appear that the reference in article 41(1)(*c*) loses its justification in respect of those claims and defences covered by the new paragraph (2 *bis*).

48. However, article 41(1)(*c*) remains relevant as regards other defences, which include those listed in article 25(1)(*a*), (*c*) and (*d*). Since these remaining defences essentially relate to discharge or absence of liability, there does not appear to be any reason why, if knowledge on the part of the transferor is not required in respect of the defects listed in article 41(1)(*a*) and (*b*), knowledge should be required in respect of the defects under subparagraph (*c*). Consequently, the above redraft of article 41(2) retains the requirement of knowledge merely in respect of the defects listed in subparagraph (*d*).

49. Subparagraph (*d*) has been retained even though dishonour by non-acceptance or non-payment may give rise to discharge of liability under article 59 and would thus fall under article 41(1)(*c*). However, liability under article 41 should also exist in cases where protest has been made upon dishonour and liability on the instrument is thus not discharged. In the latter case, the value of the instrument would be affected and therefore only a transferor who knew about the dishonour should be held liable in this respect.

50. Paragraph (3) fixes a limit of the liability incurred under paragraph (1) by establishing a ceiling for the amount recoverable by the transferee. Variant A implements the decision of the Working Group that the amount which the holder may recover from a transferor by mere delivery should be limited to the amount he paid, or the value he gave, for the instrument plus interest which, in a given case, may be less than the amount of the instrument. [13]

[13]A/CN.9/261, para. 57.

51. Variant B has been added by the secretariat for consideration by the Working Group for the following reasons. The amount of the instrument provides a clear-cut ceiling, while the value received by the transferor may be less easily determined when goods or services were given to him by the holder. This ceiling would also better accord with the basis of the liability, namely, that the holder received an instrument which was not what the transferor represented it to be.

52. It may be noted that paragraph (3) merely regulates the limit of liability, without specifying which particular remedies may be available and how the recoverable amount would be assessed. While thus recovery of damages could be accommodated as well as rescission of contract, these two methods should be taken into account when selecting the most acceptable variant of paragraph (3). In particular, if variant B were chosen it should be considered whether this ceiling would apply only to recovery of damages or also to rescission of contract, i.e. limit the amount or value to be returned by the transferor to the holder to the amount of the instrument.

53. As regards assessment of damages, it is submitted that this is to be done in accordance with the applicable national law which, in most likelihood, will provide that the recoverable loss consists of the difference between what the holder justifiedly expected to receive and what he in fact received. The assessment is easily made after maturity when the holder can clearly see the extent to which the defect affects his right to obtain payment. As regards assessment of damages before maturity or dishonour, a practical way of determining the loss due to the defect or infirmity under article 41(1) would be to ascertain the actual or probable market price which a buyer, who knows about the defect, would pay for the instrument.

4. Draft Convention on International Bills of Exchange and International Promissory Notes: response to requests of the Working Group on International Negotiable Instruments: note by the secretariat: (A/CN.9/285)

[Original: English]

1. At its fourteenth session, the Working Group on International Negotiable Instruments requested the secretariat to undertake certain enquiries or to prepare certain draft provisions in implementation of decisions made by it in respect of the draft Convention on International Bills of Exchange and International Promissory Notes and to present its conclusions to the Commission for consideration. This note conveys the conclusions of the secretariat in these matters.

I. Definition of money or currency, article 4(11)

2. The definition of money or currency in article 4(11) as found in document A/CN.9/211 was as follows:

"[(11) 'Money' or 'currency' includes a monetary unit of account which is established by an intergovernmental institution even if intended by it to be transferable only in its records and between it and persons designated by it or between such persons.]"

The Working group adopted a revised text as follows:

"(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."

In doing so, the Working Group noted that there might be implications to its decision of which it was unaware.

Accordingly, it requested the secretariat to consult with the International Monetary Fund and to report to the Commission (A/CN.9/273, para. 90).

3. The International Monetary Fund has informed the secretariat that it sees no problems arising out of the new definition for drawing or making instruments under the Convention in SDRs or similar units of account established by an intergovernmental institution.

4. Two considerations in respect of monetary units of account established by agreement between two or more States have been noted and are brought to the attention of the Commission:

— The definition would include the units of account denominated in specified quantities of gold found in several important liability conventions. These do not appear to be among the units of account contemplated by the Working Group.

— Units of account created by agreement of two or more States for specific purposes may be terminated when that purpose is fulfilled. It is possible that no means of converting those units into replacement currencies or units of account would be devised, especially if the States concerned were unaware that private obligations had been created in that unit of account.

II. Floating interest rates

Provision permitting floating interest rates

5. The Working Group at its fourteenth session requested the secretariat to prepare in consultation with the UNCITRAL Study Group on International Payments a text permitting the issuance of instruments under the Convention with floating interest rates (A/CN.9/273, para. 97). In this respect, the following text is suggested as a new paragraph (5) of article 7.

> "(5) A rate at which interest is to be paid may be expressed either as a definite rate or as a variable rate. For a variable rate to qualify for this purpose, it must vary in accordance with provisions stipulated in the instrument and those provisions must refer to one or more other rates of interest [that are both publicly available and not subject to the control of the payee]."

6. Proposed article 7(5) states two definite requirements for a variable or floating interest rate provision to qualify as a permissible interest provision: the means of calculating the rate must be stipulated in the instrument and the rate must vary in accordance with one or more other interest rates. The first of these requirements is in conformity with general concepts of negotiable instruments law that the rights of the parties must be determined or determinable from the face of the instrument. The second requirement, that the interest rate must vary in accordance with one or more other interest rates, is in conformity with the idea that a floating interest rate should reflect changes in the cost of funds in a relevant financial market. If the interest rate provision did not meet either requirement, article 7(4) would apply and the instrument would bear no interest.

7. The Working Group suggested two additional requirements: any adjustments to the original stated rate should relate directly to the movement of an index which is publicly disclosed and the index should not be subject to the control of interested persons, in particular, the payee (A/CN.9/273, para. 93). Those two requirements are found in proposed article 7(5) in square brackets. Although those proposed requirements should be followed in practice, stating them as requirements for validity of a floating interest rate provision may create potential difficulties. Many floating interest rate provisions refer to particular rates offered by named banks or to the average of several such rates. If these rates are not published but are available upon enquiry, as is common, it may be questioned whether they are publicly disclosed. Similarly, if the payee is a large bank in the same city as other banks whose rates are the reference rates, the argument might be subsequently raised that the payee had sufficient influence over those rates to have exercised "control". As pointed out above, if a floating interest rate provision did not meet the stated requirements, under article 7(4) the instrument would bear no interest.

Alternative consequences of invalidity of floating interest rate provision

8. The consequences arising out of the invalidity of the floating interest rate provision could be reduced by providing that interest would be payable at the rate specified in article 66(2). This solution could also be used to solve the problem arising when the numerical value of the rate of interest cannot be calculated for any reason, either at the time of issue of the instrument or later. This can occur because the provision as drafted, although adequate on its face, cannot be applied or because the referenced interest rate or rates are no longer available. Although the floating interest rate provision in the instrument may provide for alternative means of calculating the interest rate if the first method cannot be applied, the alternative means of calculating the interest rate may also be impossible to apply. The suggested reference to article 66(2) could appear in article 7(6) as follows:

> "(6) If a variable rate does not qualify under the preceding paragraph or for any reason it is not possible to determine the numerical value of the variable rate for any period, interest shall be payable for the relevant period at the rate specified in article 66(2)."

9. Even if this suggestion was followed, there would be a difference between the interest payable for one or more periods as envisaged under the floating interest rate provision in the instrument and the interest payable under article 66(2). That difference could be to the benefit of either party. Therefore, it may be thought that where proposed article 7(6) was to be applied, either the holder or the person liable on the instrument should have the right to declare the instrument immediately due and payable by notice to the other party. This latter sugges-

tion would seem to be even more appropriate if the consequence following from the invalidity of the floating interest rate provision was that no interest was payable by application of article 7(4).

Other matters

10. The secretariat was also requested by the Working Group to consider the need for redrafting other provisions (e.g. articles 1(2)(*b*), 1(3)(*b*) and 7(4)) with a view to clarifying the applicability of the Convention to instruments with floating interest rates (A/CN.9/273, para. 97). There seems to be no need to redraft articles 1(2)(*b*) and 1(3)(*b*) since the instrument would be for a definite sum as intended by those provisions when the interest rate was determined or determinable as described above. Article 7(4) need not be redrafted as a result of the proposed articles 7(5) and 7(6). Nevertheless, the possibility that interest might be payable at the rate specified in article 66(2) when the variable interest rate provision in the instrument could not be applied for some reason, raises the question whether interest should also be payable at the rate specified in article 66(2) in the cases currently covered by article 7(4), i.e. when payment of interest has been stipulated in the instrument but no rate, whether fixed or not, has been indicated. However, it should be noted that parties who did not indicate an interest rate when the stipulation for interest was part of a printed form may have intended that there be no interest applicable to the instrument.

11. During discussions of article 66(2) it was noted that, while in some countries there was no official rate (bank-rate), in others there were two or more. In order to solve the latter problem, the last sentence of article 66(2) might read "In the absence of any such rate or in the presence of more than one such rate, ...".

III. Model forms

12. In order to aid users in designing forms that would satisfy the requirements of the Convention, the Working Group requested the secretariat to submit to the Commission at its nineteenth session model forms of instruments to be included in an annex to the Convention (A/CN.9/273, para. 67). These model forms were not to be mandatory.

13. In the context of the discussion in the Working Group, the purpose of the model forms was to aid in distinguishing instruments that were to be governed by the Convention from those instruments that would be governed by other legal rules. This involves, in particular, the requirement that the words "international bill of exchange (Convention of ...)" or "international promissory note (Convention of ...)" appear in both the heading and the text of the instrument. The model forms were not expected to provide guidance for other matters that might be found in an instrument. As a result, the model forms suggested by the secretariat are limited to the essential elements of these instruments.

International bill of exchange (Convention of ...)

________________ __________
place where drawn date

Pay against this international bill of exchange (Convention of ...) [*specify on demand or definite time*] the sum of

________________ __________
in words in figures

to [the order of] ________________ of

____
place of payee Payable at

To __________ __________
name of drawee

__________ __________
place of drawee

__________ __________
signature of drawer place of drawer

International promissory note (Convention of ...)

________________ __________
place where made date

[*specify on demand or definite time*] I/we promise to pay against this international promissory note (Convention of ...) to [the order of]

__________ __________
name of payee place of payee

the sum of

________________ __________
in words in figures

[with interest payable ....]

Payable at

__________ __________
signature of maker

__________ __________
place of maker