity, interest at the rate stipulated, or in the absence of such stipulation interest at the rate specified in paragraph (2), calculated from the date of maturity on the sum specified in paragraph 1 (*b*) (i);

"(iii) Any expenses of protest and of the notices given by him;

"(*c*) Before maturity:

"(i) The amount of the bill with interest, if interest has been stipulated for, to the date of payment, subject to a discount from the date of payment to the date of maturity, calculated in accordance with paragraph (3).

"(ii) Any expense of protest and of the notices given by him.

"(2) The rate of interest shall be [2] per cent per annum above the official rate (bank-rate) or other similar appropriate rate effective in the main domestic center of the country where the instrument was payable or, if there is no such rate, then at the rate of [ ] per cent per annum, to be calculated on the basis of the number of days in accordance with the custom of that centre.

"(3) The discount shall be at the official rate (discount rate) or other similar appropriate rate effective on the date when recourse is exercised at the place where the holder has his principal place of business or, if he does not have a place of business, his habitual residence, or, if there is no such rate, then at the rate of [ ] per cent per annum, to be calculated on the basis of the number of days and in accordance with the custom of that place."

150. The Working Group adopted the text of article 67 as set forth in the preceding paragraph.

Article 68

151. The text of article 68, as considered by the Working Group, is as follows:

"(1) A party who takes up and pays an instrument in accordance with article 67 may recover from the parties liable to him:

"(*a*) The entire sum which he was obliged to pay in accordance with article 67 and has paid;

"(*b*) Interest due on that sum at (2) per cent per annum above the official money market rate effective in the main domestic centre of the country of the place of payment calculated on the basis of the number of days from the day on which he made payment;

"(*c*) Any expenses which he has incurred.

"(2) Notwithstanding article 25 (4), if a party takes up and pays the instrument in accordance with article 67 and the instrument is transferred to him such transfer does not vest in that party the rights to and upon the instrument which any previous protected holder had."

Paragraph (1), subparagraphs (a) *and* (b)

152. The Working Group decided to align these two provisions with the wording it had adopted in respect of article 67 and, accordingly, adopted the following text of the two subparagraphs:

"A party who takes up and pays an instrument in accordance with article 67 may recover from the parties liable to him:

"(*a*) The entire sum which he was obliged to pay in accordance with article 67 and has paid;

"(*b*) Interest on that sum at the rate specified in article 67, paragraph 2, from the date on which he made payment;".

Paragraph (1), subparagraph (c)

153. The main issue discussed by the Working Group in this context was the nature of expenses which one could recover under this subparagraph. While there was general agreement that the present wording was too broad since it did not appear in terms to limit the kinds of expenses recoverable, widely divergent views were, however, expressed as to the proper content of the recoverable expenses.

154. On one view two kinds of expenses were recoverable: the expenses of giving notice pursuant to article 62 and the expenses involved in taking up and paying the instrument. The latter would consist of such items as bank charges and commissions incurred in remitting the funds to the holder and possibly re-exchange as recognized under the English Bills of Exchange Act (article 57 (2)). On another view, however, items such as bank charges and commissions are "external" to an instrument and do not relate to it the way items such as the principal and interest do; if one were to allow these costs, then what about the loss suffered by a party who had to liquidate some assets at an unfavourable market price in order to meet the obligation of payment?

155. A third view favoured the approach adopted by the Geneva Uniform Law (article 48 (3)) which allows the expenses of protest and notices "as well as other expenses", arguing that this formulation was familiar and had not caused much problem in practice.

156. Under a fourth view only the expenses incurred in giving notice should be allowed on the ground that any others were either too speculative and hard to specify or would open the way for very divergent interpretations by national courts.

157. The Working Group, while noting the reservations of two representatives who favoured a broader formulation, decided to restrict recovery under this subparagraph to expenses incurred in giving notice pursuant to the draft Convention. The following text was, therefore, adopted by the Working Group:

"(*c*) any expenses of the notices given by him."

Paragraph (2)

158. The Working Group deferred consideration of this paragraph until its next session.

C. *Article 70 (payment)*

159. The text of article 70, as considered by the Working Group, is as follows:

"(1) A party is discharged of his liability on the instrument when due payment has been made in accordance with this article.

"(2) Due payment is payment by a party or the drawee to the holder of the amount due pursuant to article 67 or 68:

"(*a*) At or after maturity, or

"(*b*) Before maturity, upon discharge by non-acceptance.

"(Variant I)

"(3) Payment by a party or the drawee before maturity to a holder of the amount due pursuant to article 67 or 68 constitutes a defence available to any party as against a subsequent holder who is not a protected holder.

"(Variant II)

"(3) Payment by a party or the drawee before maturity to a holder of the amount due pursuant to article 67 or 68 constitutes a defence available to any party as against a subsequent holder who acquired the instrument with knowledge that it had already been paid.

"(Variant I)

"(4) The preceding paragraphs do not apply if the party or the drawee making payment knows at the time of payment that a third person has claimed the instrument or that the holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in such theft or forgery.

"(Variant II)

"(4) The preceding paragraphs do not apply if the party or the drawee making payment knows at the time of payment that the holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or acquired the instrument with knowledge of such theft or forgery.

"(5) A person receiving payment of an instrument must deliver to the person making the payment the

receipted instrument, any authenticated protest and a receipted account."

160. The Working Group noted that the purpose of this article was to establish the circumstances in which payment of an instrument constitutes a discharge of liability on the instrument. Under the draft Convention, the principal rule is that in order that there be due payment three conditions must be fulfilled: (*a*) payment must be made to the holder, (*b*) the amount payable must be in accordance with article 67, and (*c*) payment must be made at maturity. The article sets forth special provisions in respect of payment before maturity. Such payment, if made upon dishonour by non-acceptance, is due payment; in any other case, such payment may constitute a defence in the circumstances contemplated by paragraph (3). Paragraph (4) of the proposed article deals with the special cases of *ius tertii,* namely where payment was made with knowledge of a claim to the instrument by a third person and of the forgery of an endorsement.

161. The Working Group was agreed that payment by a party or the drawee to the holder at maturity is due payment and constitutes a discharge. The Group was also agreed that the same rule should apply in the case of payment before maturity if payment was made upon dishonour by non-acceptance.

162. The Working Group was of the opinion that payment made before maturity in any other case should not be considered as due payment and therefore not be a discharge, though such payment could be set up as a defence against the person who received payment. Consequently, the Group adopted the following text of a new paragraph (2) (*bis*):

"Payment before maturity other than under paragraph (2) (*b*) of this article does not discharge the party making payment of his liability on the instrument except in respect of the person to whom payment was made."

163. The Working Group considered the case of an instrument having been paid before maturity by a drawee or a party liable and which remains in the possession of the person paid, who subsequently transfers it to a transferee with or without knowledge of the fact that the instrument had already been paid. The Group was of the view that it was reasonable to hold that if an instrument after having been paid was transferred to a transferee who took it with knowledge of the fact that it was paid, the payor should have a valid defence. However, if the transferee did not know that the instrument was already paid, the payor should, under one view, not be entitled to rely on the defence that he had paid the instrument as against the transferee. According to another view, the only case in which the payor could not rely on such a defence would be if the transferee was a protected holder.

164. The Working Group, after deliberation, was of the view that the draft Convention should not set forth provisions for such cases on the ground that they only rarely occurred in practice. Accordingly, the Group decided to delete the two variants of paragraph (3).

Paragraph (4)

165. There was consensus in the Working Group that payment of an instrument, even when made at maturity, should not be considered as due payment when the payor knew that the person receiving payment had stolen the (bearer) instrument, or forged the endorsement to him, or had participated in the theft or forgery. This rule was a counterpart of the rule on forged endorsements in article 22, and in article 24 (3).

166. One representative was of the view that payment was duly made if the payor, though he had knowledge, did not have sufficient evidence of the theft or forgery.

167. In the case where there is a claim to the instrument by a third person (*ius tertii*), the Working Group concluded that mere knowledge by the payor of such a claim would not prevent due payment, but that it was necessary that the claim be a valid claim and one that had been asserted. Therefore, the Group adopted variant I of paragraph (4) as follows:

"(4) Payment is not due payment if the party or the drawee making payment knows at the time of payment that a third person has asserted a valid claim to the instrument or that the holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in such theft or forgery."

168. As a result also of this decision, the Group adopted variant I of article 24 (3), which reads as follows:

"(3) A party may not raise as a defence against a holder who is not a protected holder the fact that a third person has a claim to the instrument unless:

"(*a*) Such third person asserted a valid claim to the instrument, or

"(*b*) Such holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in such theft."

169. The question was raised as to what would be the effect of the above provisions in the case where the payor knows that the holder who presents the instrument at maturity, or before maturity, upon this honour by non-acceptance, is bankrupt. After deliberation, it was agreed that article 70 should set forth no specific rule in respect of such a case but that the solution should be derived from the general principles of the draft convention and the applicable law on bankruptcy. The view was expressed that where the trustee in bankruptcy had asserted a claim to the instrument, the issue under some legal systems would be solved under article 70 (4) as adopted.

170. It was also suggested that this paragraph would have to be reconsidered if a decision were later taken by the Working Group to accelerate the maturity of an instrument upon the bankruptcy of the maker, drawee or acceptor.

Paragraph (5)

171. The Working Group decided to defer consideration of this paragraph until its next session.

FUTURE WORK

172. The Working Group noted that it was nearing completion of its work on the draft Convention on International Bills of Exchange and International Promissory Notes, but that at least one more session was required in order to accomplish this. Bearing in mind the desirability of putting the final draft text before the Commission at its twelfth session, in 1980, the Group decided to recommend to the Commission that a further session of the Working Group (its eighth session) be held in 1979, preferably during the first two weeks of September.

173. As to the venue of such a session, it was assumed that this would be Vienna or Geneva in view of the impending transfer of the International Trade Law Branch from New York to Vienna.

ANNEX

Draft Convention on International Bills of Exchange and International Promissory Notes

(Text of articles 24 (3) and 53 (*e*) and articles 54 to 70, as adopted by the Working Group on International Negotiable Instruments at its seventh session, held at New York from 3 to 12 January 1979)

Article 24

(3) A party may not raise as a defence against a holder who is not a protected holder the fact that a third person has a claim to the instrument unless:

(*a*) Such third person asserted a valid claim to the instrument, or

(*b*) Such holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in such theft.

Article 53

(*e*) An instrument which is not payable on demand must be presented for payment on the date of maturity or on the first business day which follows.

Article 54

(1) Delay in making presentment for payment is excused when the delay is caused by circumstances which are beyond the control of the holder and which he could neither avoid nor overcome. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

(2) Presentment for payment is dispensed with:

(*a*) If the drawer, an endorser or guarantor has waived presentment expressly or by implication; such waiver:

(i) If made on the instrument by the drawer, binds any subsequent party and benefits any holder;

(ii) If made on the instrument by a party other than the drawer, binds only that party but benefits any holder;

(iii) If made outside the instrument, binds only the party making it and benefits only a holder in whose favour it was made.

(*b*) If an instrument is not payable on demand, and the cause of delay in making presentment continues to operate beyond 30 days after maturity;

(*c*) If an instrument is payable on demand, and the cause of delay continues to operate beyond 30 days after the expiration of the time-limit for presentment for payment;

(*d*) If the drawee, the maker or the acceptor has no longer the power freely to deal with his assets, or is a fictitious person or a person not having capacity to make payment by reason of his insolvency, or if the drawee, the maker or the acceptor is a corporation, partnership, association or other legal entity which has ceased to exist;

(*e*) [See new paragraph 3 below]

(*f*) (deleted)

(*g*) If there is no place at which the instrument must be presented in accordance with article 53 (*g*).

(3) Presentment for payment is also dispensed with as regards a bill, if the bill has been protested for dishonour by non-acceptance.

Article 55

(1) If a bill is not duly presented for payment, the drawer, the endorsers and their guarantors are not liable thereon.

(2) If a note is not duly presented for payment, the endorsers and their guarantors are not liable thereon.

(3) Failure to present an instrument for payment does not discharge the acceptor or the maker or their guarantors or the guarantor of the drawee of liability thereon.

Article 56

(1) An instrument is considered to be dishonoured by non-payment:

(*a*) When payment is refused upon due presentment or when the holder cannot obtain the payment to which he is entitled under this Convention.

(*b*) [a]

(*c*) If presentment for payment is dispensed with pursuant to article 54 (2) and the instrument is overdue and unpaid.

(2) If a bill is dishonoured by non-payment, the holder may, subject to the provisions of article 57, exercise a right of recourse against the drawer, the endorsers and their guarantors.

(3) If a note is dishonoured by non-payment, the holder may, subject to the provisions of article 57, exercise a right of recourse against the endorsers and their guarantors.

[Section 3. Recourse]

Article 57

If an instrument has been dishonoured by non-acceptance or by non-payment, the holder may exercise a right of recourse only after the instrument has been duly protested for dishonour in accordance with the provisions of articles 58 to 61.

Article 58

(1) A protest is a statement of dishonour drawn up at the place where the instrument has been dishonoured and signed and dated by a person authorized to certify dishonour of a negotiable instrument by the law of that place. The statement must specify:

(*a*) The person at whose request the instrument is protested;

(*b*) The place of protest; and

(*c*) The demand made and the answer given, if any, or the fact that the drawee or the acceptor or the maker could not be found.

(2) A protest may be made:

(*a*) On the instrument itself or on a slip affixed thereto ("allonge"); or

(*b*) As a separate document, in which case it must clearly identify the instrument that has been dishonoured.

(3) Unless the instrument stipulates that protest must be made, a protest may be replaced by a declaration written on the instrument and signed and dated by the drawee or the acceptor or the maker, or, in the case of an instrument domiciled with a named person for payment, by that named person; the declaration must be to the effect that acceptance or payment is refused.

(4) A declaration made in accordance with paragraph (3) is deemed to be a protest for the purposes of this Convention.

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[a] The substance of former paragraphs (*a*) and (*b*) is now contained in the present paragraph (*a*). See para. 55 of the report.

Article 59

(1) Protest for dishonour of a bill by non-acceptance must be made on the day on which the bill is dishonoured or one of the two business days which follow.

(2) Protest for dishonour of an instrument by non-payment must be made on the day on which the instrument is dishonoured or on one of the two business days which follow.

Article 60

(1) If a bill which must be protested for non-acceptance or for non-payment is not duly protested, the drawer, the endorsers and their guarantors are not liable thereon.

(2) If a note which must be protested for non-payment is not duly protested, the endorsers and their guarantors are not liable thereon.

(3) Failure to protest an instrument does not discharge the acceptor or the maker or their guarantors or the guarantor of the drawee of liability thereon.

Article 61

(1) Delay in protesting an instrument for dishonour is excused when the delay is caused by circumstances which are beyond the control of the holder and which he could neither avoid nor overcome. When the cause of delay ceases to operate, protest must be made with reasonable diligence.

(2) Protest for dishonour by non-acceptance or by non-payment is dispensed with:

(*a*) If the drawer, an endorser or guarantor has waived protest expressly or by implication; such waiver:

(i) If made on the instrument by the drawer, binds any subsequent party and benefits any holder;

(ii) If made on the instrument by a party other than the drawer, binds only that party but benefits any holder;

(iii) If made outside the instrument, binds only the party making it and benefits only a holder in whose favour it was made.

(*b*) If the cause of delay in making protest continues to operate beyond 30 days after the date of dishonour;

(*c*) As regards the drawer of a bill, if the drawer and the drawee or the acceptor are the same person;

(*d*) (deleted)

(*e*) If presentment for acceptance or for payment is dispensed with in accordance with article 49 (2) or 54 (2);

(*f*) If the person claiming payment under article 80 cannot effect protest by reason of his inability to satisfy the requirements of article 83.

Article 62

(1) The holder, upon dishonour of a bill by non-acceptance or by non-payment, must give due notice of such dishonour to the drawer, the endorsers and their guarantors.

(2) The holder, upon dishonour of a note by non-payment, must give due notice of such dishonour to the endorsers and their guarantors.

(3) An endorser or a guarantor who received notice must give notice of dishonour to the party immediately preceding him and liable on the instrument.

(4) Notice of dishonour operates for the benefit of any party who has a right of recourse on the instrument against the party notified.

Article 63

(1) Notice of dishonour may be given in any form whatever and in any terms which identify the instrument and state that it has been dishonoured. The return of the dishonoured instrument is sufficient notice, provided it is accompanied by a statement indicating that it has been dishonoured.

(2) Notice of dishonour is deemed to have been duly given if it is communicated or sent to the person to be notified by means appropriate in the circumstances, whether or not it is received by that person.

(3) The burden of proving that notice has been duly given rests upon the person who is required to give such notice.

Article 64

Notice of dishonour must be given within the two business days which follow:

(*a*) The day of protest or, if protest is dispensed with, the day of dishonour; or

(*b*) The receipt of notice given by another party.

Article 65

(1) Delay in giving notice of dishonour is excused when the delay is caused by circumstances which are beyond the control of the holder and which he could neither avoid nor overcome. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

(2) Notice of dishonour is dispensed with:

(*a*) If the drawer, an endorser or guarantor has waived notice of dishonour expressly or by implication; such waiver:

(i) If made on the instrument by the drawer, binds any subsequent party and benefits any holder;

(ii) If made on the instrument by a party other than the drawer, binds only that party but benefits any holder;

(iii) If made outside the instrument, binds only the party making it and benefits only a holder in whose favour it was made.

(*b*) If after the exercise of reasonable diligence notice cannot be given;

(*c*) As regards the drawer of a bill, if the drawer and the drawee or the acceptor are the same person.

(*d*) (deleted)

Article 66

Failure to give due notice of dishonour renders a person who is required to give such notice under article 62 to a party who is entitled to receive such notice liable for any damages which that party may suffer directly from such failure, provided that such damages do not exceed the amount due under article 67 or 68.

Article 66 bis

The holder may exercise his rights on the instrument against any one party, or several or all parties, liable thereon and is not obliged to observe the order in which the parties have become bound.

Article 67

(1) The holder may recover from any party liable:

(*a*) At maturity: the amount of the instrument with interest, if interest has been stipulated for;

(*b*) After maturity:

(i) The amount of the instrument with interest, if interest has been stipulated for, to the date of maturity;

(ii) If interest has been stipulated for after maturity, interest at the rate stipulated, or in the absence of such stipulation, interest at the rate specified in paragraph (2), calculated from the date of maturity on the sum specified in paragraph 1 (*b*) (i);

(iii) Any expenses of protest and of the notices given by him;

(c) Before maturity:

(i) The amount of the bill with interest, if interest has been stipulated for, to the date of payment, subject to a discount from the date of payment to the date of maturity, calculated in accordance with paragraph (3).

(ii) Any expenses of protest and of the notices given by him.

(2) The rate of interest shall be [2] per cent per annum above the official rate (bank rate) or other similar appropriate rate effective in the main domestic centre of the country where the instrument was payable, or if there is no such rate, then at the rate of [ ] per cent per annum, to be calculated on the basis of the number of days in accordance with the custom of that centre.

(3) The discount shall be at the official rate (discount rate) or other similar appropriate rate effective on the date when recourse is exercised at the place where the holder has his principal place of business, or if he does not have a place of business his habitual residence, or if there is no such rate then at the rate of [ ] per cent per annum, to be calculated on the basis of the number of days and in accordance with the custom of that place.

Article 68

(1) A party who takes up and pays an instrument in accordance with article 67 may recover from the parties liable to him:

(a) The entire sum which he was obliged to pay in accordance with article 67 and has paid;

(b) Interest on that sum at the rate specified in article 67, paragraph 2, from the date on which he made payment;

(c) Any expenses of the notices given by him.

(2) [b]

[b] The Working Group deferred consideration of this paragraph until its next session.

[PART SIX. DISCHARGE]

Section 1. General

Article 69

(1) (deleted)[c]

(2) (deleted)

Section 2. Payment

Article 70

(1) A party is discharged of his liability on the instrument when due payment has been made in accordance with this article.

(2) Due payment is payment by a party or the drawee to the holder of the amount due pursuant to article 67 or 68:

(a) At or after maturity, or

(b) Before maturity, upon dishonour by non-acceptance.

(2) (*bis*) Payment before maturity other than under paragraph (2) (b) of this article does not discharge the party making payment of his liability on the instrument except in respect of the person to whom payment was made.

(3) (deleted)

(4) Payment is not due payment if the party or the drawee making payment knows at the time of payment that a third person has asserted a valid claim to the instrument or that the holder acquired the instrument by theft or forged the signature of the payee or an endorsee, or participated in such theft or forgery.

(5) [d]

[c] The Working Group was agreed that with the earlier deletion of paragraph (2) of this article by the Working Group (A/CN.9/99, paras. 51-55; Yearbook ... 1975, part two, II, 1) no purpose was served by the remaining paragraph.

[d] The Working Group deferred consideration of this paragraph until its next session.

B. Report of the Secretary-General: stand-by letters of credit (A/CN.9/163)*

CONTENTS

I. INTRODUCTION

1. At its eleventh session the Commission adopted, as a priority topic in its new programme of work, "Stand-by letters of credit, to be studied in conjunction with the International Chamber of Commerce". It further requested the Secretariat to undertake a preliminary study of the topic.[1] The present report is submitted in pursuance of that decision.

* 9 May 1979.

[1] UNCITRAL, report on the eleventh session (A/33/17), para. 67 (Yearbook ... 1978, part one, II, A).

II. NATURE OF STAND-BY LETTERS OF CREDIT

2. The parties to a contract[2] sometimes agree that, in the event of non-performance or defective performance by the obligor,[3] a specified sum is to be payable to the obligee[4] under a letter of credit[5] to be opened in favour of the obligee at the instance of the obligor. This stand-by letter of credit seeks to ensure that the obligor

[2] In the discussion below, this contract will be referred to as "the underlying contract".

[3] In the discussion below, this party will be referred to as "the account party".

[4] In the discussion below, this party will be referred to as "the beneficiary".

[5] This is the "stand-by letter of credit".