I. INTERNATIONAL PAYMENTS

A. International negotiable instruments

1. Report of the Working Group on International Negotiable Instruments on the work of its fourteenth session (Vienna, 9–20 December 1985) (A/CN.9/273) [Original: English][a]

CONTENTS

[a] For consideration by the Commission, see Report, chapter II (part one, A, above).

INTRODUCTION

1. The United Nations Commission on International Trade Law, at its seventeenth session (New York, 25 June – 10 July 1984), considered the draft Convention on International Bills of Exchange and International Promissory Notes as Regarding by the Working Group and contained in document A/CN.9/211. As regards its future course of action, the Commission decided that further work should be undertaken with a view to improving the draft Convention and entrusted this work to the Working Group on International Negotiable Instruments.[1]

2. The mandate of the Working Group was to revise the draft Convention on International Bills of Exchange and International Promissory Notes in the light of decisions and discussion at the seventeenth session of the Commission,[2] and also taking into account those comments of Governments and international organizations in documents A/CN.9/248 and A/CN.9/249/Add.1 which were not discussed at that session.

3. In the execution of the mandate entrusted to it, the Working Group held its thirteenth session at United Nations Headquarters in New York from 7 to 18 January 1985. At that session the Working Group commenced its work by considering the major controversial issues relating to the draft Convention, as set forth in document A/CN.9/249 and as discussed by the Commission at its seventeenth session, and some related questions. The deliberations of the Working Group are set forth in the report of the Working Group on the work of that session (A/CN.9/261).

4. The Working Group held its fourteenth session at Vienna from 9 to 20 December 1985. The Working Group consists, according to the decision of the Commission at its seventeenth session,[3] of the following 14 members of the Commission: Australia, Cuba, Czechoslovakia, Egypt, France, India, Japan, Mexico, Nigeria, Sierra Leone, Spain, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America. With the exception of Sierra Leone, all members of the Working Group were represented at the fourteenth session. The session was also attended by observers from the following States: Argentina, Austria, Brazil, Canada, Chile, China, Ger-

[1] Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17* (A/39/17), para. 88.

[2] The discussion and conclusions on major controversial and other issues are set forth in *ibid.*, paras. 21–82.

[3] *Ibid.*, para. 88.

many, Federal Republic of, Holy See, Hungary, Indonesia, Iran (Islamic Republic of), Italy, Kuwait, Netherlands, Panama, Peru, Poland, Republic of Korea, Romania, Sweden, Switzerland, Thailand, Cameroon and Venezuela, as well as by observers from the following international organizations: Hague Conference on Private International Law, European Banking Federation, International Bar Association, International Chamber of Commerce, International Law Association and Regional Centre for International Commercial Arbitration, Cairo.

5. The Working Group elected the following officers:

Chairman: Mr. Willem Vis (Netherlands)[a]

Rapporteur: Mrs. G.O. Adebanjo (Nigeria)

6. The Working Group had before it the following documents:

A/CN.9/WG.IV/WP.29—Provisional agenda;

A/CN.9/WG.IV/WP.30—Draft Convention on International Bills of Exchange and International Promissory Notes: Some considerations and suggestions relating to major controversial issues: note by the secretariat;

A/CN.9/211—Draft Convention on International Bills of Exchange and International Promissory Notes: Text of draft articles as adopted by the Working Group on International Negotiable Instruments: note by the secretariat;

A/CN.9/213—Commentary on draft Convention on International Bills of Exchange and International Promissory Notes: report of the Secretary-General;

A/CN.9/248—Draft Convention on International Bills of Exchange and International Promissory Notes and draft Convention on International Cheques: analytical compilation of comments by Governments and international organizations;

A/CN.9/249—Draft Convention on International Bills of Exchange and International Promissory Notes and draft Convention on International Cheques: major controversial and other issues;

A/CN.9/249/Add.1—Draft Convention on International Bills of Exchange and International Promissory Notes and draft Convention on International Cheques: major controversial and other issues—Addendum: summary of the comments of Romania and Switzerland;

A/CN.9/261—Report of the Working Group on International Negotiable Instruments on the work of its thirteenth session (New York, 7–18 January 1985);

A/39/17—Report of the United Nations Commission on International Trade Law on the work of its seventeenth session (1984), *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17.*

DELIBERATIONS AND DECISIONS

7. The Working Group continued its review of the draft Convention on International Bills of Exchange and International Promissory Notes, and its consideration of the major controversial issues. It took into account a note by the secretariat setting forth some considerations and suggestions relating to the major controversial issues (A/CN.9/WG.IV/WP.30). The deliberations of the Working Group relating to the major controversial issues are set forth below in part I of this report, and the deliberations relating to other issues are set forth in part II of this report. In the course of its deliberations, the Working Group prepared revised versions of certain articles of the draft Convention on International Bills of Exchange and International Promissory Notes as contained in document A/CN.9/211 based upon decisions of the Commission at its seventeenth session and of the Working Group at its thirteenth and fourteenth sessions. The revised articles are set forth in the annex to this report and will be incorporated into the complete text of the draft Convention, to be submitted to the Commission as document A/CN.9/274.

8. During the present session the Working Group completed the task entrusted to it by the Commission. The Working Group was of the view that the revisions suggested by it to the draft Convention on International Bills of Exchange and International Promissory Notes would in large measure meet the concerns expressed by Governments during the deliberations in the Commission at its seventeenth session, and in their written comments.

9. The Working Group wished to note the constructive atmosphere of its thirteenth and fourteenth sessions and the increased level of satisfaction that many representatives and observers had expressed with the draft text and with the entire project. The Working Group expressed the opinion that the review of the draft Convention at the nineteenth session of the Commission should be the final consideration of the full text prior to its adoption as a convention. For this reason it requested the Secretary-General, when he informed member States of the nineteenth session and invited observer States to that session, to suggest that experts in the field of negotiable instruments be named to the delegations. In making this request, the Working Group recalled that resolution 2205 (XXI), by which the General Assembly created the Commission, provided in its paragraph 4 that "The representatives of members of the Commission shall be appointed by Member States in so far as possible from among persons of eminence in the field of the law of international trade".

DRAFT CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES: CONSIDERATION OF MAJOR CONTROVERSIAL AND OTHER ISSUES

I. Major controversial issues

A. *Defences available against holder or protected holder and related issues*

1. *Article 26(1)(a): failure to make protest*

10. The Working Group agreed to amend article 26(1)(*a*) by adding a reference to article 59, thereby

[a]The Chairman was elected in his personal capacity.

making failure to make a necessary protest a defence against the protected holder of a bill or a note.

2. *Article 26(1)(b): arising out of other transactions*

11. The Working Group recalled that at its thirteenth session it had requested the secretariat to consider which defences should be available to an immediate party against a holder or protected holder (under articles 25 and 26), with particular regard to the provisions of article 25(1)(*c*) and article 26(1)(*b*) (A/CN.9/261, para. 26). The Working Group considered the proposal of the secretariat, made in implementation of that request, to modify article 26(1)(*b*) as follows:

"(1) A party may not set up against a protected holder any defence except:

(*a*) ....

(*b*) Defences *resulting from a transaction between himself and such holder that would be available as defences against contractual liability* or defences arising from any fraudulent act on the part of such holder in obtaining the signature on the instrument of that party;"

12. It was noted that the proposed redraft of paragraph (1)(*b*) would allow as a defence only those defences which arose out of transactions between the protected holder and the party against whom he was claiming. This proposal would enlarge the text as found in document A/CN.9/211 by permitting that party to raise defences arising out of transactions with the protected holder which did not involve the instrument. It was also suggested that the proposal would restrict somewhat the defences available to that party which arose out of the underlying transaction between himself and the protected holder in that only those defences available against contractual liability would be recognized. In some countries, certain defences arising out of the underlying transaction might be based on tort and not be available as a defence against contractual liability.

13. During the discussion it was noted that there was a wide variety of positions taken on this point in national law. In some countries, the special nature of a negotiable instrument was emphasized and no defences were permitted to a claim on the instrument, not even when they arose out of the underlying transaction between the protected holder and the party against whom he was claiming. In other countries all claims of any type arising directly between the two parties could be interposed as a defence to an action on the instrument by the protected holder. In yet other countries only a restricted number of claims arising out of other transactions could be interposed as a defence against the protected holder. In some cases the available defences were described by type. In other cases the rule was that the only defences which could be raised were those that could be settled promptly by the tribunal before which the action on the instrument was brought so as not to delay the action on the instrument.

14. The Working Group was in agreement that the status of the protected holder under the draft Convention was a high one and that his ability to enforce the instrument promptly should not be unduly interfered with. At the same time there was general agreement that some defences which did not arise out of the underlying transaction should be permitted. It was recognized that those defences would be based on the national law applicable to the transactions, but it was suggested that the effect of such a defence on the substantive rights of the protected holder was a matter for the draft Convention.

15. The suggestion was made that, although the question arose in large measure because of the procedural advantages of claiming on a negotiable instrument, no attempt should be made to unify procedural rules. However, it was also suggested that the proposed modification of subparagraph (1)(*b*) would pose a substantive rule which the national procedural law would have to accommodate. It was stated that this would mean that the summary procedure for enforcement of a negotiable instrument currently used in some countries which recognize few if any defences to an action by a protected holder would not be available for enforcement of an instrument under this Convention without some modification.

16. In the light of the discussion the observer from Canada, at the request of the Working Group, prepared a revised version of paragraph (1)(*b*) which read as follows:

"(1) A party may not set up against a protected holder any defence except:

(*a*) ....

(*b*) (i) A defence based on the underlying transaction between himself and such holder;

(ii) A claim or defence in a liquidated amount resulting from a [business] transaction between himself and such holder that is available in accordance with the proper law of that transaction;

(iii) A defence arising from any fraudulent act on the part of such holder in obtaining the signature on the instrument of that party."

17. It was stated in explanation of the draft that the use of the term "liquidated amount" in subparagraph (1)(*b*)(ii) was intended to restrict defences not arising out of the underlying transaction to those that could normally be settled promptly by the court. It was noted, however, that the term was unknown in many legal systems and would be hard to apply. After a further discussion of this proposal a working party consisting of the delegates of Australia, Czechoslovakia and Mexico and the observers from Canada and Switzerland, along with the Chairman of the Working Group, were asked to prepare a further revision.

18. The working party reported that they had attempted a number of formulas for re-drafting subparagraph (1)(*b*)(ii) of the Canadian proposal, but had been unable to express the desired concept in an acceptable manner. As a consequence, a majority of the working party

favoured the text as proposed by the observer from Canada with subparagraph (1)(*b*)(ii) deleted. A minority of the working party favoured the retention of the text originally proposed by the secretariat.

19. The Working Group was divided on the preferable approach. In response to a concern that was expressed, it was understood that under either formula a party could base a defence on the grounds, for example, that the protected holder had agreed with him to defer payment, even though that agreement was subsequent to the transfer of the instrument to the protected holder. Accordingly, the Working Group decided to present to the Commission both solutions referred to in paragraph 18.

3. *Article 25(1)(c): arising out of other transactions*

20. In view of its decision in respect of article 26(1)(*b*), the Working Group decided not to consider redrafting article 25(1)(*c*) but to bring to the attention of the Commission that article 25(1)(*c*) should be in accord with article 26(1)(*b*).

4. *Article 4(7): effect of knowledge of such a defence on status as protected holder*

21. The Working Group noted that if article 25(1)(*c*) was redrafted to permit some defences to be raised against a holder that did not arise out of the underlying transaction, the definition of protected holder in article 4(7) should be modified so that a party could be a protected holder in spite of having knowledge of such a defence.

22. The Working Group decided to delete from the definition as adopted by it at its thirteenth session the words "by him" since in some cases the completion of the instrument might be done by a person acting under the authority of the holder but whose actions might not be considered to be the actions of the holder.

23. It was noted that an instrument that was incomplete may not be an instrument under the Convention. Therefore, the Working Group decided to use the words of article 11(1) which speak of "an incomplete instrument".

5. *Article 25(3)(b): forgery*

24. The Working Group agreed to modify article 25(3)(*b*) by adding at the end the words "or forgery". It noted that this addition would correct what appeared to be a legislative oversight and would align the provision with the "mirror image" provision of article 68(3).

6. *Article 27: shelter rule*

25. The Working Group was in agreement that it should retain the shelter rule of article 27. It was noted that after a protected holder had acquired an instrument it might become common knowledge that there was a defence arising out of the transaction which underlay the issuance of the instrument. The example was given of notes issued to finance a large project which were in the hands of a protected holder when a dispute in respect of the project was reported in the financial press. No subsequent holder might qualify as a protected holder because of knowledge of the dispute. Without article 27, which would permit a subsequent holder to have the rights of a protected holder in spite of knowledge of the dispute, the protected holder might not be able to sell the notes except at a substantial loss and might be forced to hold them to maturity when he could collect their face value.

26. The Working Group was also in agreement that a party who had at one time been in possession of an instrument, but not as a protected holder, who later reacquires the instrument from a protected holder should not have the rights of a protected holder and that this rule should be expressed in the article.

27. The Working Group agreed to delete paragraph (2) as unnecessary by reason of the fact that an instrument is not transferred to a party who pays it and such party does not become a holder of it.

28. The question was raised whether it was compatible with the principle of good faith that the present scope of the shelter rule would also give protection to a holder who had, when obtaining the instrument, knowledge of a fraud committed by a prior party. In a response, it was said that a restriction of the shelter rule would impair the transferability of instruments.

B. *Definition of "knowledge"*

29. The Working Group, at its thirteenth session, requested the secretariat to prepare a revised draft of the definition of knowledge in article 5 which would recognize that, while knowledge should in principle be actual knowledge, the courts should also have the power to deduce from the circumstances of the case that a person, despite his denial, had actual knowledge of a fact and that, without covering negligence, it should allow imparting knowledge to a person who did not have actual knowledge because he had wilfully disregarded relevant facts (A/CN.9/261, para. 67).

30. The Working Group, at its present session, considered a revised draft of article 5 prepared by the secretariat in response to that request which read as follows:

"For the purposes of this Convention, a person is considered to have knowledge of a fact if he has actual knowledge of that fact or

Variant A: if he deliberately disregarded facts or circumstances known to him which, but for such disregard, would have given him actual knowledge.

Variant B: if there exist facts or circumstances which would have given him actual knowledge had he not deliberately disregarded them.

Variant C: if he does not have actual knowledge because he wilfully disregarded facts or circumstances known to him."

31. The ensuing discussion focused on the differences between the three variants and the extent to which they adequately implemented the Working Group's request at its thirteenth session. The view was expressed that it was not appropriate to say that a person knew something he did not know, but that it was a different question whether a person should be responsible for not knowing what he should have known. The view was also expressed that the use of terms such as "deliberately" and "wilfully" in variants B and C did not make clear the strength of the inference to be drawn. Furthermore, it was stated, there is a danger in preparing a definition of knowledge that would require a party to inquire extensively as to possible additional facts on the basis of those facts which did come to his attention.

32. At the request of the Working Group the observer from Canada prepared a new draft article 5 which would have added to the end of the text in A/CN.9/211 the words "or he has deliberately disregarded other facts known to him which would have given him knowledge of that fact, unless such disregard was commercially reasonable."

33. It was explained that the real innovation of this proposal lay in the last clause. What was commercially reasonable must be tested by local standards, how one would act in regard to a local transaction. It was stated, however, that if the law required something to be done, no proof that it was commercially reasonable not to do that thing should be permitted.

34. After deliberation the Working Group decided to retain the original text of article 5. It was felt that under that text a court could reach the desired result in any given case.

C. *Forged endorsements: limit of liability in articles 23(4) and 23* bis *(4)*

35. The Working Group was in agreement that the damages recoverable in articles 23(4) and 23 *bis* (4) should be limited to those mentioned in articles 66 and 67, and should not include interest or costs incidental to the giving of security under article 74 as had been suggested by the secretariat (A/CN.9/WG.IV/WP.30, para. 16). Although some representatives and observers viewed the use of cross references as a questionable practice, it was decided that the limit of recoverable damages would be expressed by referring to those articles.

D. *Liability of a transferor by mere delivery (article 41)*

36. The Working Group considered article 41 in the light of the explanatory notes and the revised draft prepared by the secretariat.[4] The discussion focused on the following issues: (1) whether a provision like article 41 should be retained which imposed liability on persons who transferred the instrument by mere delivery, i.e. without endorsing it; (2) if so, what should be the nature and extent of such liability, and in which circumstances should it be incurred; and (3) should such liability be imposed also upon endorsers.

1. *Retention of provision on liability of transferor by mere delivery*

37. While some doubt was expressed about the appropriateness of regulating in the draft Convention the liability of a transferor by mere delivery, the Working Group, after deliberation, reaffirmed its decision, taken at its thirteenth session, to retain a provision along the lines of article 41.[5]

2. *Nature and extent of liability*

38. The Working Group considered the content and scope of the representation of the transferor on which the transferee would be entitled to rely. As regards the infirmities listed in subparagraph (*a*) of paragraph (1), divergent views were expressed as to whether forged or unauthorized signatures of all parties should be covered or only those of certain parties such as the maker and the acceptor and, possibly, the drawer of an unaccepted bill. The Working Group, after deliberation, was agreed that the signatures of all parties should be covered since any restriction to certain signatures would be contrary to the interest and legitimate expectations of the transferee who may place particular reliance on the quality of a specific signature such as that of a given guarantor or endorser.

39. Regarding the infirmity listed in subparagraph (*b*) of paragraph (1), the Working Group was agreed that not only an alteration of the amount of the instrument should be covered but also any other kind of material alteration, since such other alterations could equally affect the value of the instrument.

40. As regards the infirmities listed in subparagraph (*c*) of paragraph (1), it was noted that the protection afforded to a transferee was not needed if the transferee was a protected holder since, due to this status, he would not be subject to any claim or defence covered by that provision.

41. Divergent views were expressed as to whether the infirmities listed in this provision formed an acceptable basis for liability of the transferor. Under one view, the transferee of an instrument should be able to rely on the absence of a valid claim to the instrument or a defence against him since his expectations as to the value of what he received were the same and as justified as those of a buyer of any other item. Some proponents of this view pointed out that liability in this respect was appropriate if it was limited to the value received by the transferor and was conditioned on the return of the instrument to him.

42. The prevailing view, however, was that the scope of subparagraph (*c*) was too wide to be acceptable to most countries, in particular, if an immediate action for damages were envisaged as remedy. It was also pointed out that the expectations of a buyer of an instrument were

[4] A/CN.9/WG.IV/WP.30, paras. 18–53.

[5] A/CN.9/261, para. 51.

directed at getting payment at maturity and that the detrimental consequences of any infirmity listed in this provision may occur or be assessed with certainty only at the time of maturity.

43. The Working Group decided not to retain subparagraph (*d*).

44. It was realized that under some existing laws a transferor by mere delivery incurred liability for certain infirmities other than those relating to the genuineness and validity of the instrument as covered by subparagraphs (*a*) and (*b*).

45. In this context, the Working Group considered the general question whether the draft Convention should provide an exhaustive list of infirmities or whether a transferee may benefit from a rule in a national law other than the Convention embracing other kinds of infirmities. The Working Group, after deliberation, was agreed that, for the sake of uniformity, the liability under the draft Convention should be exclusive.

46. With this aim in mind, various proposals were made for inclusion of further infirmities in a new subparagraph (*c*). One proposal was to have the transferor represent that he was entitled to transfer the instrument. The Working Group did not adopt this proposal in view of the fact that under the system of the draft Convention, unlike certain national laws, transfer of title was not a precondition for becoming a holder.

47. Another proposal was to have the transferor represent that the instrument was in conformity with what it purported to be, that the claim in respect of which it was issued in fact existed, and that there was no impediment, even if unknown, to its payment. The Working Group did not adopt this proposal because it was regarded as too vague or too wide.

48. Yet another proposal was to impose liability on a transferor who knew of any fact which rendered the instrument valueless or significantly reduced its value. While there was some support for this proposal, the prevailing view was that this proposal was too far-reaching, in particular by covering instances of insolvency or similar facts affecting the chances of payment.

49. It was agreed that the gist of the basis of liability in the new subparagraph (*c*) should be the representation that the transferee acquired the rights to payment, as purported by the instrument, against the party primarily liable or, in the case of an unaccepted bill, against the drawer. It was agreed that the precise representation of the transferor envisaged in new subparagraph (*c*) was that, at the time of transfer, he had no knowledge of any fact which would impair such right of the transferee; one representative expressed the view that this liability should not depend on knowledge.

50. The Working Group was agreed that liability on account of any infirmity referred to in paragraph (1)(*a*), (*b*) or (*c*) was incurred only to a holder who took the instrument without knowledge of such infirmity.

51. Divergent views were expressed as to the appropriate point of time at which liability under article 41 was incurred and the transferee had a right of recovery against the transferor. Under one view, the decisive point of time should not be before the date of maturity because it was only then that any detrimental effect of the defect or infirmity would materialize and the extent of that effect on the transferee's rights and expectations to obtain payment could be clearly assessed.

52. The prevailing view, however, was that the transferee should be given an immediate right of recovery. This was not only of practical importance but also in conformity with the basis of liability, namely that the transferee did not receive an instrument of the value it purported to have. While the precise reduction in value caused by the infirmity in question may not be easily determined at that early point of time, such possible difficulty was no convincing reason against an immediately available action since it could be taken care of in deciding on the appropriate type of remedy which the draft Convention should accord to the transferee.

53. As regards the decision on the type of remedy, the Working Group was agreed that the transferee's right to recover should not be characterised or labelled in a certain way such as action for damages or right to rescind the contract. Article 41 would simply state the content of the remedy which was agreed to be that the transferee may recover, against return of the instrument, the value originally received by the transferor for that instrument, plus interest calculated at a certain rate (to be determined by the Commission).

3. *Extension of article 41 to endorsers*

54. Some doubts were expressed as to the appropriateness of extending the provisions of article 41 to persons who transferred the instrument by endorsement and delivery. It was questioned whether there was a real need for such extension in view of the fact that in such cases the transferee, in his capacity as endorsee, had a right to payment from the transferor as endorser if payment could not be obtained from the party primarily liable. It was also pointed out that liability under article 41 was not appropriate in those cases where the instrument was endorsed without recourse or for collection.

55. However, the Working Group, after deliberation, was agreed that liability under article 41 should be imposed also on an endorser. It was thought that the policy reasons underlying the liability of a transferor by mere delivery applied with similar force to a person who transferred the instrument by endorsement and delivery and thus was, after all, also a transferor by delivery. A further reason was that, without such liability, the transferor by endorsement and delivery would be treated more favourably than the transferor by mere delivery whose liability was an immediate one and not conditioned upon dishonour for non-acceptance or non-payment.

56. Regarding the case of an endorsement for collection, the extension of article 41 to endorsers would not create any hardship since the endorsee for collection suffered no loss, for lack of any value given to his endorser; if due to any of the infirmities listed in article 41(1) he could not collect, he would simply return the instrument to his endorser. Regarding the case of an endorsement without recourse, the situation was similar to that of a transfer by mere delivery in that there was no endorsement which would be sufficient to compensate the transferee. Yet, it was pointed out that persons (often banks) who endorsed without recourse usually did so for the purpose and with the understanding of excluding any liability connected with the instrument or its transfer.

57. In this connection, the Working Group considered whether the expression "without recourse" or words of similar import should be interpreted as excluding only the liability on the instrument (see article 40(2)) or also any liability off the instrument as the one provided for in article 41. Since divergent views were expressed on that point, a proposal was made to include in the draft Convention a clear rule of interpretation and, for example, require specific wording (e.g. "without liability") for an effective exclusion of liability off the instrument.

58. The Working Group, after deliberation, did not adopt this proposal since no agreement was reached on the content of such a rule or on a standard wording and because it was felt to be too burdensome and possibly confusing to require an express stipulation to that effect on the instrument. The Working Group, therefore, decided that the faculty of the endorser to exclude or limit his liability under article 41 was appropriately expressed in the draft Convention by the opening words of article 41 "Unless otherwise agreed by the parties".

II. Other issues

59. The Working Group noted that, during the consideration of the draft Convention by the Commission at its seventeenth session, the Commission had decided a certain number of issues but had left other issues open for possible further consideration by the Working Group. The Working Group decided to review those issues to determine in respect of which issues it could add further clarification.

A. *Internationality and formal requisites*

1. *Article 1(2) and (3): International elements*

60. The view was expressed that the place at which a bill was drawn and the place at which it was payable should be shown on the bill to be in different countries for the bill to fall under the draft Convention. It was stated that this was not a question of internationality but of validity. The Working Group did not retain this suggestion since the Commission had already decided that an indication of those places should not be a pre-condition to the application of the draft Convention.

61. A proposal was made by the observer for the Hague Conference on Private International Law to divide article 1 into two articles. The first article would express the international elements necessary for the draft Convention to apply while the second article would contain the conditions for validity of an instrument as follows:

"Article 1

"(1) This Convention applies to an international bill of exchange when the instrument contains the words 'international bill of exchange (Convention of...)' and shows that at least two of the following places are in different States:

(*a*) The place where the bill is drawn;

(*b*) The place indicated next to the signature of the drawer;

(*c*) The place indicated next to the name of the drawee;

(*d*) The place indicated next to the name of the payee;

(*e*) The place of payment.

"(2) This Convention applies to an international promissory note when the instrument contains the words 'international promissory note (Convention of ...)' and shows that at least two of the following places are in different States:

(*a*) The place where the note is made;

(*b*) The place indicated next to the signature of the maker;

(*c*) The place indicated next to the name of the payee;

(*d*) The place of payment.

"(3) Proof that the statements referred to in this article are incorrect does not affect the application of this Convention.

"Article 1 bis

"(1) An international bill of exchange is a written instrument which:

(*a*) Contains an unconditional order whereby the drawer directs the drawee to pay a definite sum of money to the payee or to his order;

(*b*) Is payable on demand or at a definite time;

(*c*) Is dated;

(*d*) Is signed by the drawer.

"(2) An international promissory note is a written instrument which:

(*a*) Contains an unconditional promise whereby the maker undertakes to pay a definite sum of money to the payee or to his order;

(*b*) Is payable on demand or at a definite time;

(*c*) Is dated;

(*d*) Is signed by the maker."

62. The view was expressed that the original text was preferable since all elements presently set out in paragraphs (2) and (3) of article 1 were essential elements for the validity of an instrument under this Convention. The Working Group decided to retain the present text but to bring the proposal to the attention of the Commission.

2. *Articles 1 and 2: application of Convention to parties other than maker or drawer*

63. The prevailing view in the Working Group was that it was already clear that once an instrument fell under the Convention, the rights of all persons in regard to that instrument would be governed by the Convention and that it was not necessary to modify the text in that regard.

3. *Article 1: definition of "writing"*

64. The question was raised whether it would be useful to have a definition of writing in the draft Convention. It was noted that many recent international texts have defined writing as including telegrams, telex, and more recently, data communication which provides a record of the communication. Under one view expressed in the Working Group it was better not to include a definition of writing so as to permit the application of the draft Convention to new methods of data transmission. Under another view a definition was not necessary since the context of the draft Convention could only apply to an instrument in a paper-based form. The Working Group, after deliberation, decided not to recommend that a definition of writing be included in the draft Convention.

4. *Article 1: invocation of the Convention*

65. There was general agreement that an international bill of exchange or international promissory note should be easily recognizable. It was noted, in particular, that some banking systems handle large amounts of commercial paper and they would need easy means to distinguish these instruments which might need special handling. It was also noted that article 1 required the words of internationality to be in the text of the instrument, which had certain advantages but which might mean they would be difficult to find.

66. Various suggestions were put forth: that the words of internationality be in a conspicuous place such as the heading, that the words of internationality be in a widely used international language such as English or French, that a distinctive symbol be used, that the instrument follow a prescribed form as contained in an annex to the Convention. It was stated that for technical reasons a previous suggestion that the instrument be in a distinctive colour could not easily be implemented in all countries.

67. The Working Group decided that the words of internationality should be in the heading of the instrument as well as in the text. In order to reflect its decision the Working Group decided to re-word paragraph (2) as follows:

"An international bill of exchange is a written instrument with the heading 'international bill of exchange (Convention of ...)' which:"

with the rest of the paragraph unchanged. A similar modification of paragraph (3) would be made for the international promissory note. In order to aid users in designing a form which would satisfy the requirements of the draft Convention, it was decided to request the secretariat to submit to the Commission at its nineteenth session model forms to be included in an annex to the Convention. The Working Group also decided that use of the forms would not be mandatory. Reference should be made in the text of the draft Convention to the recommended forms in such manner as the Commission should consider appropriate.

5. *Express provision excluding cheques from the scope of application of the draft Convention*

68. It was noted that in common law jurisdictions a cheque was a species of bill of exchange (i.e. a cheque was a bill of exchange, which contained an order by the drawer to a bank to pay on demand a sum of money to the payee). It was suggested that, since the draft Convention was not intended to apply to cheques, a provision excluding the application of the draft Convention to cheques should be included therein. It was noted, however, that it was unlikely that the provisions of the draft Convention would be applied to cheques. One reason for this would be the fact that instruments to which the draft Convention applied would contain in the text thereof the words "international bill of exchange (Convention of ...)". After deliberation, the Working Group decided that a provision excluding cheques from the scope of application of the draft Convention was needed, and should be added.

B. *Questions relating to article 2*

69. The Working Group noted that, under article 2, the Convention applied without regard to whether the places indicated on an international bill of exchange or on an international promissory note pursuant to paragraph (2)(*e*) or (3)(*e*) of article 1 were situated in Contracting States. It was pointed out that this provision created uncertainty, with particular regard to its effect in a non-contracting State. The main reason for such uncertainty or limited effect was that the provision presupposed party autonomy which, however, was not recognized in respect of negotiable instruments by most systems of conflict of laws. The situation was aggravated by the fact that the draft Convention did not require any link between the instrument or its use and a Contracting State and that, by virtue of article 1(4), even those instruments may be covered which were not genuinely international. It was, therefore, suggested that a certain link between the use of the instrument and a Contracting State should be required. For example, one could limit the application of

the Convention to those cases where the bill was drawn or the note was made in one Contracting State and the place of payment was situated in another Contracting State, or one could require that one of these two places was in a Contracting State.

70. In reply to these concerns, reference was made to the commentary on draft article 2 which addressed the possible problems as to the effectiveness of this provision.[6] Above all, it was pointed out that the above concerns had been expressed in previous sessions of the Working Group and at the seventeenth session of the Commission; the Commission had not adopted any of the proposals requiring a certain link between the instrument and a Contracting State, and there was wide agreement in the Commission that the problems referred to with regard to the applicability of the draft Convention should be addressed by the Hague Conference on Private International Law in the course of its intended revision of the Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes (Geneva, 1930).[7]

71. The Working Group, after deliberation, concluded that, in the light of these considerations, it was not appropriate for the Working Group to decide these questions, and that the Commission itself may wish to reconsider them.

C. *Addition to article 3: observance of good faith*

72. The Working Group considered a proposal to add at the end of article 3 of the draft Convention the following words "and the observance of good faith in international trade".

73. There was wide agreement that the addition of these words would serve a useful purpose. It was noted that the observance of good faith by the parties formed the basis for the proper operation of many provisions of the draft Convention. A suggestion was made that the proposed text should refer expressly to the use of the instruments covered by the Convention. It was suggested that, in the context of the draft Convention, it was more appropriate to refer to the observance of good faith "in international transactions" rather than "in international trade".

74. The Working Group decided to accept the proposal that article 3 contain the words "and the observance of good faith in international transactions".

75. There was support for the view that, since the provision was in the nature of a recommendation, it should be made part of the preamble to the draft Convention and not placed in the body of the draft Convention. The prevailing view was that, since provisions of this character had previously been placed in the body of the Conventions to which they related, this past practice should be followed.

D. *Articles 4(10) and X: definition of "signature"*

76. The Working Group considered certain questions relating to the definition of signature in article 4(10) and the possible content and effects of the declaration by a Contracting State envisaged in article X. The Working Group noted that, when these two articles were considered by the Commission at its seventeenth session, there was general agreement that article X should be retained to accommodate States whose legislation required that a signature on an instrument be handwritten but that the text of article X might need some clarification.[8]

77. In the course of the deliberations of the Working Group, various observations and proposals were made with a view to clarifying matters. The observations concerned the appropriateness of the required link between a given signature and the Contracting State which had made a declaration under article X and concerned the possible effects of such declaration within and outside that Contracting State.

78. As regards the required link between a given signature and the Contracting State, doubts were expressed as to the appropriateness of the territorial criterion envisaged in article X. It was observed that a declaration by a State to the effect that a signature placed on an instrument in its territory must be handwritten presented practical problems in those frequent cases where the place at which the signature had been made was not apparent from the instrument. Any obligation of other persons who took the instrument to make enquiries as to that place were deemed to be too burdensome in the context of an international instrument and would adversely affect the desired ease of its circulation. Moreover, the territorial criterion might be too wide in view of the fact that a Contracting State in its legislation may not require that all signatures placed on the instrument in its territory be handwritten. It may, for example, impose this requirement only on its nationals or only on certain of its legal or physical persons or only on certain parties to the instrument.

79. In the light of these concerns, a proposal was made to envisage in article X a declaration to the effect that any particular signature on an international instrument made by a legal or physical person of the Contracting State be handwritten. However, doubts were expressed as to the appropriateness of using the nationality of a person, or the seat of a legal person, as the connecting factor for the purposes of article X. One concern was that this formula may embrace nationals of the Contracting State who signed the instrument outside that State. Above all, it was felt that such connecting factor would adversely affect the transferability and circulation of the instrument in that it obliged other persons to enquire about the nationality of

[6] Commentary on Draft Convention on International Bills of Exchange and International Promissory Notes, Report of the Secretary-General, A/CN.9/213, commentary on article 2, paras. 1–6.

[7] Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17* (A/39/17), para. 70.

[8] *Ibid.*, para. 45.

those who signed it. It was suggested that such obligation was even more burdensome than the one resulting from the use of the territorial criterion.

80. It was observed that the difficulties concerning the link between a given signature and article X were aggravated by the fact that, as was generally agreed, article X did not clearly set out the precise effects of a declaration under that article. For example, it was not clear whether such a declaration would have an extraterritorial effect in that it would cover the case where the validity of a signature made in violation of the legislation of the Contracting State would arise in another State which did not require signatures to be handwritten.

81. A proposal was made to adopt the approach of article 12 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) and to provide that the provision of article 4(10) which allowed a signature to be made by stamp, symbol, facsimile, perforation or other mechanical means did not apply where a Contracting State had made a declaration in respect of any signature which under its legislation must be handwritten.

82. The proposal was objected to on the ground that its effect, namely to exclude the application of article 4(10) as regards signatures covered by the declaration even in jurisdictions outside the Contracting State, was undesirable in the area of negotiable instruments law which, unlike sales law, concerned not merely two persons but a plurality of persons interested in the transferability and circulation of the instrument.

83. It was pointed out that due to this special feature of negotiable instruments law the traditional method of a reservation, even if its effect were limited to the Contracting State, would not solve the problem. By way of illustration, it was asked whether the fact that a Contracting State regarded a certain signature, for example that of an acceptor, as invalid should be treated as a case of dishonour in any action brought against the drawer in another jurisdiction or whether the acceptance would be treated there as valid with the result that the drawer would not be liable and the holder in fact could not obtain payment in either of the two jurisdictions.

84. In view of the above difficulties, two suggestions were made with a view to rendering the declaration envisaged in article X unnecessary. One suggestion was to delete the definition of signature in article 4(10). It was stated in support of this suggestion that the Geneva Uniform Law did not contain such a definition and that this fact had not led to any difficulties in the fifty years of its application. In view of future technical developments it might even be an advantage to let the individual States decide which forms of signature they were prepared to allow. It was stated in reply that it was undesirable to delete the definition of signature and to leave this important question to the individual States since the ensuing disparity and uncertainty was detrimental to the use of an international negotiable instrument.

85. The other suggestion was based on the premise that in respect of signatures made by legal persons the use of means prohibited under the law of a Contracting State should be regarded as an unauthorized use with the consequences laid down in article 32(3) concerning the signature of an agent without authority. It was thought that the interest of a State whose legislation required certain signatures to be handwritten could be met by regarding signatures made by legal persons in other forms not as non-existent but as unauthorized and thus not binding on the principal. The suggestion, therefore, was to let Contracting States use the vehicle of a declaration or any other appropriate means of publicizing its signature requirements in order to provide certainty and to exclude the possibility of reliance by persons outside that State and thus of any possible finding of apparent or implied authority.

86. The Working Group, after deliberation, was agreed that the above questions and proposals needed further consideration. It decided to retain article X placed between square brackets and to invite the Commission to reconsider this provision in the light of the discussion and suggestions made in the Working Group.

E. *Definition of "money" and "currency"*

87. The Working Group considered article 4(11) dealing with the definition of "money" and "currency", which was at present placed between brackets. It was noted that the definition of "money" or "currency" was not a comprehensive definition but only inclusive. The Working Group noted that certain modifications to this article had been suggested during the discussions in the Commission.

88. The Working Group considered a modified draft of article 4(11) which had been previously proposed by the International Monetary Fund, which read as follows:

> "'Money' or 'currency' includes a monetary unit of account which is established by an intergovernmental institution and which is transferable among the members of this institution or other entities as the institution may prescribe." (A/CN.9/249, para. 24).

89. There was wide agreement that the substance of this definition was acceptable. The view was expressed that in addition to monetary units of account established by intergovernmental institutions, other units of account were established by bilateral or multilateral agreements between Governments. Such units of account should also be included within the definition of "money" and "currency". The Working Group agreed with this view, and decided that the definition should be modified to include such units of account.

90. The Working Group was also of the view that the definition of "money" and "currency" need not include the requirement that the unit of account established by an

intergovernmental institution or intergovernmental agreement be expressly made transferable by the institution or agreement. The purpose of the definition was solely to extend for the purposes of the draft Convention the ordinary meaning of "money" and "currency" so that these terms included monetary units of account established by an intergovernmental institution or intergovernmental agreement. The Working Group therefore decided to delete this reference to the transferability of the unit of account in the definition. However, since there might be implications to its decision of which the Working Group was unaware, the secretariat was requested to consult with the International Monetary Fund and to report to the Commission.

91. The Working Group considered the possible effect of a definition of the kind set forth above on the operation of article 71(1). The question was raised as to how payment would be made under that article if the amount of the instrument was expressed in a unit of account. It was observed in reply that payment could be made in certain units of account (i.e. accounts can be currently maintained in those units of account and the units of account due could be credited to those accounts). It was also observed that there is currently no means by which payment could be made in certain other units of account. When the amount of the instrument was expressed in the latter units of account, the drawer or the maker could indicate on the instrument that it must be paid in a specified currency other than the unit of account (article 71(2)). It was decided that article 71 needed to be supplemented by a rule determining the currency of payment when the drawer or maker had failed to specify the currency of payment.

92. The view was expressed that in some countries the term "currency" meant physical currency in the form of coin or notes. The question might arise in such countries as to whether a payee was entitled under article 71(1) to demand payment in coin or notes. One approach to resolving this difficulty might be for the draft Convention to provide a comprehensive and extended definition of "currency" or "money" (e.g. as including immediately available credit). The Working Group was of the view that it would be difficult to formulate an acceptable definition of "currency" or "money" in view of the different meanings given to those terms under national legal systems. The Working Group decided to maintain the present approach under which the draft Convention contained no comprehensive definition of the term, but only provided that certain items which might be regarded as not being included within the meaning of those terms were in fact so included (article 4(11)).

F. *Rate of interest: instruments with floating rates of interest*

93. The Working Group noted that the Commission, at its seventeenth session, had considered the proposal that the draft Convention should allow the issuance of instruments with floating rates but had not taken a final decision on this proposal.[9] The Working Group considered this general proposal with the following qualification added: It shall be required that any adjustments to the original stated rate relate directly to the movement of an index which is both publicly disclosed and not subject to control of interested persons, in particular, the payee.

94. Under one view, the proposal should not be adopted since it created uncertainty as to the amount due at maturity. Such uncertainty was contrary to the principle that instruments should be certain on their face and, above all, might turn out to be to the detriment of the debtor. Therefore, the draft Convention should not condone or encourage the use of such instruments. If the proposal were to be accepted, it should at least be accompanied by a further safeguard such as an absolute interest rate ceiling or a limit on the maximum adjustment allowed.

95. The prevailing view, however, was in favour of the proposal. It was stated that promissory notes, and more recently also bills of exchange, with floating rates were being issued in large numbers and that their use was likely to increase. These instruments would continue to be used whether or not they were covered by the draft Convention. However, if they were covered, the draft Convention would gain considerably in attractiveness and acceptability, in particular since almost none of the existing national laws permitted such instruments to be negotiable.

96. Regarding the uncertainty inherent in a variable rate of interest, it was pointed out that the real cause of uncertainty lay in the economic situation with its fluctuation of rates of interest and of currency exchange. Instruments with floating interest rates were the response to that situation and the necessary cover could be obtained by certain types of credit. It was noted that any future adjustment did not necessarily work to the detriment of the debtor. It was also pointed out that the imposition of an absolute ceiling would defeat the object of an instrument with floating rates and that it was wellnigh impossible to fix an adequate ceiling. Above all, the qualification added to the proposal would ensure that the determinative source of adjustment was easily ascertainable and could not be influenced by the payee or any interested party to the detriment of the debtor.

97. The Working Group, after deliberation, was agreed that the proposal warranted serious consideration and that the Commission should be invited to consider inclusion of a provision which the secretariat was requested to prepare in consultation with the Study Group on International Payments and other banking experts. The secretariat was also requested to consider the need for redrafting certain other provisions (e.g. articles 1(2)(*b*), (3)(*b*) and 7(4)) with a view to clarifying the applicability of the Convention to instruments with floating interest rates.

[9] *Ibid.*, para. 50.

G. *Questions relating to article 8(2)*

98. The Working Group noted that article 8(2) allowed an instrument payable at a definite time to be accepted or endorsed or guaranteed after maturity with the result that the instrument was payable on demand as regards the acceptor, the endorser or the guarantor. It was pointed out that the precise effects of this rule, in particular with regard to the liability of an endorser, were not clearly set out in the draft Convention. It was asked, for example, whether the endorser in such case was secondarily liable and what exactly was the starting point and the duration of his liability. Since it was not clear whether the provision of article 51(*f*) applied or whether the effective time-limit was set by article 80(1)(*d*), a suggestion was made to include in the draft Convention a specific rule regulating this question.

99. The Working Group, after deliberation, decided not to include a specific rule in view of the fact that the situation envisaged in article 8(2) was not likely to occur frequently and that it was not feasible to provide specific rules for the many questions which possibly arose in this context.

H. *Article 11: incomplete instruments*

100. The Working Group noted that the Commission, at its seventeenth session, was in agreement with the policy underlying article 11 but had also expressed the view that certain aspects regarding completion should be clarified.[10] One such aspect was the question as to who could complete the instrument so as to make it effective as a bill or a note. It was noted that the uncertainty arose from the fact that the object of the two paragraphs of article 11 was not immediately apparent.

101. The Working Group, after an exchange of views, was agreed that paragraph (1) dealt with the formal requisites of an instrument irrespective of whether the person completing it had authority to do so, while paragraph (2) dealt with the consequences of a completion by a person without any authority or by a person who had authority but completed the instrument in a way not conforming with the terms of authority. It was felt that the term "authority", which had been used in an earlier draft, was more appropriate than the term "agreement".

102. The Working Group decided that this understanding should be made clear by revising the opening words of paragraph (2) as follows: "When such an instrument is completed without authority or otherwise than in accordance with the authority given". The secretariat was requested to make the necessary revisions to paragraph (2)(*a*).

I. *Article 16: clauses prohibiting further transfer*

103. During the discussion in the Commission,[11] it was noted that article 16 covered two situations: (*a*) the drawer or the maker issues an instrument excluding its transferability, and (*b*) an endorser makes a restrictive endorsement prohibiting further transfer. The Working Group shared the doubts expressed in the Commission as to the appropriateness of combining these two situations, as it might lead to confusion and uncertainty about the legal effects of such clauses.

104. Regarding the first situation, the Working Group was agreed that the rule laid down in article 16 was correct in providing that the instrument was not transferable.

105. Regarding the second situation, divergent views were expressed as to the appropriate consequences of such a restrictive endorsement. Under one view, the instrument should remain transferable but the endorser would not be liable to any subsequent transferee except his immediate endorsee. The prevailing view, however, was that a stipulation of the kind envisaged in article 16 should be taken literally and, thus, exclude further transfer by the endorsee, except for purposes of collection.

106. The Working Group was agreed that this solution, which accorded with the rule laid down in article 16, should be expressed in the context of article 20.

J. *Articles 30, 52, 58 and 63: legal effects of implied act or omission*

107. The Working Group was agreed that the exclusion of implied waivers in articles 52, 58 and 63 was justified, as had been generally agreed by the Commission.[12] However, as regards the exclusion of the words "or impliedly" in article 30,[13] the Working Group was agreed that the situation of an implied acceptance of a signature by a person whose signature was forged should be treated differently. While the appropriate result might be obtained from an applicable rule of general law based on a principle of estoppel or good faith, it was preferable to provide a uniform answer in the draft Convention.

K. *Article 34(2): exclusion of liability by drawer*

108. The Working Group considered the question whether the drawer should be permitted to disclaim liability for non-payment of the bill, a question on which opinions had been divided during the discussion in the Commission.[14] Under one view, article 34(2) should not permit such disclaimer, since permitting such disclaimer would make it possible for a bill of exchange to be issued and to circulate without a person being liable on it. Under another view, article 34(2) was acceptable in that it reflected actual practice and found its counterpart in some legal systems. Under yet another view, the drawer should be permitted to disclaim his liability for non-payment by the drawee or the acceptor in instances where a party other than the drawer was liable on the bill.

[10] *Ibid.*, para. 56.
[11] *Ibid.*, para. 73.
[12] *Ibid.*, para. 57.
[13] *Ibid.*, para. 58.
[14] *Ibid.*, para. 59.

109. The Working Group was in accord with the view of the Commission that article 34(2) should be revised to reflect the policy that a disclaimer by the drawer of his liability for non-payment should be effective provided another party was liable on the bill whereas a disclaimer of liability for non-acceptance might be effective even though no other party was liable on the bill.

L. *Article 42: guarantee of incomplete instrument*

110. The Working Group considered a proposal which had been accepted by the Commission that the draft Convention contain a provision according to which an instrument may be guaranteed before it had been signed by the drawer or the maker or while otherwise incomplete.[15] It was noted that article 38(1) permitted an incomplete instrument which satisfied the requirements set out in article 1(2)(*a*) to be accepted by the drawee before it had been signed by the drawer, or while otherwise incomplete. The Working Group decided that a provision should be included permitting an incomplete instrument which satisfied the requirements set out in article 1(2)(*a*) to be guaranteed.

M. *Article 42(2): guarantee to be written on instrument or on slip affixed thereto*

111. The Working Group noted that article 42(2) might be construed as prohibiting guarantees which did not appear on the instrument (e.g. were created on a separate document). It was also noted that guarantees were so created in practice. In order to clarify that such guarantees were not affected by the draft Convention, it was suggested that the words "under this Convention" be added after the opening words "A guarantee". It was observed, however, that the draft Convention in general did not deal with agreements created outside the instrument, and that the addition of these words in one instance might give rise to the argument that, in other instances where no such words were added, the Convention would exclude agreements created outside the instrument. The Working Group agreed with an observation to the effect that a guarantee could be given outside the instrument on a separate document and decided to retain article 42(2) without change. It requested the secretariat to refer to this possibility in any commentary to the draft Convention.

N. *Article 46: stipulation by drawer prohibiting presentment for acceptance*

112. The Working Group considered article 46 with a view to clarifying the legal nature and effects of stipulations prohibiting presentment for acceptance. The Working Group noted that under article 45(2) presentment was mandatory in the cases specified therein. To permit the drawer under article 46 to stipulate that the bill must not be presented for acceptance in those specified cases led to inconsistency. Article 46 should therefore be amended so as to deprive the drawer of the power to so stipulate. However, it was agreed that even in the cases under article 45(2) the drawer should have the power to stipulate that the bill must not be presented for acceptance before a specified date or before the occurrence of a specified event.

113. When presentment for acceptance was optional (article 45(1)), the Working Group was of the view that stipulations prohibiting or restricting presentment for acceptance (article 46(1)) might be permissible. However, the legal consequences if a bill was presented for acceptance contrary to such stipulations and not accepted should vary with the nature of the stipulations. In practice, stipulations prohibiting presentment and motivated by commercial considerations were sometimes included in a bill. If a bill was presented for acceptance notwithstanding such a stipulation, and acceptance was refused, the bill should not thereby be considered dishonoured. The Working Group noted that the provisions of article 46(1) and (2) were appropriate for these cases, and should be retained to deal with them. Stipulations were also sometimes included which, while not prohibiting presentment, excluded the liability of the drawer if acceptance were refused upon presentment. If acceptance was refused, the bill would be considered to be dishonoured, but an immediate right of recourse against the drawer would be excluded. Rights of recourse which might be available against other parties would be unaffected. The Working Group noted that these cases were governed by article 34(2). It was suggested that the distinction between a stipulation which prohibits presentment for acceptance and a stipulation which excludes liability for non-acceptance was subtle and may be difficult to apply in practice.

O. *Articles 48 and 52: bankruptcy of drawee*

114. During the consideration of the draft Convention by the Commission,[16] it had been noted that where the drawee had accepted a bill and had, after such acceptance but before maturity, become bankrupt, the draft Convention did not provide for the exercise of a right of recourse by the holder before the date of maturity of the bill (article 54(1)(*b*), (2)). It had been proposed during the discussion in the Commission that the draft Convention should provide an immediate right of recourse, before maturity, where the holder of an accepted bill learned of the bankruptcy of the acceptor before the date of maturity. The Working Group was in accord with the prevailing view in the Commission that this proposal should not be accepted.

P. *Article 51(h): presentment for payment at a clearing-house*

115. The Working Group considered a proposal made during the discussion in the Commission to add to article 51(*h*) the words "if in conformity with the rules of that clearing-house".[17] In support of this proposal, it was

[15] *Ibid.*, para. 61(*c*).

[16] *Ibid.*, para. 62.

[17] *Ibid.*, paras. 78–79.

noted that presentment for payment at a clearing-house might not be feasible under the rules of a particular clearing-house. There was wide agreement that due presentment at a clearing-house could occur only if such presentment could be made in conformity with the rules of the clearing-house or the applicable law.

116. The Working Group noted that under the law of some States an instrument was duly presented for payment when it was presented at a clearing-house in conformity with the rules of that clearing-house. Under the law of other States, however, due presentment occurred only when the instrument was conveyed through the clearing-house to the drawee or acceptor. It was noted that article 51(*h*) needed clarification as to when due presentment occurred under its terms. Certainty as to the time when presentment occurred was required for the application of other rules of the draft Convention (e.g. to ascertain the commencement of the time period within which protest for dishonour must be made: articles 54(1)(*a*) and 57(2)).

117. The Working Group decided that article 51(*h*) should be re-drafted with a view to providing that an instrument may be presented at a clearing-house when under the law of the place of the clearing-house or under the rules of the clearing-house such presentment constituted due presentment. However, the re-drafted article should not restrict the practice in some States under which instruments were presented to the drawer or acceptor through a clearing-house.

Q. *Article 66(2), (3): rate of interest recoverable*

118. The Working Group decided not to consider the rate of interest recoverable under article 66, as it was of the view that it was appropriate to decide this issue only at a future session of the Commission, or at a Diplomatic Conference which would consider the draft Convention.

R. *Article 68(3):* "ius tertii"

119. The Working Group considered a proposal made during the discussion in the Commission that article 68(3) should provide that, if the payer was notified of the claim of a third party to the instrument, the payer could make payment and be validly discharged unless the third person claiming the instrument provided security deemed adequate by the payer.[18]

120. It was noted that many legal systems provided a mechanism to deal with situations when a party to an instrument was faced with conflicting claims in respect of the instrument (e.g. the party may be permitted to discharge his obligations by depositing the sum claimed in court). Despite difficulties which might sometimes arise in using these mechanisms (e.g. it might be difficult to satisfy time-limits within which action had to be taken), it was preferable to rely on these mechanisms. The Working Group therefore did not adopt the proposal, and retained article 68(3) in its present wording on the understanding that no serious objections had been raised against the text of article 68(3) during the discussions at the Commission's seventeenth session. There was some support in the Working Group for a new drafting approach to article 68(3).

121. A view was expressed that the changes in the concepts of holder and protected holder decided upon at the thirteenth session of the Working Group required a re-consideration of article 68(3). Because of those changes, it might now be justifiable to give the holder greater rights by limiting the circumstances in which a party who paid a holder was not discharged of liability.

S. *Article 68(4)(a): delivery of instrument against payment*

122. The Working Group considered a suggestion that paragraph (4) should be reviewed as to its appropriateness in cases of instruments payable by instalments on successive dates (article 6(*b*)) and in cases of partial payment (article 69(1)).[19] It was noted that, on the one hand, the payee should not be required to deliver the instrument, and that, on the other hand, the payer needed to be protected in respect of his payment. It was noted that in respect of partial payment effect was already given to these considerations in article 69(5), which provided that the drawee or a party making partial payment may require that mention of the payment be made on the instrument and that a receipt therefore be given to him. It was decided that a provision on those lines should be included in respect of instruments payable by instalments.

T. *Article 69(1): partial payment*

123. The Working Group considered the divergent views expressed in the Commission as to the appropriateness of the rule contained in article 69(1).[20] Under one view, the holder should be obliged to take partial payment since that would, at least to some extent, be in the interest of prior parties. Under another view, the holder should not be obliged to take partial payment so as to leave it to the holder, who was entitled to full payment, to decide whether or not to accept partial payment in accordance with his interests and assessment of the risks involved. The Working Group decided that the holder should not be obliged to take partial payment, and retained the article in its present form.

Annex

Draft articles revised by the Commission or the Working Group

This annex sets forth all modifications to the draft Convention, as found in document A/CN.9/211, irrespective of whether

[18] *Ibid.*, para. 65.

[19] *Ibid.*, para. 81.

[20] *Ibid.*, para. 82.

the modifications were decided by the Commission at its seventeenth session or by the Working Group at its thirteenth or fourteenth session. For ease of reference, the relevant paragraphs of the pertinent report of the Working Group are added.

Article 1: opening words of paragraphs (2) and (3); new (5)

(See A/CN.9/273, paras. 67–68)

(2) An international bill of exchange is a written instrument *with the heading "International bill of exchange (Convention of ...)"* which: ...

(3) An international promissory note is a written instrument *with the heading "International promissory note (Convention of ...)"* which: ...

(5) *This Convention does not apply to cheques.*

Article 3

(See A/CN.9/273, para. 74)

In the interpretation of this Convention, regard is to be had to its international character, the need to promote uniformity in its application *and the observance of good faith in international transactions.*

Article 4(7)

(See A/CN.9/261, paras. 13–14; A/CN.9/273, paras. 22–23)

(7) "Protected holder" means the holder of an instrument which, *when he took it, was complete or, if an incomplete instrument within the meaning of article 11(1), was completed in accordance with authority given,* provided that, when he became a holder:

(*a*) He was without knowledge of a claim to or defence upon the instrument referred to in article 25 or of the fact that it was dishonoured by non-acceptance or non-payment; and

(*b*) The time-limit provided by article 51 for presentment of that instrument for payment had not expired.

Article 4(11)

(See A/CN.9/273, paras. 88–92)

(11) "Money" or "currency" includes a monetary unit of account which is established by an intergovernmental institution *or by agreement between two or more States.*

Article 11(2)

(See A/CN.9/273, paras. 101–102)

(2) When such an instrument is completed *without authority or otherwise than in accordance with the authority given:*

(*a*) A party who signed the instrument before the completion may invoke *such lack of authority* as a defence against a holder *who* had knowledge *of such lack of authority* when he became a holder;

(*b*) ...

Article 16

(See A/CN.9/273, para. 104)

When the drawer or the maker has inserted in the *instrument such* words as "not negotiable", "not transferable", "not to order", "pay (X) only", or words of similar import, *the instrument may not be transferred except for purposes of collection.*

Article 20, new (3)

(See A/CN.9/273, paras. 105–106)

(3) *When an endorsement contains the words "not negotiable", "not transferable", "not to order", "pay (X) only", or words of similar import, the instrument may not be transferred further except for purposes of collection.*

Article 23

(See A/CN.9/261, paras. 38–39; A/CN.9/273, para. 35)

(1) If an endorsement is forged, *the person whose endorsement is forged or any party who signed the instrument before the forgery has the right to recover compensation* for any damage that he may have suffered because of the forgery against:

(*a*) The forger,

(*b*) The person to whom the instrument was directly transferred by the forger,

(*c*) *A party or the drawee who paid the instrument directly to the forger.*

(2) *However, an endorsee for collection shall not be liable under paragraph (1) if, at the later of:*

(*a*) *The time he receives the proceeds of the instrument or*

(*b*) *The time at which he accounts to his principal for them,*

he was without knowledge of the forgery, provided that such absence of knowledge was not due to his negligence.

(3) *Also, a party or the drawee who pays an instrument shall not be liable under paragraph (1) if, at the time he paid the instrument, he was without knowledge of the forgery, provided that such absence of knowledge was not due to his negligence.*

(4) *Except as against the forger, the damages recoverable under paragraph (1) may not exceed the amount referred to in article 66 or 67.*

Article 23 bis

(See A/CN.9/261, paras. 47–48; A/CN.9/273, para. 35)

(1) *If an endorsement is made by an agent without authority or power to bind his principal in the matter, the principal or any party who signed the instrument before such endorsement has the right to recover compensation for any damage that he may have suffered because of such endorsement against:*

(*a*) The agent,

(*b*) *The person to whom the instrument was directly transferred by the agent,*

(*c*) *A party or the drawee who paid the instrument directly to the agent.*

(2) *However, an endorsee for collection shall not be liable under paragraph (1) if, at the later of:*

(*a*) *The time he receives the proceeds of the instrument or*

(*b*) *The time at which he accounts to his principal for them,*

he was without knowledge that the endorsement did not bind the principal, provided that such absence of knowledge was not due to his negligence.

(3) *Also, a party or the drawee who pays an instrument shall not be liable under paragraph (1) if, at the time he paid the instrument, he was without knowledge that the endorsement did not bind the principal, provided that such absence of knowledge was not due to his negligence.*

(4) *Except as against the agent, the damages recoverable under paragraph (1) may not exceed the amount referred to in article 66 or 67.*

Article 25, new (2 bis*), (3)*

(See A/CN.9/261, paras. 18–19; A/CN.9/273, para. 24)

(2 *bis*) *A holder who is not a protected holder is subject to a defence under paragraph (1)*(b) *or to a claim under paragraph (2) of this article only if he took the instrument with knowledge of such defence or claim or if he obtained the instrument by fraud or participated at any time in a fraud affecting it.*

(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 *or forgery*.

Article 26(1)(a)

(See A/CN.9/273, para. 10)

(1) A party may not set up against a protected holder any defence except:

(*a*) Defences under articles 29(1), 30, 31(1), 32(3), 49, 53, *59* and 80 of this Convention;

Article 27

(See A/CN.9/273, paras. 26–27)

(1) The transfer of an instrument by a protected holder vests in any subsequent holder the rights to and upon the instrument which the protected holder *had*.

(2) *Such rights are not vested in a subsequent holder if:*

(*a*) He participated in a transaction which gives rise to a claim to, or a defence upon, the instrument;

(*b*) *He has previously been a holder, but not a protected holder.*

Article 34(2)

(See A/CN.9/273, para. 109)

(2) The drawer may exclude or limit his own liability *for acceptance or for payment* by an express stipulation on the bill. Such stipulation has effect only with respect to the drawer. *A stipulation excluding or limiting liability for payment is operative only if another party is or becomes liable on the bill.*

Article 41

(See A/CN.9/273, paras. 38–58)

(1) *Unless otherwise agreed, a person who transfers an instrument represents to the holder to whom he transfers the instrument that:*

(*a*) *The instrument does not bear any forged or unauthorized signature;*

(*b*) *The instrument has not been materially altered;*

(*c*) *At the time of transfer, he has no knowledge of any fact which would impair the right of the transferee to payment of the instrument against the acceptor or, in the case of an unaccepted bill, the drawer, or against the maker of a note.*

(2) *Liability of the transferor under paragraph (1) is incurred only if the transferee took the instrument without knowledge of the matter giving rise to such liability.*

(3) *Where the transferor is liable under paragraph (1), the transferee may recover, even before maturity, the amount paid by him to the transferor, plus interest calculated at the rate of ..., upon return of the instrument.*

Article 42, new (6)

(See A/CN.9/273, para. 110)

(6) *A guarantor may not raise as a defence to his liability the fact that he signed the instrument before it was signed by the person for whose account he is a guarantor, or while the instrument was incomplete.*

Article 46

(See A/CN.9/273, paras. 112–113)

(1) The drawer may stipulate on the bill that it must not be presented for *acceptance before* a specified date or before the occurrence of a specified event. *Except where a bill must be presented for acceptance under article 45(2), the drawer may stipulate that it must not be presented for acceptance.*

(2) If a bill is presented for acceptance notwithstanding a stipulation permitted under paragraph (1) and acceptance is refused, *the drawer, the endorser, and their guarantors are not liable for dishonour by non-acceptance.*

*Article 51(*h*)*

(See A/CN.9/273, para. 117)

(*h*) *An instrument which is presented at a clearing-house is duly presented for payment if the law of the place where the clearing-house is located or the rules or customs of that clearing-house so provide.*

Article 52(2)(a)

(See A/CN.9/273, para. 107)

(2) Presentment for payment is dispensed with:

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

Article 58(2)(a)

(See A/CN.9/273, para. 107)

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

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

Article 63(2)(b)

(See A/CN.9/273, para. 107)

(2) Notice of dishonour is dispensed with:

(*a*) ...

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

Article 68(4), new (a bis)

(See A/CN.9/273, para. 122)

(a bis) In the case of an instrument payable by instalments at successive dates, the drawee or a party making a payment, other than payment of the last instalment, may require that mention of such payment be made on the instrument and that a receipt therefor be given to him.

Article 71, new (1 bis)

(See A/CN.9/273, para. 91)

(1 bis) When the amount of an instrument is expressed in a monetary unit of account within the meaning of article 4(11) and does not specify a currency of payment, the instrument is to be paid in the currency of the place of payment. However, this provision does not apply if, between the person making the payment and the person receiving it, the unit of account is transferable.

2. Draft Convention on International Bills of Exchange and International Promissory Notes: text of draft articles as revised by the Commission at its seventeenth session or by the Working Group on International Negotiable Instruments at its thirteenth or fourteenth session: note by the secretariat (A/CN.9/274)

[Original: Chinese, English, French, Russian and Spanish][a]

This note contains a consolidation of the 1981 draft text set forth in document A/CN.9/211 and the revised draft articles set forth in the annex to document A/CN.9/273. Incorporated are thus all modifications decided by the Commission at its seventeenth session or by the Working Group on International Negotiable Instruments at its thirteenth or fourteenth session. It should be noted that, apart from these modifications adopted by the Commission or the Working Group, there are a number of issues and proposals which the Working Group invited the Commission to consider at its nineteenth session and which are not incorporated in this note. Matters of this kind are, for example, suggestions for inclusion of new provisions (e.g. covering instruments with floating rates of interest; see A/CN.9/273, paras. 93–97) or proposals for redrafting accompanied by alternative wordings (e.g. on article 26(1)(*b*); see A/CN.9/273, paras. 11–19) or other submissions for possible consideration by the Commission at its nineteenth session (e.g. questions relating to article 2; see A/CN.9/273, paras. 69–71).

[a]For consideration by the Commission, see Report, chapter II (Part One, A, above).

Draft Convention on International Bills of Exchange and International Promissory Notes

Chapter I. Sphere of application and form of the instrument

Article 1

(1) This Convention applies to international bills of exchange and to international promissory notes.

(2) An international bill of exchange is a written instrument with the heading "International bill of exchange (Convention of ...)" which:

(*a*) Contains, in the text thereof, the words "international bill of exchange (Convention of ...)";

(*b*) Contains an unconditional order whereby the drawer directs the drawee to pay a definite sum of money to the payee or to his order;

(*c*) Is payable on demand or at a definite time;

(*d*) Is dated;