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UNITED NATIONS

**GENERAL
ASSEMBLY**



Distr.
GENERAL

A/CN.9/214

27 May 1982

28395

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Fifteenth Session
New York, 26 July - 6 August 1982

COMMENTARY

ON

DRAFT CONVENTION ON INTERNATIONAL CHEQUES

Report of the Secretary-General

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INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL), at its fifth session, after having taken note of the Secretary-General's report setting forth a draft uniform law on international bills of exchange accompanied by a commentary, entrusted its Working Group on International Negotiable Instruments with the preparation of a final draft uniform law and also requested the Group to consider the desirability of preparing uniform rules applicable to international cheques. 1/
2. The Working Group, in the light of replies received to a questionnaire circulated to banking and trade institutions, concluded that the formulation of uniform rules for international cheques was desirable and the application of the draft Convention on International Bills of Exchange and International Promissory Notes could be extended to international cheques. The Commission at its twelfth session authorized the Working Group to proceed accordingly. 2/
3. The Working Group on International Negotiable Instruments adopted the draft Convention on International Bills of Exchange and International Promissory Notes (A/CN.9/211) and the draft Convention on International Cheques (A/CN.9/212) at the close of its eleventh session (August 1981), after a Drafting Group had reviewed both drafts and established corresponding language versions (in Chinese, English, French, Russian and Spanish).
4. The Commission at its fourteenth session requested the Secretary-General, after the completion of the texts by the Working Group, to circulate them, together with a commentary, to all Governments and interested international organizations for comments. At the request of the Secretariat the commentary on the two draft Conventions was prepared by Professor Aharon Barak and Professor Willem Vis who as former members of the Commission's Secretariat and subsequently as consultants assisted the Working Group on International Negotiable Instruments in the drawing up of the draft Conventions. The commentary on the draft Convention on International Bills of Exchange and International Promissory Notes is set forth in document A/CN.9/213, the commentary on the draft Convention on International cheques is set forth in the present report.
5. An account of the preparatory work on international negotiable instruments may be found in the introduction to the commentary on the draft Convention on International Bills of Exchange and International Promissory Notes (A/CN.9/213).

1/ Report of the Commission on the work of its fifth session (1972), Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717), para. 61.

2/ Report of the Commission on the work of its twelfth session (1979), Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17), para. 44(5.).

Comparative table of the numbering of the articles of the draft Convention adopted by the Working Group and of the draft articles as considered by it

The articles of the Convention have been numbered consecutively only upon its adoption by the Working Group. Until then, the original numbering of the draft articles has generally been maintained throughout the various stages of the deliberations by the Working Group in order to facilitate reference to the relevant reports of the Working Group; where, exceptionally, draft provisions have been transferred or combined with other provisions, their previous location is also indicated in the following table.

The original numbering may also assist in a comparison between provisions on bills or notes and on cheques since each draft article on cheques had been numbered to correspond to the draft article on bills or notes which relates to the same or a similar issue.

Number of article in Convention	Number of previous draft article	Number of article in Convention	Number of previous draft article
1	1	22	20
2	3	23	21
3	α	24	21 bis
4	β(1)	25	22
5	4	26	23
6	5	27	24
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7	6	29	25 bis (earlier 25(4) and 68(2))
8	7	30	26
9	7 bis	31	27(1,2)
10	8(1,2)	32	28
11	9	33	29
12	10	34	30
13	11	35	30 bis
14	13	36	X (between 34 and 41)
15	New Article (between 13 and 13 bis)	37	34
16	13 bis	38	41
17	15	39	42
18	16	40	43
19	17	41	44
20	18	42	45
21	19	43	53
		44	54

Number of article in Convention	Number of previous draft article	Number of article in Convention	Number of previous draft article
45	55	63	72
46	56	64	74
47	B(2)	65	74 bis
48	57	66	74 ter
49	58	67	78
50	59	68	A
51	61	69	B
52	60	70	C
53	62	71	E
54	63	72	F
55	64	73	80
56	65	74	81
57	66	75	82
58	66 bis	76	83
59	67	77	84
60	68(1)	78	85
61	70	79	79
62	71		

Abbreviations used in the commentary

BEA:	Bills of Exchange Act, 1882 (United Kingdom)
Cheques Act:	Cheques Act, 1957 (United Kingdom)
Convention:	Draft Convention on International Cheques, as adopted by the UNCITRAL Working Group on International Negotiable Instruments (A/CN.9/212)
Geneva Convention of 1931:	Convention Providing a Uniform Law for Cheques (Geneva, 1931)
UCC:	Uniform Commercial Code (United States)
ULC:	Uniform Law on Cheques, set forth in Annex I to the Geneva Convention of 1931

COMMENTARY

ON

DRAFT CONVENTION ON INTERNATIONAL CHEQUES

CHAPTER ONE. SPHERE OF APPLICATION AND FORM OF THE CHEQUE

Article 1

- (1) This Convention applies to international cheques.
- (2) An international cheque is a written instrument which:
 - (a) Contains, in the text thereof, the words "international cheque (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 or to bearer;
 - (c) Is drawn on a banker;
 - (d) Is dated;
 - (e) Shows that at least two of the following places are situated in different States:
 - (i) The place where the cheque is drawn;
 - (ii) The place indicated next to the name or the signature of the drawer;
 - (iii) The place indicated next to the name of the drawee;
 - (iv) The place indicated next to the name of the payee;
 - (v) The place of payment;
 - (f) Is signed by the drawer.
- (3) Proof that the statements referred to in paragraph (2) (e) of this article are incorrect does not affect the application of this Convention.

Relevant legislation

BEA - sections 3 and 73

UCC - section 3-103

ULC - articles 1, 2, 3 and 5

Cross references

Definite sum of money: article 8

Payable on demand: article 11

Payable at a definite time: article 11

Money: article 6(9)

Drawee: article 6(2)

Banker: article 6(3)

Commentary

1. This article provides the rules for determining when a written instrument qualifies as an "international cheque" under the Convention. If an instrument so qualifies the Convention is applicable. The definition of an international cheque is set forth in paragraph (2) which makes clear that the use of an instrument governed by the provisions of this Convention is entirely optional. The initial choice to use a cheque subject to the Convention is exercised by the drawer. He may do so if certain international elements are present, but he is under no obligation to draw a cheque under the Convention. Persons other than the drawer are bound by the provisions of the Convention by virtue of their signature on the international cheque or by taking it up. As regards the applicability of this Convention, see also article 2.

Paragraph (1)

2. This paragraph is of a declaratory character.

Paragraph (2)

3. This paragraph defines an international cheque, i.e. it lays down the basic formal requisites with which a cheque must comply in order to be an international cheque governed by this Convention. Non-compliance of a cheque with these requisites makes the Convention inapplicable. However, it is to be noted that an incomplete cheque may be completed in accordance with article 13. The inapplicability of this Convention is the sole consequence of non-compliance with paragraph (2); such non-compliance does not interfere with the validity of the cheque under applicable national law (e.g., the law of the place of drawing or of the place of issuance).

"a written instrument"

4. The term "written" is not defined in the Convention. This term, in the context in which it is here used, would include any mode of representing or reproducing words in visible form, such as handwritten, typed or printed.

5. Subject to the requirements laid down in paragraph (2), the validity of a cheque as an international cheque is not dependent on the use of any specific wording or any specific language.

Formal requisites of an international cheque

6. Sub-paragraphs (a) to (f) set forth the formal requisites of a cheque.

Sub-paragraph (a)

7. An instrument is valid as an international cheque under the Convention only when the drawer, in the text thereof, has inserted the words "international cheque (Convention of ...)". This designation, which expresses the intent of the parties that their liability on the cheque is governed by the Convention, must be incorporated "in the text" of the cheque. Such designation would not meet the requirement of sub-paragraph (a) if it appeared outside the text, as where it would be printed or stamped in the margin of the cheque. The requirement is intended to guard against altering the character of a cheque after its issuance.

Sub-paragraph (b)

8. An international cheque must be an "unconditional order" (it must not be payable upon a contingency) to pay a "definite sum of money" (as defined in article 8). The sum is payable to the "payee" or to bearer.
9. The wording of sub-paragraph (b) permits a drawer to draw an international cheque on himself or to draw it payable to himself (see also article 12).
10. The words "or to his order" have been added after the words "to the payee" because of a well-established practice in certain common law countries to draw cheques "to the order of" a payee. However, the omission of the words "or to his order" does not prevent the cheque from being a negotiable instrument under this Convention. Therefore, an international cheque may be drawn "pay to X", "pay to the order of X", "pay to X or to his order", or "pay to bearer".

Sub-paragraph (c)

11. An instrument in order to be a cheque under this Convention must be drawn on a banker. Banker is defined in article 6 (3) as including any person or institution assimilated to a banker.

Sub-paragraph (d)

12. The date of the instrument is relevant in the context of other provisions of this Convention, such as article 43 (b).

Sub-paragraph (e)

13. International cheques are intended to be used in international payment transactions. Therefore, the Convention should be applicable only when elements are present evidencing the international character of the payment transaction. Consideration was given, during the preparatory stage of the work, to the feasibility of linking the test of internationality to the requirement that an international cheque be used solely to settle international transactions, such as an international sale of goods, or a test geared to potential conflict of law situations. These tests were not retained because they were considered impracticable and uncertain. Instead, preference was given to the approach reflected in sub-paragraph (e) which requires that the elements of internationality be apparent from the face of the instrument.

14. Sub-paragraph (e) requires that at least two of the following places indicated on the cheque be situated in different States: the place of drawing, the place indicated next to the name or the signature of the drawer, the place indicated next to the name of the drawee, the place indicated next to the name of the payee, and the place of payment. The analysis of this test shows that it embraces the majority of cases in which there is an international payment transaction and also the principal situations in which conflicts of law may arise. Sub-paragraph (e) does not require that a street address and the name of a town appear on the cheque. For the purpose of internationality it suffices for the cheque to mention two different States. Thus a cheque drawn by J. Brown, Australia, made payable to A. Petrov, Bulgaria, would meet the requirement of sub-paragraph (e).

Sub-paragraph (f)

15. The order to pay, contained in the cheque, is an order that can only be given by the drawer. His signature is an indispensable element of the validity of a writing as a cheque. If the signature of the drawer is lacking, the writing cannot be made into a cheque by completion (cf. article 13).

16. A cheque may be drawn by two or more drawers (cf. article 12(1)(b)).

Paragraph (3)

17. The security of transactions in connexion with international cheques depends on a clear and indisputable identification of the legal régime. To this end, paragraph (2) (a) requires that the cheque contain in its text the words "international cheque", followed by the words "(Convention of ...)". In addition, under paragraph (2) (e), a cheque, in order to be subject to this Convention, must show that at least two places, as specified, are situated in different States. The requisite of "internationality" consequently must appear from the statements made on the cheque. These rules are strengthened by the rule of paragraph (3) whereby the applicability of this Convention cannot be placed in doubt by controverting the statements made on the face of the cheque in conformity with paragraph (2) (e).

18. Paragraph (3) has the same effect as a provision that, for the purpose of application of the Convention, the appearance of international elements, required under paragraph (2) (e), constitutes an irrebuttable presumption. Therefore, an incorrect statement as to the place of drawing, etc., so as to bring the cheque under the Convention, does not thereby make the cheque invalid as an international cheque, and cannot be a defence to be raised against a holder, even if the holder, when taking the cheque, had knowledge of the fact that a statement was incorrect. To provide otherwise would lend grounds for casting doubts on the applicability of the Convention, and would impair the circulation of the international cheque.

19. Incorrect or false statements made on a cheque as to the international elements may of course be considered by a State as violating its law.

* * *

Article 2

This Convention applies without regard to whether the places indicated on an international cheque pursuant to paragraph (2) (e) of article 1 are situated in Contracting States.

Cross reference

Definition of "international cheque": article 1 (2)

Commentary

1. The sole requirement for the Convention's applicability is that the cheque is an international cheque, i.e. a cheque which complies with the formal requirements laid down in article 1 (2). Under this test, the forum of a Contracting State would apply the Convention, and not its domestic law or the negotiable instruments law of a foreign State which, through the application of conflict rules, might otherwise be applicable.

2. The provision of article 2 may be illustrated by the following example. A cheque containing, in the text thereof, the words "international cheque (Convention of ...)" (see article 1 (2) (a)) on its face shows that it is drawn in State X on a drawee-banker in State Y. Neither X nor Y is a Contracting State. The payee endorses the cheque to E. The drawee dishonours the cheque by non-payment and E requests the drawer to pay the cheque. The drawer asserts a defence (for instance, failure by E to observe applicable formalities as to protest), and the holder brings his claim before the court of a Contracting State. By virtue of article 2, the Convention is applicable, and the rights and liabilities of all parties to the cheque are governed by the Convention, irrespective of the place where each separate contract on the cheque was made, where the cheque was dishonoured, or where protest was made or should have been made. This rule on the applicability of the Convention thus supplants the various rules on conflict of laws that might otherwise be applicable.

3. In substance, article 2 gives effect to the intention of the parties that their legal relationships on the cheque are to be governed by the Convention, in accordance with the statement on the cheque. Thus parties signing an international cheque as drawer, endorser, or guarantor thereby manifest their intention that their liabilities on the cheque be governed by the Convention. The same may be said of a person who takes the cheque as transferee, holder or protected holder. The application of the Convention to legal relationships between parties to an international cheque on the sole ground that the cheque is an international cheque responds therefore to the reasonable expectations of the parties.

4. Of course, the obligation to apply the Convention in the circumstances defined in articles 1 and 2 is incumbent on Contracting States only. Consequently, whether the forum of a non-contracting State would apply the Convention to a cheque that complies with the requirements set forth in article 1 (2) would depend on the conflict of law rules of that forum. Presumably, the forum of a non-contracting State would consider such a cheque to be an international cheque subject to the Convention if its conflict rules referred to the law of the country where the cheque was drawn and if that country is a Contracting State. But in other factual settings a non-contracting State may apply the rules of the national law rather than this Convention. In such cases, an instrument drawn as an international cheque under the Convention, might not qualify as a cheque under the applicable law. The Convention seeks to meet that potential problem by laying down, in article 1 (2), requisites that are in substance similar to those which in the principal legal systems are considered to be the minimum requirements for an instrument to qualify as a cheque. Hence, the presence on an instrument of the requisites under article 1 (2) will, in most cases, also qualify the instrument as a cheque under whatever national law may be applicable. Therefore, article 1 (2) helps to ensure that an instrument drawn pursuant to its provisions will qualify as a cheque even if the forum of a non-contracting State applies its own law or, by reason of its conflict rules, applies the law of another non-contracting State. However, there may be cases where an instrument that satisfies the requisites of article 1 (2) will not meet one of the requirements imposed by a national law.

5. Consideration has been given to adding a provision that the Convention would be applicable only if the instrument was drawn, or issued in a Contracting State. The principal effect of such a rule would be to discourage persons from drawing international cheques in non-contracting States and thereby reduce the complications that might result from the application of conflict rules by the fora of non-contracting States. Such a rule limiting the applicability

of the Convention has not been incorporated in the Convention. Under this Convention a person is given the opportunity to draw, endorse or guarantee an international cheque without regard to whether it is drawn in a Contracting State or a non-contracting State, and a court in a Contracting State would give effect to his intent that the rules of the Convention should apply which was expressed on the face of the instrument and by the voluntary use thereof. Of course, the court of a non-contracting State may not give effect to this intent. This possibility, however, can be taken into account by the parties in deciding whether to employ the international cheque in the light of their expectations as to whether litigation would be brought in a Contracting or in a non-contracting State. Furthermore, the rule mentioned above would necessarily make the Convention inapplicable to an instrument drawn as an international cheque in a non-contracting State, even where the drawee is in a Contracting State, or the cheque is payable in a Contracting State, and litigation arises in a Contracting State. Such a rule would unduly restrict the scope of application of the Convention.

6. The above problem, and others related to the application of uniform rules to rights and liabilities on an international instrument, are inherent in the process of adoption of uniform rules for as long as a Convention setting forth such rules is not universally adopted and applied.

* * *

CHAPTER TWO. INTERPRETATION

Section 1. General provisions

Article 3

If a cheque is drawn against insufficient funds, it is nevertheless valid as a cheque.

Relevant legislation

ULC - article 3

Commentary

It is the assumption that if a drawer draws a cheque on his account with the banker the account contains funds sufficient for the payment of the cheque. Article 3 makes clear that if the account is insufficient for payment of the cheque the cheque is nevertheless a valid cheque under this Convention and upon dishonour the holder may exercise a right of recourse against the drawer and parties secondarily liable to him.

* * *

Article 4

A cheque which bears a date other than the date on which it was drawn is nevertheless valid as a cheque.

Relevant legislation

BEA - section 13 (2)
UCC - section 3-114 (3)
ULC - article 28(2)

Commentary

Under paragraph (2) (d) of article 1, an instrument in order to qualify as an international cheque must be dated. Article 4 makes clear that the date appearing on the cheque need not, for purposes of validity, be the true or correct date.

* * *

Article 5

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

Commentary

1. One of the important objectives of the article is to promote uniformity in the interpretation and application of this Convention. To this end, the text of the Convention directs attention to its "international character"; due regard for the international character of the Convention would avoid interpreting its provisions by recourse to local (and varying) national concepts, rather than to the Convention's provisions read as an independent piece of international legislation. This article may also be helpful to encourage tribunals in one State to promote uniformity by interpreting the Convention with due regard to the interpretation given to it in other States.

2. The general principle with regard to the interpretation and application of the Convention, laid down in this article, is found in other Conventions that originated in the work of the United Nations Commission on International Trade Law (UNCITRAL); see article 7 of the Convention on the Limitation Period in the International Sale of Goods (1974), article 3 of the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules), and article 7 (1) of the United Nations Convention on Contracts for the International Sale of Goods (1980).

* * *

Article 6

In this Convention:

- (1) "Cheque" means an international cheque governed by this Convention;
- (2) "Drawee" means the banker on whom a cheque is drawn;
- (3) "Banker" includes any person or institution assimilated to a banker;
- (4) "Payee" means the person in whose favour the drawer directs payment to be made;
- (5) "Holder" means a person in possession of a cheque in accordance with article 16.

(6) "Protected holder" means the holder of a cheque which, when he became a holder, was complete and regular on its face, provided that:

(a) He was, at that time, without knowledge of a claim to or defence upon the cheque referred to in article 27 or of the fact that it was dishonoured by non-payment;

(b) The time-limit provided by article 43 for presentment of that cheque for payment had not then expired.

(7) "Party" means any person who has signed a cheque as drawer, endorser or guarantor.

(8) "Signature" includes a signature by stamp, symbol, facsimile, perforation or other mechanical means* and "forged signature" includes a signature by the wrongful or unauthorized use of such means.

(9) "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. / **

*

/Article (X)

A Contracting State whose legislation requires that a signature on a cheque be handwritten may, at the time of signature, ratification or accession, make a declaration to the effect that a signature placed on a cheque in its territory must be handwritten. /

Commentary

Paragraph (1): "Cheque"

1. Article 1 (1) of this Convention provides that the Convention applies to an international cheque. Article 1 (2) specifies the formal requisites with which an instrument must comply in order to be an international cheque. This Convention uses the expression "cheque" to replace the longer expression "international cheque".

Paragraph (2): "Drawee"

2. The drawee can only be a banker (see definition of "banker" in paragraph (3)). Therefore, an instrument drawn upon a person other than a banker is not a cheque under this Convention even though it contains the words "international cheque (Convention of ...)".

Paragraph (3): "Banker"

3. The question whether any person or institution is a banker and the question whether such person or institution may be considered to be assimilated to a banker are to be determined by reference to the applicable national law.

Paragraph (4): "Payee"

4. In a cheque, the payee is the specified person to whom payment must initially be made. A cheque may be made payable to two or more payees (cf. art. 12 (1) (c)). In a cheque, the payee may be the drawer (cf. art. 12(1)(a)) or the drawee.

** Square brackets, used in the text of the Convention, indicate matters which have been reserved for further consideration and decision at a later stage.

Paragraph (5): "Holder"

Relevant legislation

BEA - section 2

UCC - section 1-201 (20)

ULC - article 19

Cross references

Holder: article 16

Rights of a holder: articles 26 and 27

5. The rights to and upon a cheque are vested in the holder. He has the right to receive payment, and payment to him discharges the party paying (article 61). Being a "holder" is a necessary element for qualifying as a protected holder. Under Chapter Five of this Convention, the holder is to present the cheque for payment, and, in the event of dishonour, to protest the cheque and to give notice of dishonour.

6. Pursuant to article 16, in order to be a holder, a person must be the specified payee, the bearer, or the endorsee of a cheque and in possession of it, or a person in possession of a cheque on which the last endorsement is in blank. If a cheque shows more than one endorsement, there is the further requirement that the series of endorsements be uninterrupted.

Example A. The payee endorsed the cheque "to A" (a "special" endorsement) and delivered the cheque to A. A is the holder.

Example B. The payee endorsed the cheque to "A", and delivered the cheque to B. Neither A nor B is a holder.

Example C. The payee endorsed the cheque in blank and delivered it to A. A is the holder.

Example D. The payee endorsed the cheque in blank. The cheque was stolen by T. T is the holder. Since the payee is not "in possession" of the cheque, he is not the holder.

Example E. The drawer makes a cheque payable to bearer. Any person in possession of this cheque is a holder.

7. Under the definition of "holder", a drawer or a guarantor are not holders since they are neither a "payee" nor "endorsee". If the cheque is endorsed to them or if a bearer cheque is delivered to them, they are a holder.

Example F. The drawee dishonoured the cheque. The holder exercised his rights of recourse, and was paid by the drawer. The cheque was delivered to the drawer without an endorsement. The drawer is not the holder of the cheque.

8. A payee or endorsee may reacquire a cheque. Even though the cheque is not endorsed to them, in connexion with the reacquisition, the "payee" or "endorsee" comply with the definition of "holder" (article 23).

9. If a holder parts with possession of the cheque he ceases to be a holder. If the lack of possession is caused by the loss of the cheque, his rights are determined by the rules on "lost cheques" (articles 73-78).

10. For the purposes of the definition of holder it is irrelevant whether the possession of the cheque is lawful or not. As seen from example D., even a thief may be a holder. Of course, if the possession is unlawful, there may be a defence on or a claim to the cheque pursuant to article 27.

11. To be a "holder" the possessor need not be the owner of the cheque. When a cheque is endorsed "for collection", the endorsee in possession is the holder of the cheque, although he may be only an agent of the endorser rather than the owner of it.

Paragraph (6): "Protected holder"

Relevant legislation

BEA - section 29

UCC - sections 3-302 and 3-304

ULC - articles 21 and 22

Cross references

Protected holder: article 28

12. The main advantages of a cheque result from the strong legal position of a protected holder: as a general rule, he takes the cheque free from claims of ownership third parties may have to the cheque and from defences to an action by him on the cheque (article 28).

"was complete and regular on its face"

13. A person does not acquire the status of a protected holder if the cheque, on the face of it, is not complete and regular. For example, a cheque on which the sum payable is lacking is not complete even though a person may complete it in accordance with article 13. It may be noted that a person, upon so completing an incomplete cheque, may become a holder but cannot become a protected holder. A cheque is not regular if, for instance, the name of the first endorser does not correspond to the name of the payee. The expression "on its face" means that the holder need not look beyond the cheque, and refers to both the face and the back of the cheque.

"without knowledge"

14. A holder does not qualify as a protected holder if, when taking the cheque, he knows about the existence of a claim or a defence affecting the cheque or about the fact that it was dishonoured. Such holder takes the cheque at his own risk, and it is not the policy of this Convention to protect him. However, it should be noted that under article 29 (the so-called "shelter-rule") the transfer of a cheque by a protected holder may vest in any subsequent holder the rights of the protected holder, even though the subsequent holder is not a protected holder in his own right as where, for instance, he knew of a claim or a defence.

15. For the definition of the expression "without knowledge", see article 7 and commentary.

"at that time"

16. A holder may be a protected holder even though he acquired knowledge of claims, defences or the fact that the cheque had been dishonoured after he became a holder.

17. A person may be a protected holder even though he has not given value or consideration for the cheque. This rule is consistent with some legal systems, notably those of civil law inspiration, and departs from others (e.g. BEA, section 29 (1), and UCC, sections 3-302 (1) (a) and 3-303). The present approach was selected because of the problems of unifying the different approaches to the relevance of "value" or "consideration" by legal systems.

Paragraph (7): "Party"

18. The Convention uses the term "party" to refer to a party to a cheque, i.e. a person who has signed a cheque. The drawer, endorser and guarantor are parties to a cheque. On the other hand, the payee is not a party to the cheque (unless he has endorsed it) and the drawee is not a party to the cheque.

Paragraph (8): "Signature" and "forged signature"

19. This provision accommodates modern practice in respect of signatures on negotiable instruments. Therefore a signature need not be handwritten. A complete signature is not necessary.

20. Article (X) permits a Contracting State whose legislation requires that signatures on cheques be executed in handwriting to make, at the time of signing, ratifying or acceding to the Convention, a declaration derogating from the provision of paragraph (8) to the effect that a signature placed on an international cheque in its territory must be handwritten.

21. The term "forged signature" is relevant in the context of article 25, concerning the rights and liabilities of parties to a cheque on which an endorsement is forged, and article 31, concerning the liability of the person whose signature is forged. This paragraph makes articles 25 and 31 applicable where a cheque was signed by an agent without authority or was signed by the wrongful use of any means by which a signature may be made in accordance with the present provision.

Paragraph (9): "Money" or "currency"

22. Amongst the formal requisites with which a written instrument must comply in order to qualify as an international cheque is the requisite that the instrument must contain "an unconditional order whereby the drawer directs the drawee to pay a definite sum of money to the payee or to his order or to bearer" (article 1 (2) (b)). The definition of "money" or "currency" set forth in paragraph (9) suggests that the Convention, in addition to providing the usual rule that a cheque is payable in a medium of exchange authorized or adopted by a Government as its official currency, should further provide that a cheque:

(a) may be made payable in other monetary units or units of account such as the special drawing rights (SDRs) of the International Monetary Fund, the European currency units (ECUs) of the European Economic Community and the transferable rouble of the International Bank for Economic Co-operation, and

(b) may call for payment in a specified currency but be denominated in such monetary units or units of account.

23. Whilst it is true that only a limited class (member States of the inter-governmental institution concerned and, exceptionally, certain other authorized holders who are not members) may hold or use the units referred to, their use in a variety of transactions is on the increase. There would appear to be no special reason not to permit the application of the Convention to a cheque payable in such units if the drawer (who must perforce belong to the limited class) should wish to make the cheque subject to the provisions of the Convention. Furthermore, private parties, as a safeguard against currency fluctuations, might wish to denominate the amount of the cheque in, say, SDRs and specify in the cheque the currency in which it is to be paid. Such a denomination would be a "definite sum of money" in that the valuation of a SDR against the specified currency would be available on the date when the cheque is payable.

24. Whether the application of the Convention should be extended in this manner will, in the last resort, depend on the desire of Governments to use the Convention for the above stated purposes. Consequently, the proposed definition of "money" or "currency" is placed between square brackets so as to indicate the tentative nature of the definition. If the views of Governments should be of a positive nature certain provisions of the Convention will have to be amended accordingly.

* * *

Article 7

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 could not have been unaware of its existence.

Relevant legislation

BEA - sections 29(1), 59(1) and 90
UCC - sections 1-201(19) and (25), and 3-304
ULC - articles 21 and 22

Cross references

Knowledge of a fact: articles 6(6), 13(2)(a), 27(1)(d), 28(1)(c), 39(3) and 61(2)

Commentary

In several provisions of the Convention the rights and liabilities of a party are dependent on whether he took or paid the cheque without knowledge of a certain fact. Under this article the concept of "knowledge" covers (a) actual knowledge of a fact and (b) constructive knowledge, i.e. the person could not have been unaware of the existence of a fact.

* * *

Section 2. Interpretation of formal requirements

Article 8

The sum payable by a cheque is deemed to be a definite sum although the cheque states that it is to be paid:

(a) According to a rate of exchange indicated on the cheque or to be determined as directed by the cheque; or

(b) In a currency other than the currency in which the amount of the cheque is expressed.

Relevant legislation

BEA - section 9
UCC - section 3-106
ULC - article 36

Cross references

Amount of the cheque: article 10
Rate of exchange: article 64

Commentary

1. The sum payable by a cheque is a definite sum only if its amount can be determined ex facie the instrument without reference to evidence or sources extrinsic to it.

2. Paragraphs (a) and (b) sanction the common practice of cheques drawn in a currency which is not the currency of the place of payment. If no rate of exchange is indicated on the cheque or the cheque contains no directions to that effect, article 64 applies.

3. Paragraph (a) is intended to cover cheques drawn, for example, as follows: "Pay £5.000 in Swiss francs at the rate of exchange of (x) Swiss francs to one pound sterling".

* * *

Article 9

Any stipulation on a cheque that it is to be paid with interest is deemed not to have been written.

Relevant legislation

BEA - section 9
UCC - section 3-106
ULC - article 7

Commentary

A stipulation of interest on a cheque is deemed not to have been written, i.e. is invalid without affecting the validity of the cheque. The rationale underlying this provision is that the cheque is a payment instrument (for payment on demand) and that stipulation of interest might lead to undesired late presentment.

* * *

Article 10

(1) If there is a discrepancy between the amount of the cheque expressed in words and the amount expressed in figures, the amount of the cheque is the amount expressed in words.

(2) If the amount of the cheque is expressed in a currency having the same description as that of at least one other State than the State where payment is to be made as indicated on the cheque and the specified currency is not identified as the currency of any particular State, the currency is to be considered as the currency of the State where payment is to be made.

Relevant legislation

BEA - sections 9(2) and (3), and 72(4)
UCC - section 3-118(c)
ULC - article 9

Commentary

Paragraph (1)

1. The sum payable by a cheque may be expressed in words only, in figures only, or in words and figures. If both words and figures are used and there is a discrepancy between them, the words control. The paragraph follows in substance the relevant provisions of the principal legislations.

Paragraph (2)

2. This provision envisages the case where a cheque for X dollars is drawn in, say, Toronto, Canada, and made payable in Canberra, Australia. In the absence of any express indication to the contrary, the cheque is then payable in Australian dollars.

* * *

Article 11

(1) A cheque is always payable on demand. It is so payable:

(a) If it states that it is payable at sight or on demand or on presentment or if it contains words of similar import; or

(b) If no time of payment is expressed.

(2) A stipulation on a cheque that it is payable at a definite time is deemed not to have been written.

Relevant legislation

BEA - sections 10 and 11
UCC - sections 3-108 and 3-109
ULC - article 28

Commentary

1. Under the Convention, there is no formal requirement that the cheque expresses that it is payable on demand. Article 11 sets forth the basic rule that a cheque is always payable on demand whether or not it so states.
2. If a cheque stipulates that it is payable at a definite time, the stipulation is deemed not to have been written and does not affect the validity of the instrument as a cheque nor does the stipulation detract from the basic rule that a cheque is payable on demand.

* * *

Article 12

(1) A cheque may:

- (a) Be drawn by the drawer on himself or be drawn payable to his order;
- (b) Be drawn by two or more drawers;
- (c) Be payable to two or more payees.

(2) If a cheque is payable to two or more payees in the alternative, it is payable to any one of them and any one of them in possession of the cheque may exercise the rights of a holder. In any other case the cheque is payable to all of them and the rights of a holder can only be exercised by all of them.

Relevant legislation

BEA - sections 5 and 32(3)
UCC - sections 3-110 and 3-116
ULC - article 6

Commentary

Paragraph (1)

1. Under sub-paragraph (a) of this paragraph, the drawer of a cheque may address the order to pay to himself, and he may draw the cheque payable to himself or to his order. Therefore, one person may be both drawer and drawee, or both drawer and payee.
2. The purpose of sub-paragraphs (b) and (c) of this paragraph is to make clear that a written instrument is also a cheque if the direction to pay is made by more than one person or if the persons directed to receive payment are several.

Paragraph (2)

3. This paragraph deals with the case where a cheque is drawn payable to two or more payees. It provides a rule of interpretation whereby, if the cheque does not state expressly that such payees are in the alternative, it is payable to all of them and only all of them can exercise the rights of a holder.

Example. A cheque is drawn payable to A and B. A endorses the cheque to C. What are C's rights? If A has authority to endorse the cheque in the name of B, C is the holder, and has all the rights which a holder has under this Convention. On the other hand, if A has no authority to endorse the cheque on behalf of B, his signature is not an "endorsement" since it is not signed by the proper persons, i.e., A and B together.

4. Where a cheque provides that it is payable to A or B, every one of them in possession of the cheque is its holder (see definition of holder in article 16); and every one of them in possession of the cheque may exercise the rights of a holder as provided by this Convention.

5. Where a cheque is drawn payable to A and/or B, it is considered to be payable to both A and B, and not any one of them.

* * *

Section 3. Completion of an incomplete cheque

Article 13

(1) An incomplete cheque which satisfies the requirements set out in subparagraphs (a) and (f) of paragraph (2) but which lacks other elements pertaining to one or more of the requirements set out in paragraph (2) of article 1 may be completed and the cheque so completed is effective as a cheque.

(2) When such a cheque is completed otherwise than in accordance with an agreement entered into:

(a) A party who signed the cheque before the completion may invoke the non-observance of the agreement as a defence against a holder, provided the holder had knowledge of the non-observance of the agreement when he became a holder;

(b) A party who signed the cheque after the completion is liable according to the terms of the cheque so completed.

Relevant legislation

BEA - section 20
UCC - sections 3-115 and 3-407
ULC - article 13

Cross references

Holder: articles 6(5) and 16
Knowledge: article 7

Commentary

1. Article 13 deals with the completion of a writing which lacks one or more of the requirements set forth in article 1(2) of this Convention: a definite sum of money, the name of the payee or the indication that it is payable to bearer, the name of the drawee, or one or more of the places referred to in article 1(2)(e). However, the power conferred by article 13 does not include the power to insert: (a) the signature of the drawer and (b) the words "international cheque (Convention of ...)". Therefore, only an instrument on

which such designation already appears and which is signed by the drawer may be completed as a cheque by inserting such other elements as are required by article 1(2). The rationale underlying this rule is that only the drawer decides whether the instrument he issues is to be governed by the Convention. It may be noted that a writing which lacks the words "international cheque (Convention of ...)" may be completed under the applicable national law but would, if completed, not be governed by the Convention.

2. If a writing lacks elements pertaining to one or more of the requirements set out in article 1(2) it is not a cheque under this Convention and cannot be enforced as a cheque until completed. When the lacking elements have been inserted the writing becomes a cheque within the meaning of article 1 and the Convention is applicable.

3. Article 13 deals with the completion of a cheque which lacks elements that are required for purposes of validity under the Convention. The article does not apply to the alteration or correction of elements that appear on an incomplete or a complete cheque. In the latter case article 33 concerning material alterations applies.

4. The mere fact that a cheque was issued incomplete cannot be set up by a party as a defence against his liability on the cheque as completed. However, if an incomplete cheque is completed otherwise than in accordance with an agreement entered into, two situations affecting the liability of parties to that cheque are envisaged by paragraph (2):

(a) If a party signed the cheque before its completion he may raise the fact that it was completed otherwise than in accordance with the agreement entered into as a defence to his liability against any holder with knowledge of that fact;

(b) If a party signed the cheque after its completion, inobservance of the agreement entered into cannot be set up as a defence to his liability, not even against a holder with knowledge of such inobservance.

Example. An incomplete cheque, containing in the text thereof the words "international cheque (Convention of ...)" and signed by the drawer is issued to the payee without the sum being stated. It is agreed between the drawer and the payee that the sum to be inserted should be "X". Contrary to this agreement the payee inserts sum "Y" and endorses the cheque to A. What are A's rights? If A took the cheque without knowledge of the inobservance of the agreement by the payee he has rights on the cheque, as completed, against the drawer and the payee. If A knew about the inobservance, the drawer may raise a defence based upon the fact that the incomplete cheque was completed contrary to the agreement between himself and the payee. This defence cannot be raised by the payee. If A with knowledge of the inobservance of the agreement transfers the cheque to B who is without knowledge of the inobservance, neither the drawer nor the payee nor A may raise such inobservance as a defence against B even if B is not a protected holder.

* * *

CHAPTER THREE. TRANSFER

Article 14

A cheque is transferred:

(a) By endorsement and delivery of the cheque by the endorser to the endorsee; or

(b) By mere delivery of the cheque if it is drawn payable to bearer or if the last endorsement is in blank.

Relevant legislation

BEA - sections 22(2) and 31
UCC - section 3-202(1)
ULC - article 14

Cross reference

Endorsement: article 15

Commentary

1. A negotiable instrument, by its nature, is transferable although parties may exclude or limit its transferability (see article 18). The transfer of an instrument is in some legal systems known as "negotiation".

2. Article 14 sets forth the ways in which a cheque may be transferred. It follows in substance the relevant provisions of the existing legal systems. A cheque is transferred when the holder endorses it, either specially or in blank, and delivers it to the endorsee (paragraph (a)) or, if the last endorsement is in blank, when the holder delivers the cheque (paragraph (b)).

3. When a cheque is transferred under this article, the transferee becomes a holder (cf. arts. 6(5) and 16(1)(b)) and thus acquires the rights, and is subject to all the duties, of a holder.

Example A. The payee endorses the cheque specially to A and delivers it to A. By these acts the cheque is transferred to A and A becomes the holder of it.

Example B. The payee endorses the cheque specially to A but does not deliver it to A. Without further endorsement the payee delivers the cheque to B. The cheque is not transferred either to A or to B. Neither A nor B is a holder.

Example C. The payee endorses a cheque in blank and delivers it to A. The cheque is thereby transferred to A who becomes its holder. If A delivers the cheque to B, even without endorsement, the cheque is thereby transferred to B and B is the holder.

4. It should be noted that article 14 deals only with the transfer of a cheque by endorsement and delivery or, if the last endorsement is in blank, by mere delivery. The article does not deal with other ways by which a person may acquire the rights to and upon a cheque, as where a person is the heir of the holder or where the holder assigns his rights on the cheque to another person. These questions are left to the applicable national law.

Article 15

(1) An endorsement must be written on the cheque or on a slip affixed thereto ("allonge"). It must be signed.

(2) An endorsement may be:

(a) In blank, that is, by a signature alone or by a signature accompanied by a statement to the effect that the cheque is payable to any person in possession thereof;

(b) Special, by a signature accompanied by an indication of the person to whom the cheque is payable.

Relevant legislation

BEA - sections 2 and 32
UCC - section 202(2)
ULC - article 16

Cross reference

Signature: article 6(8)

Commentary

1. An endorsement serves two functions. It is a necessary element in the transfer of an order cheque (article 14(a)), and it renders the endorser liable on the cheque as a party (article 38(1)). In most cases, the endorsement is intended to serve both functions. However, the endorser may exclude or limit the liability function of the endorsement by an express stipulation on the cheque as provided in article 38(2), e.g. by inserting the words "without recourse". Also the endorser can exclude or limit the transfer function as regards any possible transfer from his endorsee to others. For example, he may exclude the possibility that a person other than his endorsee becomes a holder except for purposes of collection. He would achieve this by inserting in his endorsement the words "not transferable", "pay (X) only" or words of similar import (article 18).

2. Article 15 explains what is meant by endorsement and how it is effected. An endorsement is effected by the signature of the person endorsing the cheque.

3. The endorsement may be a special or a blank endorsement. A special endorsement is effected by the signature of the endorser accompanied by an indication of the person to whom the cheque is payable (paragraph (2)(b)). A blank endorsement may be effected by the endorser's signature alone or by a signature combined with a statement to the effect that the cheque is payable to any person in possession thereof (paragraph (2)(a)).

Example. The payee signs "Pay A". This is a special endorsement to A. However, when the payee signs his name or accompanies his signature by such words as "Pay any person" or "Pay bearer", the endorsement is a blank endorsement.

4. It should be noted that a signature alone on the cheque is not necessarily a blank endorsement; it may be a guarantee (cf. art. 40) or a certification (cf. art. 36).

Article 16

(1) A person is a holder if he is:

(a) In possession of a cheque drawn payable to bearer; or

(b) The payee in possession of the cheque; or

(c) In possession of a cheque which has been endorsed to him, or on which the last endorsement is in blank, and on which there appears an uninterrupted series of endorsements, even if any of the endorsements was forged or was signed by an agent without authority.

(2) When an endorsement in blank is followed by another endorsement, the person who signed this last endorsement is deemed to be an endorsee by the endorsement in blank.

(3) A person is not prevented from being a holder by the fact that the cheque was obtained under circumstances, including incapacity or fraud, duress or mistake of any kind, that would give rise to a claim to, or to a defence upon the cheque.

Relevant legislation

BEA - section 2

UCC - sections 1-201(20) and 3-202(1)

ULC - article 19

Cross references

Holder: article 6(5)

Payee: article 6(4)

Endorsement: article 15

Commentary

1. Under the Convention the concept of "holder" is relevant in, inter alia, the following contexts:

(a) being a holder is a necessary element of the status of a protected holder (cf. art. 6(6);

(b) the holder may exercise all rights on the cheque against the parties to it (cf. art. 26);

(c) a party to a cheque is discharged when he pays the holder (cf. art. 61).

2. Pursuant to article 16 a person in order to be a holder

(a) must be in possession of the cheque, and

(b) must be a payee, or a bearer, or a transferee under a special endorsement **or an endorsement in blank.**

Example A. The drawer issues a cheque and delivers it to the payee. The payee is a holder.

Example B. The payee lost the cheque. Not being in possession of the cheque he is not a holder (as to lost cheques see articles 73-78).

Example C. The payee endorses the cheque to A and delivers it to A.
A is a holder.

Example D. The payee endorses the cheque to A and delivers it to B.
Neither A nor B is a holder.

Example E. The payee endorses the cheque in blank and delivers it to A.
A is a holder.

Example F. The drawer issues a cheque payable to bearer and delivers it to A.
A is a holder. A delivers it to B. B is a holder.

Example G. The drawer issues a cheque made payable to bearer. It is stolen
by T. T is a holder.

3. Under this Convention a drawer or a guarantor is not a holder even though he be in possession of the cheque unless he acquired the cheque under an endorsement in blank or the cheque has been drawn payable to bearer. However, these parties have rights to and upon the cheque by virtue of special provisions in this Convention.

Example H. The drawee of a cheque which is not made payable to bearer and on which the last endorsement is not in blank dishonours it by non-payment. The holder is paid by the drawer and delivers the cheque to him without an endorsement. The drawer, though in possession of the cheque, is not a holder.

4. A payee or an endorsee may reacquire the cheque by payment or otherwise. By virtue of article 23 such a payee or endorsee, even though the cheque is not endorsed to him, is a holder.

5. For the purposes of holder status it is irrelevant whether the possession of the cheque is lawful or not. As seen from example G. above even a thief may be a holder. However, if the possession is unlawful the owner of the cheque has a valid claim to the cheque and such claim may be set up as a defence against liability (cf. art. 27).

6. To be a holder the possessor of a cheque need not be the owner of it. Where a cheque is endorsed "for collection" the endorsee in possession is the holder of it even though he may be only an agent of the endorser rather than the owner of it.

"uninterrupted series of endorsements"

7. The question whether the possessor of the cheque is a holder is to be determined only from what appears on the cheque. It is necessary, but it suffices, that the chain of endorsements: (a) is uninterrupted and (b) designates the possessor as the last endorsee unless the last endorsement is in blank.

Example I. The cheque is stolen from the payee. T, the thief, forges the signature of the payee and endorses the cheque to A. A is a holder. However, the drawer may raise the defence of forgery against A (cf. art. 27). Such a defence would not prevail if A is a protected holder (cf. art. 28). The payee may claim the cheque from A (cf. art. 27(2)) unless A is a protected holder.

Example J. The payee delivers the cheque to A without an endorsement. A endorses the cheque to B. B is not a holder because the endorsement that is necessary for the establishment of an uninterrupted chain of endorsements (the endorsement of the payee to A) is lacking.

Paragraph (2)

8. The provision of paragraph (2) may be illustrated by the following example:

Example K. The payee endorses the cheque to A and delivers it to him. A endorses the cheque in blank and delivers it to B. B endorses the cheque specially to C or in blank and delivers it to C. Under article 16(2), B is deemed to be the endorsee of A by his endorsement in blank. It follows that C is a holder since he received the cheque under an uninterrupted series of endorsements.

Paragraph (3)

9. The purpose of this paragraph is to provide that the transferee is a holder even though the transferor is a person without legal capacity, or the endorsement or delivery was obtained by fraud or other illegal means. The main importance of this provision lies in the fact that such transferee, being a holder, may qualify himself in proper circumstances as a protected holder. Even if such holder is not a protected holder he may transfer the cheque to a person who may take it in proper circumstances as a protected holder.

10. This paragraph does not deal with the question of liability upon a cheque of the party transferring it, nor does it deal with the rights of a person to the cheque. The party transferring the cheque may assert any defence or any claim available to him under articles 27 and 28 of this Convention.

11. Paragraph (3) does not impose any liability on a party who signed the cheque under the circumstances mentioned in the paragraph. The question whether such party may raise the defence of ius tertii is governed by article 27(3).

Example L. A induces the payee by way of fraud to endorse to him a cheque owned by the payee. Pursuant to article 16 A is a holder of the cheque. The consequences are shown by the following examples.

Example M. The same facts as in example L. A brings an action against the payee (P). Nothing in this article makes the payee (P) liable to A in spite of the fraud practised by A on P. Pursuant to article 27 the payee has a valid defence to A's action.

Example N. The same facts as in example L. The payee (P) brings an action against A to recover the cheque or to prohibit A from transferring the cheque. The payee (P) will succeed if remedies of this type are permitted under the law of the place where the transfer took place.

Example O. The same facts as in example L. A brings an action against the drawer. This question is not solved by article 16. The answer to this question is to be found in article 27.

Example P. By fraud A induces the payee (P) to transfer to him a cheque owned by P. A transfers the cheque to B, who takes it as a protected holder. P brings an action against B for conversion of the cheque. P's action fails. According to article 16 A is a holder, and the cheque was transferred to B in circumstances that make B a protected holder. According to article 28 P's claim fails against a protected holder.

Example Q. The same facts as in example P. B brings an action against the drawer and the payee (P). According to article 28 the defences of the drawer and the payee are not available against B, a protected holder.

* * *

Article 17

The holder of a cheque on which the last endorsement is in blank may:

- (a) Further endorse the cheque either in blank or to a specified person; or
- (b) Convert the blank endorsement into a special endorsement by indicating therein that the cheque is payable to himself or to some other specified person; or
- (c) Transfer the cheque in accordance with paragraph (b) of article 14.

Relevant legislation

BEA - section 34(4)
UCC - section 3-204
ULC - article 17

Cross references

Holder: article 16
Endorsement: article 15
Transfer: article 14

Commentary

1. If the last endorsement on a cheque is in blank and the holder transfers the cheque, several situations may arise which in various ways determine whether the transferor is liable on the cheque, as shown by the following examples.

Example A. The holder A delivers the cheque to B. This is a proper transfer (cf. art. 14(b)) and B is a holder under article 16(1)(b). A is not liable on the cheque because he has not signed it (cf. art. 31). However, he may be liable off the instrument under article 39. The instrument remains an instrument payable to bearer.

Example B. A, the holder, delivers the cheque to B after endorsing it in blank. This is a proper transfer under article 14(b) and B is a holder. A is liable on his signature as an endorser. It may be noted that A's signature is not required for the purpose of transferring the cheque to B (the cheque is a bearer cheque by reason of the blank endorsement). The effect of A's blank endorsement is to render A liable on the cheque and this may be commercially expedient.

Example C. A, the holder, delivers the cheque to B after having converted the blank endorsement into a special endorsement (by indicating in that endorsement that the cheque is payable to B). This is a proper transfer under article 14(a) and B is a holder. A is not liable on the cheque because he has not signed it (cf. art. 31). The conversion of a blank endorsement into a special endorsement is authorized under article 17(b) and is therefore not a material alteration under article 33.

2. It should be noted that a special endorsement of a cheque made payable to bearer does not convert the cheque into an order instrument. Thus, a bearer cheque with such a special endorsement may be transferred by mere delivery.

* * *

Article 18

When the drawer of a cheque payable to a payee or to his order has inserted in the cheque, or an endorser in his endorsement, such words as "not negotiable", "not transferable", "not to order", "pay (X) only", or words of similar import, the transferee does not become a holder except for purposes of collection.

Relevant legislation

BEA - sections 8(1) and 35
UCC - sections 3-205, 3-206 and 3-805
ULC - article 18

Cross references

Holder: article 16
Endorsement: article 15
Transfer: article 14
Collection: article 22

Commentary

1. Under article 18 the transfer of a cheque in accordance with article 14 may be excluded or limited by the drawer or an endorser by using such words as "not negotiable", "not transferable" or words of similar import. The drawer must insert these words in the cheque, and the endorser would have to insert them in his endorsement.

2. The purpose of such insertion is to ensure that payment of the cheque may only be claimed by the payee or the endorsee or the agent for collection, as the case may be. This insertion does not affect the character of the instrument as a cheque but the endorsee does not become a holder except for purposes of collection. He may not further transfer the cheque, not even for purposes of collection; he would have this latter power only if the endorsement to him would have been made expressly for purposes of collection (cf. art. 22).

3. Under article 1(2) of this Convention a cheque need not be made payable to "the order" of the payee. Therefore, a mere omission of the words "to order" does not prevent further transfer, and where a cheque lacking that expression is transferred by the payee in accordance with article 14 the transferee is a holder and may in turn further transfer the cheque.

4. If the words "not negotiable" are inserted in a crossed cheque, the effects of the insertion are different. Under article 71 the transferee of such a cheque does become a holder and may transfer the cheque further. However, the transferee cannot become a protected holder in his own right.

* * *

Article 19

(1) An endorsement must be unconditional.

(2) A conditional endorsement transfers the cheque whether or not the condition is fulfilled.

Relevant legislation

BEA - section 33
UCC - section 3-202
ULC - article 15

Cross references

Transfer: article 14
Endorsement: article 15

Commentary

1. Article 19 expresses the fundamental policy of the Convention that an endorsement may not be made subject to a condition (paragraph (1)).

2. If an endorsement contains a condition the endorsement is a valid endorsement for purposes of transferring the cheque and the transferee is a holder whether or not the condition has been fulfilled. Furthermore, the condition to the extent that it affects the liability of the endorser is to be disregarded. However, the fact that a condition was not fulfilled is not necessarily irrelevant. It may, for example, form the basis of a claim or defence under article 27 if the condition relates to the underlying transaction. For that reason, the same result would obtain if the condition had not been included in the endorsement but was only expressed in the agreement of the underlying transaction.

3. It should be noted that article 19 deals only with conditions in the proper sense of the term, i.e. making the liability of the endorser dependent upon the occurrence or non-occurrence of an uncertain future event. Thus, the article does not cover other ways of excluding or limiting the liability as, for example, where a cheque is endorsed partially (article 20) or without recourse (article 38(2)).

* * *

Article 20

An endorsement in respect of a part of the sum due under the cheque is ineffective as an endorsement.

Relevant legislation

BEA - section 32(2)
UCC - section 3-202(3)
ULC - article 15

Cross references

Endorsement: article 15
Sum payable: article 8

Commentary

1. This article provides that an endorsement must be of the entire cheque; therefore, a partial endorsement is not effective as an endorsement. An endorsement is partial if, for example, it states "Pay one half of the sum due to A" or "Pay half of the sum due to A and half to B". However, an endorsement is not partial if, for example, it states "Pay A and B" or "Pay A or B" since the full sum due is then payable to the person(s) indicated. A special problem arises when a cheque has been paid in part. If in such a case an endorsement is limited to the part unpaid, it is "partial" in the sense of article 20 and therefore ineffective. If however the endorsement is not so qualified, it is a valid endorsement although in fact it is only for part of the sum, namely for the amount unpaid.

2. The "transferee" of a cheque endorsed as to part of the sum payable does not qualify as a holder since the endorsement is ineffective. However, article 20 does not prevent such person from acquiring rights under the partial endorsement under the applicable domestic law (e.g. by "partial" assignment).

* * *

Article 21

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

Relevant legislation

BEA - section 32(5)
UCC - section 3-414(2)

Cross reference

Endorsement: article 15

Commentary

The purpose of this article is to establish a presumption of fact as to the chronological order in which two or more endorsements were made. The article thereby establishes a presumption of rank for the purpose of the right of recourse by an endorser who paid the cheque against prior endorser. The article is also relevant for determining to what extent the discharge of one endorser discharges subsequent endorser. Extrinsic evidence may be brought to rebut the presumption of fact and to prove the true order of endorsements.

Example. A cheque shows blank endorsements in the following order: (signed) Payee; (signed) A; (signed) B. Upon dishonour of the cheque the holder C exercises his right of recourse against A. Payment by A discharges B. However, if A proves that he endorsed after B had endorsed, the presumption is rebutted. In such a case B is not discharged and A, upon payment, has a right of recourse against B.

* * *

Article 22

(1) When an endorsement contains the words "for collection", "for deposit", "value in collection", "by procuration", "pay any bank", or words of similar import, authorizing the endorsee to collect the cheque (endorsement for collection), the endorsee:

(a) May only endorse the cheque for purposes of collection;

(b) May exercise all the rights arising out of the cheque;

(c) Is subject to all claims and defences which may be set up against the endorser.

(2) The endorser for collection is not liable upon the cheque to any subsequent holder.

Relevant legislation

BEA - section 35
UCC - sections 3-205 and 3-206
ULC - article 23

Cross references

Endorsement: article 15
Claims and defences: article 27

Commentary

1. A holder, in order to obtain payment, would normally present the cheque himself to the person liable. However, particularly in the international context, he will engage an agent (usually a bank) to do so on his behalf.

2. For that purpose, he may, for example, use the means of a regular endorsement, whether blank or special, accompanied by collecting instructions outside the cheque. He may, however, prefer an endorsement for collection as provided for in article 22 which would avoid certain risks inherent in the first approach. These risks arise from the fact that the agent for collection may disregard his instructions and further endorse the cheque to a person who may not know about the collection instructions and may thus qualify as a protected holder and exercise rights of a protected holder against the endorser whose endorsement was intended only for collection purposes. These risks cannot materialize where an endorsement for collection is made in accordance with article 22.

Example A. The payee endorses the cheque "for collection" to A. Fraudulently and without the permission of the payee the cheque is sold (and endorsed in blank) by A to B. The drawee refuses payment, and B brings an action against the payee. By virtue of paragraph (2) the payee is not liable to B. In that respect an endorsement for collection resembles an endorsement "without recourse" (see article 38(2)).

3. Since the endorsee for collection acquires his rights through an endorsement, he is a holder if he is in possession of the cheque. Thus, he may exercise the rights, and is subject to the duties, of a holder.

Example B. By fraud the payee induces the drawer to draw a cheque payable to the payee. The payee endorses the cheque "for collection" to A. A brings an action on the cheque against the drawer. By virtue of paragraph (1)(b) the drawer, since he may raise the defence of fraud against the payee, may raise it also against the payee's endorsee for collection.

4. However, the legal position of a holder under an endorsement for collection differs from that of a "normal" holder since the endorsee for collection acts as an agent of the endorser. The difference manifests itself in the following rules expressed in article 22:

(a) The endorsee for collection may not further endorse the cheque for any purpose other than for collection. Any subsequent endorsee will also be an agent for collection. This result obtains even though the subsequent endorsement is not made expressly for collection since the first endorsement controls.

(b) The endorsee for collection may exercise rights against any party who is liable to the endorser for collection, including the right to bring an action on the cheque. The endorsee for collection has no rights on the cheque against the endorser for collection since the purpose of the endorsement is to collect the cheque for the endorser and not from him. In this respect, an endorsement for collection is an endorsement that excludes the liability of the endorser and is thus similar to an express stipulation provided for in article 38(2).

(c) The endorsee for collection cannot be a protected holder in his own right. However, if the endorser for collection is a protected holder, the transfer of the cheque to the agent for collection vests in him the rights on and to the cheque which the protected holder had (article 29). It follows that the endorsee for collection is subject only to those claims and defences which may be set up against the endorser.

5. It should be noted that the Convention does not deal with the legal relations between endorser and endorsee for collection outside the cheque, e.g. the circumstances under which the underlying agency relationship is terminated. However, such termination may form the basis of a claim by the endorser for collection which, if asserted, may be set up as a defence against the holder (i.e. the ex-agent, see art. 27(3)) or may lead to the result that payment to the holder does not discharge the payer (cf. art. 61(2)).

Article 23

(1) The holder of a cheque may transfer it to a prior party in accordance with article 14; nevertheless, in the case where the transferee was a prior holder of the cheque, no endorsement is required and any endorsement which would prevent him from qualifying as a holder may be struck out.

(2) The endorsement to the drawee operates only as an acknowledgement that the endorser has received from the drawee the amount of the cheque except in the case where the drawee has several establishments and the endorsement is made in favour of an establishment other than that on which the cheque has been drawn.

Relevant legislation

BEA - sections 37 and 59(2)(b)
UCC - section 3-208
ULC - articles 15 and 47

Cross references

Transfer: article 14
Holder: articles 6(5) and 16

Commentary

Paragraph (1)

1. A cheque may be transferred to a prior party (an endorser or the drawer) or to the drawee. If the prior party was a holder no endorsement is necessary. Therefore, transfer of the cheque to the drawer (i.e. transfer within the meaning of article 14) requires an endorsement unless the last endorsement is in blank. A prior party who is a holder may further transfer the cheque.

2. Paragraph (1) also provides that a prior holder who acquires the cheque without an endorsement may strike out any endorsement which would prevent him from being a holder. Such striking out is not a material alteration.

Example. The payee endorses the cheque to A. A endorses to B. B endorses to C. C delivers the cheque to A upon payment by A. A may strike out his own endorsement to B and the endorsement of B to C.

Paragraph (2)

3. If, upon payment, the holder of a cheque "endorses" it, either specially to the drawee or in blank, the drawee does not thereby become a holder. Thus, he may not further transfer the cheque and he does not have the rights of a holder. Under paragraph (2), such an endorsement operates only as a receipt.

4. Paragraph (2) states as an exception to the rule that the endorsement to the drawee is no endorsement the case where payment is made by an establishment of the drawee other than the establishment of the drawee on which the cheque was drawn. In such a case, the endorsement is an endorsement in favour of the establishment of the drawee which paid the cheque and that establishment will thus be a holder.

Article 24

A cheque may be transferred in accordance with article 14 after the expiration of the period of time for presentment.

Relevant legislation

BEA - section 36
UCC - section 3-304(3)
ULC - article 24

Cross references

Transfer: article 14

Commentary

If a cheque is transferred after the period of time for presentment has expired, the transferee under article 24 is a holder. This rule stresses the essential characteristic of a cheque, namely its transferability.

* * *

Article 25

(1) If an endorsement is forged, any party has against the forger, and against the person to whom the cheque was directly transferred by the forger, the right to recover compensation for any damage that he may have suffered because of the forgery.

(2) Except to the extent provided in articles 70 and 72, the liability of a party or of the drawee who pays, or of an endorsee for collection who collects, a cheque on which there is a forged endorsement is not regulated by this Convention.

(3) For the purposes of this article, an endorsement placed on a cheque by a person in a representative capacity without authority or exceeding his authority has the same effects as a forged endorsement.

Relevant legislation

BEA - sections 24, 59 and 60; Cheques Act - sections 1 and 4
UCC - sections 3-404, 3-405 and 3-603; 4-207 and 4-212
ULC - articles 15, 34 and 35

Cross references

Forged signature: article 6(8)
Transfer: article 14
Endorsement for collection: article 22
Endorsement by a person in a representative capacity: article 34

Commentary

1. Where an endorsement on a cheque has been forged, one of the parties must bear the risk of loss. The problem of who should bear that risk is solved in a fundamentally different way in the common and civil law systems. The reasons

for this divergence in approach are based on a different appreciation of what is commercially expedient and what policy considerations should prevail, even though the rationalization of certain aspects of the rule may have occurred after its formulation. While there are other issues of negotiable instruments law where the two systems are in sharp contrast, the rule on forged endorsements can be said to present the most striking conflict between them.

2. The BEA, the UCC and the ULC all recognize the basic principle that a person whose signature is forged on a cheque is not liable thereon (BEA section 24; UCC section 3-404(1); ULC article 10) and that the person who forges the signature of another person is liable on the cheque as if he had signed his own name. The basic point on which the two systems differ is the effect of the transfer of a cheque bearing a forged endorsement. Who is the owner of the cheque? What are the rights and liabilities of the various parties to the cheque and of the drawee who pays on a forged endorsement and the person whose endorsement was forged?

The existing legal systems

Anglo-American Law

3. Under the common law statutes a forged endorsement, subject to certain exceptions, is wholly inoperative "as that of the person whose name is signed" (UCC section 3-404(1)) and "no right to retain the bill or to give discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature" (BEA section 24).

4. The effects of this basic rule are several. Since an order instrument is negotiated by delivery with any necessary endorsement and a forged signature is inoperative as an endorsement, without such negotiation the transferee does not become a holder. The same is true for any subsequent transferee, whether or not he acts in good faith. Because the endorsement is inoperative, it cannot make the cheque payable to bearer either. Possession of the cheque does not confer title to it nor the right to enforce it against parties who signed it prior to the forged endorsement. In respect of persons (including collecting banks) that transfer the cheque subsequent to the forged endorsement, the UCC provides for a warranty given by such transferor, who receives consideration, "that (a) he has a good title to the item or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and (b) all signatures are genuine or authorized" (UCC section 4-207(2)(a) and (b)). This warranty runs to the immediate transferee and to any subsequent collecting bank who takes the item in good faith. A warranty of title runs also to the "payor bank or other payor who in good faith pays or accepts the item" (UCC section 4-207(1)(a)). The BEA provides in this respect that an endorser is estopped from raising against subsequent transferees the fact that an endorsement was forged (section 55(2)(c)). In the case of a bearer cheque any person who negotiates it warrants to his immediate transferee for value that there are no prior forged endorsements (section 58(3)).

5. Payment on a forged endorsement does not discharge the drawee's debt to the drawer since payment is not to the holder. According to the BEA such payment does not qualify as payment in due course to the holder. As a result the drawer is entitled to demand that the drawee reverse the charge by re-crediting his account. An exception to this rule is found in section 60 of the BEA in respect of cheques (see also section 1 of the Cheques Act, 1957). If a banker pays a cheque in good faith and in the ordinary course of business it is not incumbent on him to show that any endorsement on the cheque was made by or under the authority of the person whose endorsement it purports to be; and he is deemed to have paid the cheque in due course although

the endorsement has been forged or made without authority. Therefore, such payment discharges the cheque and the banker is entitled to debit the drawer's account. Under the UCC a cheque bearing a forged endorsement is not "properly payable" (section 4-401(1)) and since the payee or the endorsee whose endorsement was forged has not signed, the drawee who pays does so without instructions and in violation of the drawer's order.

6. The payee or the endorsee whose signature is forged retains title to the cheque and the cheque remains payable to him. He may exercise his rights to it by an action for conversion outside the cheque or, alternatively, by an action on the cheque under the provisions of lost cheques. Thus if the drawee pays to someone else and receives the cheque he is liable for conversion to such payee or endorsee on an action in tort outside the cheque and the drawer may still be liable on the cheque to such payee or endorsee. In this respect, the Cheques Act sets forth an exception: A collecting bank which receives payment for its customer is not liable for conversion if it collects the cheque in good faith and without negligence (section 4). Similarly, if a drawee-bank pays a cheque on which there is a forged endorsement in good faith and in the ordinary course of business it is deemed to have paid the cheque in due course and is therefore not liable for conversion.

7. Under the UCC, the drawee who paid the cheque in good faith may recover from the person paid. Under section 4-207(1)(a), the drawee may shift the loss to the person who received payment by a claim for breach of warranty of title. Under the BEA, if a banker pays a cheque drawn on him in good faith and in the ordinary course of business, such payment is payment in due course and he may debit the account of the drawer. Therefore, he may not opt to recover, instead, the money paid from the person who received payment.

The Geneva Uniform Law

8. The approach of the ULC is fundamentally different from that of the common law. According to article 19 of that Law the person who is in possession of an endorsable cheque and establishes his title to it through an uninterrupted series of endorsements is considered to be the lawful holder (porteur légitime). These two conditions establish what is often referred to by civil law authors as légitimation formelle, a term for which there is no correct equivalent in the English language. They establish a presumption that the possessor of a cheque on which there appears an uninterrupted chain of endorsements has title to it and, as such, is entitled to exercise all rights derived therefrom. The presumption is rebuttable: the true owner may claim the cheque but will succeed only if he proves that the holder, though the conditions set forth in article 19 of the ULC may be met, acquired it in bad faith or in acquiring it has been guilty of gross negligence. In the context of forged endorsements this means that the status of lawful holder which article 19 bestows upon the possessor is not available if the possessor was aware or should have been aware that the endorser was not the true owner of the cheque and that the endorsement was forged or made by an agent without authority.

9. Therefore, under the ULC a forged endorsement is, with respect to the rights of the taker from the forger, a valid endorsement provided that the taker meets the conditions set forth in article 19. It is also a valid endorsement with respect to the rights of subsequent endorsees even if they knew about the earlier forgery. The dispossessed owner may claim the cheque from the person who took it from the forger, but if such person is a lawful holder the dispossessed

owner will succeed only if he proves bad faith or gross negligence. Since a lawful holder, in the absence of bad faith or gross negligence, is not bound to give up the cheque he may exercise the rights on the cheque. Parties to the cheque, whether they signed before or after the forgery, are liable to the lawful holder.

10. The presumption which article 19 establishes is also relevant in the context of payment of the cheque by the drawee (or by any party liable): he may act in reliance on the apparent title. If the holder establishes his title to the cheque through an uninterrupted series of endorsements, the drawee who pays in reliance on such series of endorsements may debit the account of the drawer. The drawee (or the party who pays the cheque) is not bound to verify the signatures of the endorser (article 35).

Who bears the risk of a forged endorsement?

11. The basic difference, in terms of bearing the risk of a forged endorsement, between the ULC and the BEA and UCC approach is the following: according to the ULC the risk of the forged endorsement rests upon the owner of the cheque from whom it was stolen, whilst according to the BEA and the UCC the risk rests upon the person who took the cheque from the forger. The different results under the two main systems are shown by the following example:

Example A. The drawer issues a cheque to the payee (P). T steals the cheque from P. The thief (T) forges P's signature and "endorses" the cheque to A who takes it without knowledge of the theft and forgery. A endorses it to B who takes it without knowledge of the theft and forgery. B endorses the cheque for collection to Bank C which receives payment from the drawee-bank which pays without knowledge. The drawee debits the drawer's account.

Under the ULC, the payment by the drawee operates as a discharge of his debt to the drawer, and the drawee is entitled to debit the drawer's account (i.e., the risk is not upon the drawee). As the cheque is paid to the person entitled to payment, the drawer discharges his obligation to the payee (i.e. the risk is not upon the drawer). The risk of forgery rests, therefore, according to the ULC, on the payee, the owner of the cheque who lost possession of it and who has no rights against A, B, the collecting bank C, and the drawee.

Under the UCC, payment by the drawee does not discharge his debt to the drawer and the drawee is not entitled to debit the drawer's account. The drawee has not properly paid the cheque (section 4-401) since he has not paid it in accordance with the instructions of the drawer: he has not paid to the holder. As a result the risk does not rest with the drawer. However, the drawer does not gain from the forgery since he is still liable on the cheque to the payee. The drawee is entitled to recoup his loss by shifting it to the collecting bank C, and C in turn may shift the loss to B, and B to A (i.e., the risk is not upon the drawee, the collecting bank C, or B). A cannot shift the risk back.

Under the BEA, as under the UCC, the risk of forgery falls on A; however, this result is achieved by a different approach since under the BEA the drawee-bank is not liable for conversion if it paid the cheque in good faith and in the ordinary course of business and the collecting bank is not liable if it collected the cheque in good faith and without negligence (Cheques Act section 4). Thus, under the BEA payment by the drawee to the collecting bank is payment in due course and the drawee is entitled to debit the drawer's account with him (i.e., the risk is not upon the drawee or the drawer). The risk at this point is on the payee who has no right on the cheque against the drawer. However, the

payee may shift the risk to B who is liable to the payee for converting the cheque. B is entitled to recoup his loss by shifting it to A (i.e., the risk is not upon B). A cannot shift the risk back. He will bear it. Consequently, under the BEA, as under the UCC, the risk falls on the person who took the cheque from the forger.

Identical results are reached under the ULC, the UCC and the BEA if a cheque is stolen from the post before it reaches the payee.

The advantages and disadvantages of the two approaches to forgery

12. The main advantages of the ULC, as compared to the BEA and UCC, are said to be the following:

(a) The ULC promotes circulation and payment of transactions by cheques, since any possessor without knowledge is assured that a previous forged endorsement has no effect on his rights to and upon the cheque. Under the BEA and UCC, on the other hand, a person without knowledge may be hesitant in taking a cheque since he may have no right to or upon it if there is a previous forged endorsement.

(b) The ULC rule gives greater finality of payment. If a cheque is given in payment the payment will be final once the cheque is paid by the drawee and it is no longer necessary to inquire whether the transferor or the transferee had rights to or upon the cheque. In that respect payment by way of a cheque resembles payment by way of money. Under the ULC once the drawee paid the cheque without fraud or gross negligence on his part, and provided the cheque shows a regular series of endorsements, the payment is final. The relations between the drawer and the drawee, the payee and the drawer (if the cheque was stolen from the payee), and the endorsees amongst themselves, are settled promptly and with finality. On the other hand, under the BEA and UCC, the transactions must be reopened.

(c) The ULC rule provides economy of remedies. Pursuant to the ULC, when the drawee pays and debits the drawer's account, the risk of the forgery is automatically imposed on the party who should, under the ULC bear the risk (i.e., the owner of the cheque). There is no need for any action or litigation in order to impose the risk on such party. On the other hand, according to the BEA and UCC, a series of actions or remedies may be necessary to transfer the loss to the one ultimately responsible (i.e. the person who took from the forger). One may envisage several actions (and therefore possible disputes) before the risk rests on the taker from the forger.

13. The main advantages of the approach of the BEA and UCC, as compared to the ULC, are the following:

(a) It encourages the use of a cheque by the drawer as a means of payment, since the drawer is assured that he will not bear the risk of any forgery of an endorsement. Especially, it encourages the use of the mail as a means to transfer cheques from the drawer to the drawee. Under the ULC, on the other hand, the potential drawer of a cheque may be hesitant to issue it and to send it by post, since he may bear the risk if the cheque is stolen from the post before it reaches the payee.

(b) The BEA-UCC approach puts the risk of forgery on the person who dealt with the forger. That party ought to bear the risk since he can most

easily prevent it. The endorsee should know his endorser. He should not take the cheque from a stranger. The ULC, on the other hand, imposes the risk of forgery on the owner of the cheque, who under normal and efficient procedures for handling cheques (including the use of mail) cannot prevent theft and forgery of the cheque.

14. It is to be noted that the above-mentioned advantages that are said to be inherent in one or the other system do not appear, in actual practice, to be absolute. For instance, the principal reason advanced during the 1931 international conference in favour of articles 19 and 35 of the ULC was that only by protecting the possessor of a cheque who took it in good faith would the cheque be susceptible of easy circulation and that circulation would be impeded if one would oblige the endorsee or the drawee to verify the signature of all preceding endorsers who would be mostly unknown to him. However there is no proof that the common law rule has in any way impeded circulation or that cheques subject to the rules of common law jurisdictions are in practice less negotiable. Nor, it would appear, has the alleged disadvantage of the ULC rule - that it discourages the use of a cheque by the drawer because he bears the risk of the forgery of an endorsement - led to a decrease in the issuance of cheques in countries operating under the ULC system. The other objection is that the ULC rule encourages laxity in cheque transactions because there is little risk in buying a cheque from a stranger, while the common law rule prevents this by imposing the risk on the purchaser, appears to be refuted by the near-absence of forged endorsements on instruments in civil law countries.

15. There are other rationalizations of the rules on forged endorsements that concern their procedural effects. It is certainly true that the ULC achieves finality of payment in that, once the cheque is paid by the drawee under the conditions laid down by article 35 of that Law, the drawee may debit the account of the drawer and his relations with the drawer are settled. But it is at least arguable whether this is the most appropriate solution and whether it is not preferable to protect the interests of the drawer by accepting the inconvenience of reopening the transactions.

16. It would thus appear that the so-called advantages of each legal system cannot provide absolute criteria for the formulation of new uniform rules.

Article 25 of the Convention

17. Article 25 attempts to bridge the basic differences between the common law rules and those of the ULC. The legal effects of this article and of article 16 are the following:

(a) A forged endorsement or an endorsement signed without authority is effective as an endorsement if it is part of an uninterrupted series of endorsements.

(b) Any party who suffered damages because of the forgery has a right for damages against the forger and against the person to whom the forger directly transferred the cheque.

18. As a result:

(a) The person who acquired the cheque through an uninterrupted series of endorsements is a holder even if one or more endorsements were forged. As a holder he has all the rights conferred on him by the Convention.

(b) The person who ultimately bears the risk of loss is the forger or, if he cannot be found or is insolvent, the person who took the cheque from the forger.

Example B. The drawer issues a cheque to the payee (P) who receives it. T steals the cheque from P. T forges P's signature and "endorses" the cheque to A who takes it without knowledge of the forgery. A endorses it to B who takes it without knowledge of the forgery. B endorses it for collection to bank C. Bank C receives payment from the drawee. The drawee debits the drawer's account. Who bears the risk?

Payment by the drawee effects a discharge of his debt to the drawer (consequently the risk is not on the drawee). Since the cheque was paid to the person entitled to payment the drawer discharges his obligation to the payee (consequently the risk is not on the drawer). The payee who lost his rights to and upon the cheque is entitled to compensation from T and A for such loss. If T cannot be found or is insolvent A cannot shift the risk to anyone else. Therefore, the risk of the forgery rests on A who took the cheque from the forger.

Rationale

19. As pointed out above, each solution to the "forged endorsement" problem, whether under the BEA, the UCC or the ULC, has its advantages and disadvantages. Theoretically, the best solution would be one which embodies all the advantages of these systems, without being subject to their disadvantages. This cannot be done since any "positive" aspect of an optimum solution is of necessity accompanied by a "negative" aspect. As has been noted, the elements of an optimum solution include: (a) finality of payment; (b) economy of remedies; (c) allocation of the risk of forgery to the person best able to guard against the risk; (d) encouragement of the use of cheques as payment instruments. Article 25 offers a compromise solution; it attempts to embody the principal advantages of the existing legal systems, whilst avoiding or minimizing their main disadvantages.

20. Finality of payment. Under article 25 that advantage is substantially achieved; payment by the drawee is final. The legal relations between the drawee and the drawer, the payee and the drawer, the endorsees between themselves, the drawee and the person receiving payment are settled in a final way. The only "non-final" element is the rule that enables the person from whom the cheque was stolen to recover damages from the person who acquired the cheque from the forger.

21. Economy of remedies. Payment by a drawee effects a discharge of his obligation to the drawer; the drawee may debit the drawer's account. There is no occasion for further action between them. It follows that there is no need for further action between the drawee and the person receiving payment, or between him and previous endorsers. The person whose signature is forged (payee or endorsee) loses his right to act upon the cheque, and therefore there is no need for further action by him against the drawer, drawee or any subsequent endorsee. All these potential actions are replaced by a single right of action of the owner of the cheque against the forger and the person who acquired the cheque from the forger.

22. The risk of forgery should be borne by the person who is best able to prevent the forgery. It is the person who acquired the cheque from the forger who can best prevent the circulation of it. The endorsee should know his endorser. He should not take the cheque from a stranger. Article 25 encourages this by giving the owner a right of action against the person who took from the forger.

Paragraph (1)

23. The basic rule that a person to whom a cheque is transferred through an uninterrupted series of endorsements is a holder, even if any of the endorsements was forged or was signed by an agent without authority, follows from article 16(1)(b). This rule underlies the provision of paragraph (1). Consequently paragraph (1) does not apply to the case of a stolen bearer cheque.

24. Nothing in article 25 affects the rule that a forged signature does not impose any liability on the person whose signature was forged (cf. art. 32). However, there are cases in which such a person will nevertheless be liable (cf. art. 32). In such cases paragraph (1) does not apply by reason of the fact that the person whose signature was forged is considered to be bound by it.

25. The liability of the forger and of the person to whom the cheque was directly transferred by the forger is a liability off the instrument. Paragraph (1) merely confers a statutory right for compensation upon the party who suffered damages because of a forged endorsement. Questions pertaining to the amount of damages, limitation of action for damages, etc. are left to the applicable national law.

26. Article 25 confers a right for compensation on any party who suffered damages because of the forgery. That right is therefore not limited to the person whose endorsement was forged. Thus the drawer of a cheque which was stolen from the post on its way to the payee may exercise the right if he suffered damages because of the forgery of the payee's signature.

27. The right to recover compensation may be exercised only against the forger and the immediate transferee of the forger. Thus if T forges the signature of the payee, transfers the cheque to A and A transfers to B, the payee who suffered damages because of his forged endorsement may not recover damages under article 25(1) from B, even if B knew about the forgery.

Paragraph (2)

28. Under article 25, the right to recover compensation for damages suffered because of a forged endorsement is given against the forger and against the "person to whom the cheque was directly transferred by the forger". The rationale for the rule that the right to recover compensation may be exercised against the person to whom the cheque was directly transferred by the forger, by endorsement and delivery or by delivery alone if the last endorsement was in blank, is that the transferee should know the person who so transfers the cheque to him. Therefore, such transferee is liable for damages that any party may suffer because of a forged endorsement. Paragraph (2) makes clear that the Convention makes no rule in respect of the liability of a party or the drawee to whom the cheque is transferred consequent upon payment of it by him.

29. Paragraph (2) further lays down that the Convention does not deal with the liability of a bank to which the forger has endorsed a cheque for collection and to which it is subsequently paid.

Paragraph (3)

30. Paragraph (3) extends the rule laid down in paragraph (1) in respect of a forged endorsement to an endorsement made by an agent without authority or exceeding his authority.

CHAPTER FOUR. RIGHTS AND LIABILITIES

Section 1. The rights of a holder and of a protected holder

Article 26

(1) The holder of a cheque has all the rights conferred on him by this Convention against the parties to the cheque.

(2) The holder is entitled to transfer the cheque in accordance with article 14.

Relevant legislation

BEA - section 38

UCC - sections 3-301 and 3-306

ULC - article 19

Cross references

Holder: articles 6(5) and 16

Party: article 6(7)

Transfer: article 14

Commentary

1. Article 26 is the introductory article to the articles governing the rights of a holder and of a protected holder. In order to exercise the rights on a cheque under this Convention a person must, as a general rule, be a holder. Special rules obtain if a holder is not in possession of the cheque because it is lost (see articles 73 to 78). As to the duties of a holder see Chapter Five of this Convention.

2. A cheque may be transferred only by a holder. If the transfer is in accordance with the provisions of article 14 the transferee is a holder.

* * *

Article 27

(1) A party may set up against a holder who is not a protected holder:

(a) Any defence available under this Convention;

(b) Any defence based on an underlying transaction between himself and the drawer or a previous holder or arising from the circumstances as a result of which he became a party;

(c) Any defence to contractual liability based on a transaction between himself and the holder;

(d) Any defence based on incapacity of such party to incur liability on the cheque or on the fact that such party signed without knowledge that his signature made him a party to the cheque, provided that such absence of knowledge was not due to his negligence.

(2) The rights to a cheque of a holder who is not a protected holder are subject to any valid claim to the cheque on the part of any person.

(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 cheque unless:

(a) Such third person asserted a valid claim to the cheque; or

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

Relevant legislation

BEA - sections 36(2) and (6), and 38(2)
UCC - section 3-306
ULC - articles 10, 19 and 22

Cross references

Holder: articles 6(5) and 16
Protected holder: articles 6(6) and 28

Commentary

1. A person who signs a cheque (a "party") is liable to the holder of it. The Convention makes a distinction between a "holder" and a "protected holder". Article 27 deals with the rights of a holder who is not a protected holder.

2. The distinction between a holder and a protected holder is relevant only if the party liable on the cheque can set up a defence to his liability or has a claim to the cheque. If a holder is not a protected holder he is subject to any claim or defence of any party. As to the question whether payment by a party to a holder who is not a protected holder discharges that party, see Chapter Six.

Paragraph (1)(a)

3. The Convention sets forth various defences which a party may raise against the holder. Some of them may also be raised against a protected holder (see article 28(1)(a) and commentary).

4. The following are examples of defences which may be set up against a holder.

Example A. The drawee of a cheque refuses to pay it upon due presentment. The holder fails to protest the cheque. Therefore the payee is not liable on the cheque and, if recourse is exercised against him, may raise the defence of absence of liability consequent upon lack of due protest.

Example B. The payee of a cheque presents it for payment to the drawee. The drawee pays the cheque but does not request that it be handed over to him. Subsequently, the payee endorses the cheque to A who is not a protected holder. The drawer may set up against A the defence of discharge because of payment (cf. art. 61).

Paragraph (1)(b)

5. In addition to defences that are derived from the provisions of the Convention there are the defences, referred to in paragraph (1)(b), that are based on an underlying transaction or that arise "from the circumstances as a result of which [a person] became a party". This type of defence may be illustrated by the following examples:

Example C. Pursuant to a contract of sale the buyer (drawer) issues a cheque made payable to the seller (payee). The seller fails to deliver the goods under the sales contract and endorses the cheque to A who is not a protected holder (for instance because A when taking the cheque had knowledge of seller's failure to deliver and, consequently, of buyer's defence on the cheque against seller; cf. art. 6(6)(a)). The drawer may set up the defence of non-delivery in an action on the cheque by A, even though A is a person with whom the drawer has not dealt.

Example D. The payee by fraud induces the drawer to make a cheque payable to him, the payee. The payee endorses the cheque to A who is not a protected holder. Upon dishonour by non-payment, A brings an action on the cheque against the drawer. The drawer may raise against A the defence based on fraud as a result of which the drawer became a party.

Paragraph (1)(c)

6. This sub-paragraph provides that a party may raise against a non-protected holder who is not a remote holder a defence to contractual liability that is based on a transaction between himself and such a holder.

Example E. A to whom the payee transferred the cheque upon dishonour by non-payment brings an action on it against the payee. The payee may set up as a defence the fact that A has not delivered goods under a sales contract between himself and A.

Paragraph (1)(d)

7. This sub-paragraph sets forth two defences based on the fact that the party from whom payment is demanded was never liable on the cheque: he signed the cheque without capacity to incur liability on it or without knowledge that his signature made him a party to the cheque (the defence of non est factum).

8. The question whether a person has capacity to sign a cheque is left to national law. The defence of non est factum is available if the person signing is without knowledge of the fact that he signed a cheque and the absence of knowledge is not due to his being negligent.

Example F. X signs a cheque in the belief that it is a receipt. He does so without negligence. X is not liable on the cheque.

The defence of non est factum is not available if the person signing knows that he is signing a cheque but mistakenly erred as to its contents.

Paragraph (2)

9. Whereas a "defence" refers to a party's right to establish that he is free from liability on the cheque a "claim" to a cheque refers to the assertion of a right to ownership or some other proprietary right available under the applicable law. A holder who is not a protected holder is subject to such claims.

Example G. B obtains the cheque from A by fraud and transfers it to C who is not a protected holder because he knew about the fraud. A brings an action against C to recover possession of the cheque. A has a valid claim to the cheque against C.

Paragraph (3)

10. This paragraph deals with the so-called defence of ius tertii: a defence based on the claim of a third person and not on the absence of liability of the party from whom payment is demanded.

Example H. The drawer issues a cheque made payable to the payee. By fraud A induces the payee to transfer the cheque to him. Upon dishonour by non-payment A brings an action on the cheque against the drawer. Pursuant to paragraph (3) the drawer may raise the defence based on the fraud A practised on the payee only if the payee asserts his claim to the cheque.

The drawer may raise a defence based on ius tertii also if A acquired the cheque belonging to the payee by theft or if A had forged the signature of the payee or participated in the theft.

11. The main reasons for the rule set forth in paragraph (3)(a) are:

(a) the rule protects a party liable on the cheque since his liability will be discharged by his payment to the holder even if the party has knowledge of the claim of another person (cf. art. 61(2));

(b) it is not proper to allow a party to raise a defence based on a claim which the person entitled to it does not himself wish to raise. However, if such person asserts his claim the defence of ius tertii is available.

Thus, under article 61(2), a party is not discharged of liability if, though knowing that a third person has asserted a valid claim to the cheque, he nevertheless pays it.

* * *

Article 28

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

(a) Defences under articles 31 (1), 32, 33 (1), 34 (3), 45 and 79 of this Convention;

(b) Defences based on the underlying transaction between himself and such holder or arising from any fraudulent act on the part of such holder in obtaining the signature on the cheque of that party;

(c) Defences based on the incapacity of such party to incur liability on the cheque or on the fact that such party signed without knowledge that his signature made him a party to the cheque provided that such absence of knowledge was not due to his negligence.

(2) The rights to a cheque of a protected holder are not subject to any claim to the cheque on the part of any person, except a valid claim arising from the underlying transaction between himself and the person by whom the claim is raised or arising from any fraudulent act on the part of such holder in obtaining the signature on the cheque of that person.

Relevant legislation

BEA - section 38
UCC - sections 3-305 and 3-602
ULC - articles 10, 19 and 22

Cross reference

Protected holder: article 6(6)

Commentary

1. As noted under article 6(6), the main advantages of a negotiable instrument result from the strong legal position of a protected holder. He receives the instrument free from any defences of prior parties and free from claims to it by any person.

Example A. The payee by fraud induces the drawer to draw a cheque payable to the payee. The payee transfers it to A, a protected holder. Upon dishonour by non-payment, A demands payment from the drawer. Pursuant to paragraph (1) the drawer may not raise the defence of fraud against A.

Example B. The payee endorses an order cheque in blank and mails it to A. It is stolen from the mail by X. X sells and delivers the cheque to B, a protected holder. The payee brings an action against B for recovery of the cheque or its amount. Pursuant to paragraph (2) the claim of the payee to the cheque is not available against B.

Example C. The payee of a cheque presents it for payment to the drawee. The drawee pays the cheque but does not request that it be handed over to him. The payee subsequently endorses the cheque to A, a protected holder. The cheque is dishonoured by non-payment. The drawer may not set up as a defence against A the fact that he is discharged of liability because of the cheque having been paid.

Example D. The payee endorses the cheque to A and, off the cheque, gives instructions to A to collect the cheque for him. A in disregard of his instructions endorses the cheque to B who is a protected holder. The payee may not set up against B the fact that the payee's endorsement was intended for purposes of collection only.

Example E. A cheque is dishonoured by non-payment. The holder fails to protest the cheque for dishonour and transfers it to A who is a protected holder. In an action on the cheque by A against the drawer, the drawer may not raise the failure to protest as a defence to his liability.

2. The principal rule embodied in article 28, namely that the protected holder takes the cheque free from all defences and claims of any party, is subject to a number of important exceptions as provided in paragraph (1)(a), (b) and (c).

Paragraph (1)(a)

3. The protected holder does not take the cheque free from defences that are based on the provisions of the Convention listed in paragraph (1)(a). The defences are those based on the fact that the person from whom the protected holder demands payment has not signed the cheque (art. 31(1)); that that person's signature on the cheque was forged (art. 32); that he signed the

cheque before a material alteration of the cheque (art. 33(1)); that his signature was placed on the cheque in the conditions specified in article 34(3); that the cheque was not duly presented for payment (art. 45); and that a right of action on the cheque is prescribed under article 79.

Example F. The drawer draws a cheque for Swiss francs 1.000 payable to the payee P. P fraudulently increases the amount of the cheque to Swiss francs 2.000 and transfers it to A who is a protected holder. Upon dishonour of the cheque by non-payment A brings an action on the cheque against the drawer for the amount of the cheque. The drawer may set up as a defence against A the fact that he signed the cheque before the material alteration and is liable only for Swiss francs 1.000 (article 33(1)).

Paragraph (1)(b)

4. The general rule that the protected holder takes the cheque free from defences and claims of prior parties does not obtain if the defence is raised or the claim asserted by an immediate party.

Example G. A to whom the payee of a cheque has transferred it is a protected holder. A delivers defective goods under a contract of sale between him and the payee in consideration of which the payee transferred the cheque to A. Upon dishonour by non-payment by the drawee A demands payment from the payee. The payee may raise as a defence the fact that A delivered defective goods. The payee may raise this defence because he and A are immediate parties. The defence could not be raised by the drawer since A is a protected holder and the transfer of the cheque to A is not connected with an underlying transaction between the drawer and A.

5. Usually the holder of a cheque is not a protected holder if the transaction which led to the transfer of the cheque to him is defective in the sense that it entitles the transferor to a defence against his liability on the cheque. However, there may be cases where when the cheque was transferred the holder took it in good faith and the defect in the transaction occurred later.

Paragraph (1)(c)

6. Defences against liability obtaining under a simple contract cannot be raised against a protected holder (see example A. above). However, the protected holder does not overcome defences based on the fact that the party signed the cheque without capacity or without knowledge that his signature made him a party to the cheque.

Example H. B asks A to sign a document as a witness. A, without negligence, signs what is in fact a cheque. B transfers the cheque to C, a protected holder. In an action on the cheque by C against A, A has a valid defence.

Limitation or exclusion of liability

7. The rights of a protected holder on a cheque are determined by what is apparent ex facie the cheque. Therefore if a party has limited or excluded by a stipulation on the cheque the rights of a subsequent party or subsequent parties against him, as where an endorser has endorsed "without recourse" or has endorsed for collection or where a guarantor has guaranteed payment of only part of the sum payable, the protected holder cannot overcome such stipulation. Similarly where a party has paid part of the sum payable by the cheque - the cheque is then dishonoured by non-payment as to the amount unpaid (art.62(3)) -

and such partial payment is stated on the cheque (art. 62(5)), the party who paid partially can successfully raise against a protected holder the fact that he is discharged of his liability on the cheque to the extent of the amount he paid.

Paragraph (2)

8. Whereas paragraph (1) dealt with defences against liability, paragraph (2) deals with a claim to the cheque. The basic rule is that a protected holder is not subject to such claim (see example B.). However, when a claim to the cheque arises in the circumstances in which a defence becomes available under paragraph (1)(b), the protected holder cannot overcome such claim. Thus, in example G. above the payee has a claim to the cheque against A.

* * *

Article 29

(1) The transfer of a cheque by a protected holder vests in any subsequent holder the rights to and upon the cheque which the protected holder had, except where such subsequent holder participated in a transaction which gives rise to a claim to or a defence upon the cheque.

(2) If a party pays the cheque in accordance with article 59 and the cheque is transferred to him, such transfer does not vest in that party the rights to and upon the cheque which any previous protected holder had.

Relevant legislation

BEA - section 29(3)

UCC - section 3-201

Cross references

Transfer: article 14

Holder: articles 6(5) and 16

Protected holder: article 6(6)

Commentary

Paragraph (1)

1. According to article 29 a holder who is not a protected holder may nevertheless obtain the rights of a protected holder if the cheque is transferred to him by a protected holder. The purpose of this so-called "shelter rule" is to enable the protected holder to receive the full benefit of his protected status by being able freely to transfer the cheque. However, this rule is not intended, and should not be used, to permit any person who "participated in a transaction which gives rise to a claim to, or defence upon, the cheque" to wash the cheque clean by passing it into the hands of a protected holder. Consequently, under this paragraph, such a person is denied the benefit of the "shelter rule".

Example A. The payee by fraud induces the drawer to draw a cheque payable to the payee (P). P endorses it to A who is a protected holder. A transfers the cheque to B who knows that the cheque was dishonoured. B brings an action against the drawer. Under article 29, the drawer is liable to B; the drawer has no

defence against A since A is a protected holder. In the above facts the rights of A were transferred to B; therefore the drawer has no defence against B.

Example B. P and B by fraud induce the drawer to draw a cheque payable to P. P endorses the cheque to A who is a protected holder. A transfers the cheque to B. B brings an action against the drawer. The drawer has a good defence. Though generally B acquires the same rights as A and A as a protected holder has a valid right against the drawer, article 29(1) provides that this rule does not apply when the transferee was himself a party to the fraud.

However, it should be noted that the exception in article 29(1) only applies where a person participated in the specified transaction and that mere knowledge is not sufficient. Thus if, in example B., B had not participated in the fraud, but only known about it, he would have had the rights of a protected holder.

Example C. In the fact situation described in example B., B transfers the cheque to C who is not a protected holder in his own right because he knew about the participation of B in the fraud. Under article 29(1) C acquires the same rights as A had and, thus, obtains the rights of a protected holder.

Paragraph (2)

2. The shelter rule applies irrespective of whether the subsequent holder to whom the cheque is transferred is a previous party to the cheque.

Example D. The payee P induces by fraud the drawer to draw a cheque to P, which P transfers to A who knows about the fraud. A transfers to B who is a protected holder. B transfers to C and C to A. A acquires the rights of a protected holder according to article 29(1) although as a previous party he was a holder against whom the drawer could have raised the defence of fraud.

However, a previous party may benefit from the shelter rule only if he obtains the cheque by transfer but not if he receives it against payment.

* * *

Article 30

Every holder is presumed to be a protected holder, unless the contrary is proved.

Relevant legislation

BEA - section 30
UCC - section 3-307(3)
ULC - article 19

Cross reference

Protected holder: article 6(6)

Commentary

If a person is the holder of a cheque it is presumed that he is a protected holder. Therefore, if, in an action by the holder on the cheque against a

party liable to him, such party brings a claim to the cheque or raises a defence against his liability, it is for the party bringing the claim or raising the defence to prove that the holder is not a protected holder.

* * *

Section 2. The liability of the parties

A. General provisions

Article 31

(1) Subject to the provisions of articles 32 and 34, a person is not liable on a cheque unless he signs it.

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

Relevant legislation

BEA - section 23
UCC - section 3-401

Cross reference

Signature: article 6(8)

Commentary

1. Article 31 embodies one of the basic principles of negotiable instruments law, namely that a person is liable on an instrument only if he signed it. Therefore, for example, the drawee is not liable on the cheque. Articles 32 to 34 set forth certain exceptions to this rule.

2. A person may have more than one name, e.g. a "private" name and a "business" or "trade" name. Paragraph (2) provides that the signature in any one of these names is sufficient to establish the signer's liability on the cheque. It is the fact of signing, not in which name is signed, that is the decisive factor. A person signing in a fictitious name is thus liable on the cheque he signed. It also follows from paragraph (2) that a person who forges the signature of another person is liable on the cheque as if he had signed in his own name.

* * *

Article 32

A forged signature on a cheque does not impose any liability thereon on the person whose signature was forged. Nevertheless, such person is liable as if he had signed the cheque himself where he has, expressly or impliedly, accepted to be bound by the forged signature or represented that the signature was his own.

Relevant legislation

BEA - section 24
UCC - sections 3-404 and 3-406

Cross reference

Signature, forged signature: article 6(8)

Commentary

1. In conformity with the generally prevailing rule that a person is not liable on a cheque unless he signs it (cf. art. 31), article 32 provides that a forged signature (as defined in article 6(8)) on an instrument does not impose liability on the person whose signature was forged, not even against a protected holder (cf. art. 28(1)(a)). However, article 32 sets forth two exceptions to this rule. Such person is liable if he accepts or adopts the forged signature as his own or if he represents, in writing or orally or by other conduct, that the forged signature is his own.

Example. The payee intends to endorse a cheque to A. Before A takes the cheque he asks the drawer whether the signature on the cheque is his. The drawer mistakenly answers in the affirmative. It turns out that the drawer's signature was forged. Under article 32, the drawer is liable on the cheque since he represented to A that the signature was his own.

2. For the purposes of this second exception, it is material whether the person to whom an affirmative representation is made knows of the forgery. If he does so, the person whose signature was forged is not liable since the rule on representation presupposes justified reliance on the representation.

3. It should be noted that the liability of persons other than the person whose signature was forged is not dealt with in article 32 but in other provisions (articles 25, 31).

* * *

Article 33

(1) If a cheque has been materially altered:

(a) Parties who have signed the cheque subsequent to the material alteration are liable thereon according to the terms of the altered text;

(b) Parties who have signed the cheque before the material alteration are liable thereon according to the terms of the original text. Nevertheless, a party who has himself made, authorized, or assented to, the material alteration is liable on the cheque according to the terms of the altered text.

(2) Failing proof to the contrary, a signature is deemed to have been placed on the cheque after the material alteration.

(3) Any alteration is material which modifies the written undertaking on the cheque of any party in any respect.

Relevant legislation

BEA - sections 55(2)(c) and 64
UCC - sections 3-406 and 3-407
ULC - article 51

Cross reference

Signature: article 6(8)

CommentaryParagraph (1)

1. Article 33 deals with the material alteration of a cheque and not with forgery of the signature of a party, which is dealt with in article 32. It is irrelevant whether the material alteration is made by a party or a stranger.
2. The alteration does not discharge parties to the cheque of their liability. However, as to the extent of their liability it is relevant whether they signed before or after the alteration. A party who signs after the alteration is liable according to the terms of the altered text (sub-paragraph (a)). A party who signed before the alteration is liable according to the terms of the original text. The only exception to this rule is that such party is liable according to the terms of the altered text if he himself made, authorized, or assented to the alteration (sub-paragraph (b)).

Example. A cheque states the sum payable as X. The payee then raises the sum to Y and endorses the cheque to A. A endorses the cheque to B. If the drawee dishonours the cheque the drawer is liable to B for X. Pursuant to paragraph (1)(a) the payee and A are liable to B for Y.

3. The application of the above rules based on the time of the signature does not depend on whether the person claiming payment is with or without knowledge of the alteration or whether or not he is a protected holder. Thus, a party signing before the alteration is liable according to the original terms even if the holder had no knowledge of the alteration and even if he was a protected holder (cf. art. 28(1)(a)). Conversely, a party signing after the alteration is liable according to the altered terms even if the holder had knowledge of the alteration.
4. The rule in paragraph (1) places the risk of a material alteration on the person making the alteration and on the party who takes the cheque from that person. The same policy of risk allocation is adopted in the case of a forged endorsement (cf. art. 25). In certain circumstances, this risk allocation may lead to the liability of an innocent person. Such potential hardship is unavoidable and seems justified by the fundamental principle "know your endorser".
5. It should be noted that the rule on material alteration laid down in article 33 deals only with the liability on the cheque. It does not prevent a person who suffered loss because of the alteration to claim damages under national law, for example from a drawer who facilitated the alteration by leaving open a space which enabled the payee to alter the figure and wording of the sum without it being apparent.

Paragraph (2)

6. In determining the liability of parties in a case of material alteration, the decisive factor is whether a party signed before or after the alteration. Since the point of time at which the cheque was altered is in many cases difficult to determine, paragraph (2) establishes a rebuttable presumption that the alteration has been made before a signature was placed on the cheque. A party may rebut this presumption by proving that he signed before the alteration. Such proof may be extrinsic to the cheque.

Paragraph (3)

7. Paragraph (3) defines what constitutes material alteration. The test is whether there was any change in the "written undertaking on the cheque". For example, there is such a change and, consequently, a material alteration where the sum payable is changed (whether increased or decreased). There is no such change if, for example, the sum is given in figures only and the corresponding amount is added in words, or if on a cheque the words "on demand" are added.

8. A change in the "written undertaking on the cheque" is possible only where there was already a cheque. According to article (1)(2) a writing must comply with certain formal requisites in order to qualify as a cheque. Therefore, if one or more of the essential requisites are missing article 33 does not apply. If missing elements are added, this would be a case of completion of a cheque dealt with in article 13. However, if a writing is a cheque an alteration on it may pertain to an essential or to a non-essential requirement. The only question is whether it changes the "written undertaking on the cheque of any party".

9. There is one exception to this test: an alteration is not material if it is authorized by this Convention. For example, article 33 does not apply in the cases envisaged under article 17(b) (conversion of blank endorsement into special endorsement) or article 23(1) (striking out of previous endorsements) or article 68 (crossing of cheque).

* * *

Article 34

(1) A cheque may be signed by an agent.

(2) The signature of an agent placed by him on a cheque with the authority of his principal and showing on the cheque that he is signing in a representative capacity for that named principal, or the signature of a principal placed on the cheque by an agent with his authority, imposes liability on the principal and not on the agent.

(3) A signature placed on a cheque by a person as agent but without authority to sign or exceeding his authority or by an agent with authority to sign but not showing on the cheque that he is signing in a representative capacity for a named person, or showing on the cheque that he is signing in a representative capacity but not naming the person whom he represents, imposes liability thereon on the person signing and not on the person whom he purports to represent.

(4) The question whether a signature was placed on the cheque in a representative capacity may be determined only by reference to what appears on the cheque.

(5) A person who is liable pursuant to paragraph (3) and who pays the cheque has the same rights as the person for whom he purported to act would have had if that person had paid the cheque.

Relevant legislation

BEA - sections 25 and 26

UCC - section 3-403

ULC - article 11

Cross reference

Signature: article 6(8)

CommentaryParagraph (1)

1. This provision makes it clear that a signature may be placed on a cheque by an agent for any party, i.e. for the drawer, an endorser or their guarantor.

Paragraph (2)

2. If a cheque has been signed by an agent the question arises who is liable on the cheque, the agent or the principal. If an agent signs without authority, the answer of both agency law and negotiable instruments law is generally that the principal is not liable. If the agent signs with authority, the principal would be liable under agency law. However, in negotiable instruments law the liability of the principal depends on whether the cheque shows that the agent signing acted in a representative capacity for that principal. If it does not show that, the agent, though signing with authority, is liable and not the principal. The rationale of this rule is the fundamental principle of negotiable instruments law according to which a holder must be able to see from what appears on the cheque who is liable on it.

3. In conformity with these rules, paragraph (2) sets forth the cases in which the principal and not the agent is liable. One case is where an agent places his signature on a cheque with the authority of the principal and the cheque shows that he is signing in a representative capacity for that named principal. For example, A signs his name and adds the words "as agent of P" or "on behalf of P", or A writes P's name and signs "by A, agent". The second case is where an agent places the signature of his principal on the cheque with his authority. For example, A places P's signature on the cheque without any indication that this signature was placed by him and not by P.

Paragraph (3)

4. Paragraph (3) sets forth the cases in which not the principal but the agent himself is liable on the cheque. One case is where an agent signs without, or exceeding his, authority irrespective of whether the cheque shows that he is acting in a representative capacity. If he would simply use his principal's signature without authority, this would be a case of forgery and he would be liable under article 31(2). The second case is where an agent signs the cheque for a named person. Unlike in the first case, A signs with authority and he is liable only because he does not specify on the cheque that he signs on behalf of his principal as, for example, where A signs his own name. The third case is where an agent signs with authority indicating that he signs in a representative capacity but does not name the principal as, for example, where he simply signs "A, as agent".

Paragraph (4)

5. In the above cases where an agent signs with authority, it is important to determine whether or not he has acted in a representative capacity. Paragraph (4) emphasizes that such determination may be made only by what appears ex facie the cheque and not by any circumstances outside the cheque.

Example. A places his signature under a stamp of X Corporation which appears at the place where usually the signature of the drawer appears. The question whether A signed as an agent for X Corporation or as a co-drawer must be decided on the basis of what appears on the cheque (e.g. the distance between stamp and signature may be relevant) but not on the basis of evidence extrinsic to the cheque (e.g. the fact that A is director of X Corporation).

6. Since the only relevant factor is what appears ex facie the cheque, it is immaterial whether or not the holder had knowledge of the agent's authority or of his acting as agent. Furthermore, the above rules apply even if the holder is a protected holder (cf. art. 28(1)(a)).

Paragraph (5)

7. Under paragraph (3), a person may be liable although he purports to act for another person. If, accordingly, he pays the cheque, paragraph (5) accords him the same rights as the person for whom he purported to act would have obtained upon payment.

* * *

Article 35

The order to pay contained in a cheque does not of itself operate as an assignment to the payee of funds made available for payment by the drawer with the drawee.

Relevant legislation

BEA - section 53

UCC - section 3-409

ULC - article 19 of annex II to the Geneva Convention of 1931

Commentary

Article 35 provides that the drawing of a cheque does not of itself operate as an assignment to the payee of any funds made available for payment by the drawer with the drawee. Therefore the payee has no rights against the drawee. However, nothing in this article prevents a drawer from assigning such funds to the payee by agreement. The effect of such an agreement would be governed by national law.

* * *

Article 36

(1) Any statement written on a cheque indicating certification, confirmation, acceptance, visa or any other equivalent expression has only the effect to ascertain the existence of funds and prevents the withdrawal of such funds by the drawer, or the use of such funds by the drawee for purposes other than payment of the cheque bearing such a statement, before the expiration of the time-limit for presentment.

(2) However, a Contracting State may provide that a drawee may accept a cheque and determine the legal effects thereof. Such acceptance must be effected by the signature of the drawee accompanied by the word "accepted".

Relevant legislation

UCC - section 3-411
ULC - article 4

Cross reference

Time-limit for presentment: article 43

Commentary

1. The main legal systems show different approaches to the question whether a cheque is capable of being accepted. Under the ULC "a cheque cannot be accepted" and "a statement of acceptance on a cheque shall be disregarded" (article 4). Under the UCC "certification of a check is acceptance" and certification may be procured by the drawer (which leaves him liable) or by a holder (which discharges the drawer and other prior parties) (section 3-411). Under the BEA the acceptance of a cheque is in principle possible but the practice of acceptance is not much resorted to.

2. The Convention, in article 36, adopts the approach of the ULC in that any statement written on a cheque indicating certification, confirmation, acceptance etc. is not an acceptance. Paragraph (1) states that where such statement is written on a cheque there is an irrebuttable presumption that the statement does no more than ascertain the existence of funds in the hands of the drawee-bank. Such a statement on the cheque blocks the funds of the drawer with the drawee in the amount of the cheque: the drawer cannot withdraw these funds nor can the drawee use them otherwise than for payment of the cheque before the expiration of the time-limit for presentment, i.e. within 120 days of the date stated on the cheque.

3. In view of the widespread practice of confirming cheques under the UCC, paragraph (2), placed between brackets, permits a Contracting State to provide for the acceptance of an international cheque and to determine the legal effects thereof.

* * *

B. The drawer

Article 37

(1) The drawer engages that upon dishonour of the cheque by non-payment, and upon any necessary protest, he will pay to the holder, or to any subsequent party who pays the cheque in accordance with article 59, the amount of the cheque, and any interest and expenses which may be recovered under article 59 or 60.

(2) The drawer may not exclude or limit his own liability by a stipulation on the cheque. Any such stipulation is without effect.

Relevant legislation

BEA - section 55 (1)(a)
UCC - sections 3-413(2) and 3-502
ULC - article 12

Cross references

Dishonour by non-payment: article 46
Necessary protest: article 48

Commentary

Paragraph (1)

1. The liability of the drawer is contingent upon the refusal by the drawee to pay the cheque and any necessary protest of dishonour. In this respect, the drawer's liability is like that of the endorser. However, the liability of an endorser or his guarantor is further conditioned by due presentment and due protest and, therefore, an unexcused delay in making presentment or protest will result in absence of liability on the cheque of the endorser and his guarantor. In contrast, an unexcused delay in making presentment or protest does not absolve the drawer. He remains liable because of the dishonour by non-payment. However, the delay in making presentment or protest affects the extent of the drawer's liability on the cheque since the drawer is discharged of liability on the cheque to the extent of the loss he suffered because of the delay in making presentment or protest.

2. The engagement of the drawer is to pay the cheque, upon dishonour and any necessary protest, to the holder or to any party subsequent to the holder who pays the cheque in a recourse action. Thus, if the cheque is paid by an endorser to the holder and is transferred to such endorser (with or without endorsement, cf. art. 23) by the holder, the liability of the drawer is to pay the cheque to such endorser.

3. It may be noted that the liability of the drawer is not subject to any notice of dishonour. This is in conformity with the policy of this Convention that notice of dishonour is not necessary in order to render a party liable on the cheque. Under article 57 failure to give due notice of dishonour renders a person who is required to give notice to the drawer liable to the drawer for any damage that he may suffer from such failure.

Paragraph (2)

4. Unlike an endorser or guarantor, the drawer may not exclude or limit his own liability by a stipulation on the cheque. Any such stipulation is without effect and does not affect the validity of the cheque.

* * *

C. The endorser

Article 38

(1) The endorser engages that upon dishonour of the cheque by non-payment, and upon any necessary protest, he will pay to the holder, or to any subsequent party who pays the cheque in accordance with article 59, the amount of the cheque, and any interest and expenses which may be recovered under article 59 or 60.

(2) The endorser may exclude or limit his own liability by an express stipulation on the cheque. Such stipulation has effect only with respect to that endorser.

Relevant legislation

BEA - section 55(2)(a)
UCC - section 3-414(1)
ULC - article 18

Cross references

Dishonour by non-payment: article 46
Necessary protest: article 48

Commentary

1. The endorsement may be a necessary element in the transfer of a cheque (cf. art. 14(a)) and serves the function of rendering the endorser liable on the cheque. This latter function is dealt with in article 38.
2. The endorser is liable only if the cheque is dishonoured by the drawee and his liability is subject to any necessary presentment and protest upon such dishonour.

Paragraph (1)

3. According to paragraph (1), the engagement of the endorser is to pay the cheque, upon dishonour and any necessary protest, to the holder or to any subsequent party who pays the cheque in a recourse action. Thus, if a cheque endorsed by the payee to A and by A to B is paid by A to B, the payee's liability is to pay A.

Paragraph (2)

4. The endorser - unlike the drawer (art. 37(2)) - may exclude or limit his own liability by an express stipulation on the cheque. It should be noted that in the case of an endorsement for collection the exclusion of liability follows from the rule laid down in article 22(2).
5. The words "his own liability" make it clear that only the endorser himself benefits from such an exclusion or limitation and not any other party from whom payment is claimed. The exclusion or limitation being ex facie the cheque may be invoked by the endorser even against a remote protected holder.
6. Paragraph (2) deals only with a stipulation made expressly on the cheque. It does not prevent an endorser from excluding or limiting his liability by an agreement outside the cheque; in such a case he may invoke the exclusion or limitation as a defence against a holder in accordance with article 27(1) unless that holder is a protected holder (cf. art. 28(1)(a)).
7. Paragraph (2) does not specify the wording that must be used to exclude or limit the liability. While the expression commonly used is "without recourse", the endorser may use other words for that purpose.

* * *

Article 39

(1) Any person who transfers a cheque by mere delivery is liable to any holder subsequent to himself for any damages that such holder may suffer on account of the fact that prior to such transfer:

- (a) A signature on the cheque was forged or unauthorized; or
- (b) The cheque was materially altered; or
- (c) A party has a valid claim or defence against him; or
- (d) The cheque was dishonoured by non-payment.

(2) The damages recoverable under paragraph (1) may not exceed the amount referred to in article 59 or 60.

(3) Liability on account of any defect mentioned in paragraph (1) is incurred only to a holder who took the cheque without knowledge of such defect.

Relevant legislation

BEA - section 58
UCC - section 3-417(2)

Cross references

Transfer: article 14
Forged signature: articles 6(8) and 32
Unauthorized signature: article 34(3)
Material alteration: article 33
Dishonour by non-payment: article 46
Knowledge: article 7

Commentary

Paragraph (1)

1. A person who transfers a cheque by mere delivery (cf. art. 14(b)) is not liable on it since he has not signed it. However, such person may incur liability under article 39. Under this article, he is liable for any damage that a subsequent holder may suffer as a consequence of any of the circumstances referred to in sub-paragraphs (a) to (d) of paragraph (1).

2. The fact that the transferor did not know of any such circumstance, whether negligently or not, does not affect his liability under the article. Such liability benefits any subsequent holder who, when taking the cheque, has no knowledge of the deficiency. The liability under article 39 is off the cheque and, thus, presentment and protest are not conditions precedent to such liability. It materializes the moment the cheque is transferred.

Example A. The drawer issues a cheque to the payee (P) for the sum of 1,000 Swiss francs. P endorses the cheque in blank and delivers it to C who alters the sum payable to 11,000 Swiss francs. C delivers the cheque to D who does not know about the alteration, and D delivers it to E who does not know about the alteration. E may claim from the drawer and from P 1,000 Swiss francs

under article 33(1)(b). E has no right on the cheque against C or D since they have not endorsed it. However, E may recover from C or D, under article 39, 10,000 Swiss francs as compensation for the damages suffered by him.

3. A person who transfers a cheque by mere delivery and who has no knowledge of any circumstances giving rise to liability under article 39 may exclude or limit his liability by agreement off the cheque or by an express stipulation on the cheque. Although this faculty is not stated in article 39, it follows from the fact that it is liability off the cheque and for damages.

4. Under article 39 the holder may recover only those damages which he has suffered "on account of" any factor enumerated in paragraph (1). Consequently, insolvency of the drawer would not confer a right of action under article 39 on the transferee by mere delivery, since the transferor is not deemed, under the article, to have warranted the solvency of a secondary obligor.

5. The holder may recover only if, on account of the factors enumerated, he has in fact suffered damages. This is not the case where he has been paid the amount due, for example, by a person whose signature had been forged but who accepted it or represented it to be his own (cf. art.32). Another example is where a cheque which was dishonoured by non-payment was nevertheless paid.

Sub-paragraph (a)

6. According to article 32 a person whose signature has been forged is not liable on the cheque. A holder who takes the cheque without knowledge of the forgery may therefore suffer loss by relying on the liability of that person. Sub-paragraph (a) is intended to protect him against such risk. The same is true with regard to an unauthorized signature.

Example B. The drawer issues a cheque which shows on it that he signs as agent, though he had no authority to sign. The payee endorses the cheque in blank to B who transfers it by delivery to C. Upon dishonour by non-payment, C has an action against B under article 39(1)(a).

Sub-paragraph (b)

7. According to article 33(1)(b) parties who have signed the cheque before a material alteration are liable according to the terms of the original text. This may cause loss to a holder who receives a cheque without knowledge of the alteration (cf. above example A., para. 2). Sub-paragraph (b) is intended to protect him.

Sub-paragraph (c)

8. The transferee may be subject to a valid claim against him and as a consequence may suffer loss.

Example C. The drawer issues a cheque payable to bearer to A. The cheque is stolen and the thief transfers it to B who transfers it to C who is not a protected holder. C is subject to a valid claim to the cheque by A but may recover any ensuing damages from B under article 39(1)(c).

9. The same rule applies with regard to a valid defence which a party prior to the transferor may raise against the transferee.

Example D. The payee by fraud induces the drawer to issue a cheque to him, the payee (P). P endorses the cheque in blank and transfers it to A who is not a protected holder. A transfers it to B who is not a protected holder. In an action by B against the drawer, the drawer may raise the defence of fraud. B has an action for damages against A.

Sub-paragraph (d)

10. This sub-paragraph protects the transferee against the risk that the cheque was dishonoured by non-payment. The words "was dishonoured" make it clear that damages lie only if the cheque was dishonoured before the transfer. Thus transfer by mere delivery, unlike transfer by endorsement, does not provide a warranty of payment.

Paragraph (2)

11. Paragraph (2) limits the amount of damages to the amount of the cheque. Other questions concerning the extent of liability, such as mitigation of damages, limitation of action, are left to the applicable national law.

Paragraph (3)

12. Following the rationale of the liability rule in paragraph (1), i.e. to protect the innocent transferee, paragraph (3) specifies that only those transferees may recover who are without knowledge of the defect which causes the loss (as to the definition of "knowledge", see article 7).

* * *

D. The guarantor

Article 40

(1) Payment of a cheque may be guaranteed, as to the whole or part of its amount, for the account of a party by any person who may or may not have become a party.

(2) A guarantee must be written on the cheque or on a slip affixed thereto ("allonge").

(3) A guarantee is expressed by the words: "guaranteed", "aval", "good as aval" or words of similar import, accompanied by the signature of the guarantor.

(4) A guarantee may be effected by a signature alone. Unless the content otherwise requires,

(a) A signature alone on the front of the cheque, other than that of the drawer, is a guarantee;

(b) A signature alone on the back of the cheque is an endorsement. A special endorsement of a cheque made payable to bearer does not convert the cheque into an order instrument.

(5) A guarantor may specify the person for whom he has become guarantor. In the absence of such specification, the person for whom he has become guarantor is the drawer.

Relevant legislation

BEA - no relevant provision and see section 56
UCC - no relevant provision and see sections 3-402, 3-415 and 3-416
ULC - articles 25 and 26

Cross reference

Party: article 6(7)

Commentary

1. In addition to the liability incurred by the drawer and endorser of a cheque the Convention recognizes the special liability of a person who signs a cheque as a "guarantor". The liability is a guarantee of payment of the whole or part of the amount of the cheque for the account of a party. Such a guarantee may be given by a stranger or by someone who is already a party. The guarantee is "transferable" in nature in that it runs with the cheque.
2. The provisions of the Convention in respect of this liability of a guarantor follow in substance the provisions of the ULC in respect of the giver of an aval.
3. The guarantee is given on the cheque itself, or on an allonge or slip affixed to the cheque, by a signature accompanied by the words "guaranteed", "payment guaranteed", "aval", "good as aval" or by words of similar import. However, if the guarantee is given on the face of the cheque a signature alone is sufficient to express the guarantee provided the signature is not that of the drawer. A signature alone on the back of the cheque is an endorsement.
4. The person signing as guarantor may, but need not, indicate on the cheque for whose account he effects the guarantee. In the absence of such indication the guarantee is given for the drawer.
5. It is to be noted that in the case of a cheque payable to bearer a special endorsement does not transform such cheque into an order cheque payable to the special endorsee or to his order. Of course, the endorsement establishes the liability on the cheque of the endorser.

* * *

Article 41

A guarantor is liable on the cheque to the same extent as the party for whom he has become guarantor, unless the guarantor has stipulated otherwise on the cheque.

Relevant legislation

ULC - article 27

Commentary

1. The liability of a guarantor is of an accessory nature: he is liable to the same extent as the party for whom he has become guarantor. Thus, if upon

dishonour of a cheque by non-payment there is an unexcused delay in making protest, the guarantor of the endorser is not liable but the guarantor of the drawer is liable except to the extent of the loss suffered by the delay (see art. 52).

2. A further corollary of the rule stated in article 41 is that the guarantor may base defences against his liability on the cheque on the defences which the party for whom he became guarantor may invoke. In addition the guarantor may set up defences which are personal to himself. On the other hand the guarantor is not entitled to the benefit of excussion: the holder or a party who has taken up and paid the cheque is not obliged to demand payment first from the person in favour of whom the guarantee was given. Therefore, the liability of the guarantor is not dependent on the refusal to pay by the person for whom he became guarantor. However the guarantor cannot be sued under the guarantee until the liability of the person for whom he became guarantor has materialized.

3. Under the article the guarantor may "stipulate otherwise", i.e. the liability under a guarantee may be extended or restricted by the giver thereof. Such stipulation may relate to any possible element of the guarantor's liability in any possible way, including different time or place of payment and reduction or increase of the amount. For example, the guarantor may stipulate that the guarantee is given for part of the sum due or that the guarantee is given for a limited time.

* * *

Article 42

The guarantor who pays the cheque has rights thereon against the party for whom he became guarantor and against parties who are liable thereon to that party.

Relevant legislation

ULC - article 27

Cross reference

Party: article 6(7)

Commentary

The guarantor upon payment of the cheque by him acquires rights on it against the party for whom he became guarantor and against those parties who are liable to that party. It may be noted that the guarantor has rights on the cheque against parties who are liable on it to the party for whom he became guarantor even if he is not a holder (as where the cheque was not transferred to him under article 14). A guarantor who is not a holder may not transfer the cheque.

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CHAPTER FIVE. PRESENTMENT, DISHONOUR BY
NON-PAYMENT, AND RECOURSE

Section 1. Presentment for payment and dishonour by non-payment

Article 43

A cheque is duly presented for payment if it is presented in accordance with the following rules:

- (a) The holder must present the cheque to the drawee on a business day at a reasonable hour;
- (b) A cheque must be presented for payment within 120 days of its stated date;
- (c) A cheque must be presented for payment:
 - (i) At the place of payment specified on the cheque; or
 - (ii) If no place of payment is specified, at the address of the drawee indicated on the cheque; or
 - (iii) If no place of payment is specified and the address of the drawee is not indicated, at the principal place of business of the drawee;
- (d) A cheque may be presented for payment at a clearing-house.

Relevant legislation

BEA - section 74
UCC - sections 3-503 and 3-504
ULC - articles 2, 29, 30 and 55

Cross references

Holder: articles 6(5) and 16

Commentary

1. In order to establish the liability of parties because of dishonour by non-payment, presentment for payment must be due presentment. Article 43 specifies what constitutes due presentment for payment.

Paragraph (a)

2. As elsewhere in this Convention, the word "holder" or "drawee" includes an authorized agent.

3. The requirement that presentment must be made "on a business day at a reasonable hour" refers to the business day and reasonable hour at the place of the drawee.

Paragraph (b)

4. This paragraph sets forth a rule as to the time within which presentment for payment must be made. Presentment for payment after this period of time

deprives the holder of the right of recourse against the endorsers and their guarantors. Yet, if there is delay in presentment the drawer remains liable except to the extent of the loss suffered because of the delay. However, failure to present the cheque for payment, unless dispensed with, results in absence of liability of the drawer on the cheque.

Paragraph (c)

5. This paragraph sets forth rules regarding the proper place of presentment for payment.

Paragraph (d)

6. In the collection process a collecting bank will often use a clearing-house of which it itself and the drawee-bank are members to present the cheque for payment (to "collect" the cheque). Paragraph (d) makes clear that this is due presentment for payment and consequently the holder of such a cheque may, upon due protest, exercise his rights of recourse against prior parties.

* * *

Article 44

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

(2) Presentment for payment is dispensed with:

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

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

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

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

(b) If the cause of delay continues to operate beyond 30 days after the expiration of the time-limit for presentment for payment.

Relevant legislation

BEA - section 46
UCC - section 3-511
ULC - article 48

Commentary

1. Article 44 provides for the excuse of delay in making presentment of a cheque for payment and states the grounds on which such presentment is dispensed with.

Paragraph (1)

2. When delay is excused the liability of parties prior to the holder is not affected on the ground that there was no due presentment for payment. Under paragraph (1) delay is excused when the holder is prevented from presenting the cheque for payment by circumstances beyond his control which he could neither avoid nor overcome. When the cause of delay ceases to operate presentment must be made with reasonable diligence. However, if such cause continues to operate beyond 30 days after the time period within which a cheque must be presented for payment (cf. art. 43(b)) presentment is altogether dispensed with and a right of recourse may be exercised against the drawer, the endorsers, and the guarantors of the drawer and the endorsers. It should be noted that under article 45 an unexcused delay, though it results in absence of liability of the endorsers and their guarantors, does not discharge the drawer of liability except to the extent of the loss suffered by the delay.

Paragraph (2)

3. Paragraph (2) states the cases where presentment for payment is dispensed with. Under article 46(1)(b) such cases constitute constructive dishonour and under article 46(2) the holder may then, subject to any necessary protest, exercise a right of recourse.

4. A waiver of presentment for payment may be stipulated expressly on the cheque or expressly or impliedly off the cheque. If waiver is on the cheque the dispensation is operative only as regards the party waiving presentment except if waiver is made by the drawer in which case the dispensation runs with the cheque and is operative as regards any party subsequent to the drawer. A waiver of presentment on the cheque benefits any holder. If waiver is off the cheque, whether impliedly (as where payment is made after the time period within which the cheque must be presented for payment) or expressly, the dispensation is operative only as regards the party waiving presentment and benefits only a holder in whose favour there has been a waiver.

* * *

Article 45

If a cheque is not duly presented for payment, the drawer, the endorsers and their guarantors are not liable thereon. However, if a cheque is not duly presented because of delay in making presentment, the drawer is not discharged of liability except to the extent of the loss suffered because of the delay.

Relevant legislation

BEA - section 74
UCC - sections 3-501 and 3-502

Cross reference

Due presentment for payment: article 43

Commentary

Presentment for payment of a cheque is one of the conditions precedent to the liability of parties prior to the holder. Therefore, non-presentment deprives the holder of his right of recourse against prior parties. However, delay in

presentment does not discharge the drawer of liability except to the extent of loss suffered because of that delay. Thus, the liability of the drawer of a cheque is not purely of a secondary nature.

* * *

Article 46

(1) A cheque is considered to be dishonoured by non-payment:

(a) When payment is refused upon due presentment, or when the holder cannot obtain the payment to which he is entitled under this Convention, or as regards the drawer only, if presentment of the cheque, otherwise duly made, is delayed and payment is refused;

(b) If presentment for payment is dispensed with pursuant to article 44 (2) and the cheque is unpaid.

(2) If a cheque is dishonoured by non-payment, the holder may, subject to the provisions of article 48, exercise a right of recourse against the drawer, the endorsers and their guarantors.

Relevant legislation

BEA - section 47
UCC - section 3-507
ULC - article 40

Cross references

Due presentment for payment: article 43
Dispensation of presentment for payment: article 44(2)
Payment to which the holder is entitled: articles 62, 63 and 64

Commentary

Paragraph (1)

1. Article 46 states when a cheque is dishonoured by non-payment. Paragraph (1)(a) deals with actual dishonour by non-payment: when payment is refused or the holder cannot obtain the payment to which he is entitled. Paragraph (1)(b) deals with constructive dishonour by non-payment: when presentment for payment is dispensed with under article 44.

Payment to which the holder is entitled

2. Pursuant to articles 62 and 63 the holder may refuse to take partial payment and refuse to take payment in a place other than the place where the cheque was presented for payment in accordance with article 43. Therefore, the refusal by the holder to take such payment results in dishonour by non-payment.

3. Pursuant to article 64 the refusal of the holder to take payment of a cheque, denominated in foreign currency or to be paid in a specified currency, in local currency results in dishonour by non-payment.

Paragraph (2)

4. The effect of dishonour by non-payment is that the holder is, subject to any necessary protest (cf. art. 48), entitled to exercise a right of recourse against the drawer, the endorsers and their guarantors.

* * *

Article 47

If a cheque is presented before its stated date, refusal by the drawee to pay does not constitute dishonour by non-payment under article 46.

Relevant legislation

UCC - section 3-114(2)
ULC - article 28

Cross references

Stated date: article 1(2)(d)
Dishonour by non-payment: article 46

Commentary

If a cheque is post-dated, i.e. the drawer places on the cheque a date ("stated date") which is later than the date on which he issues it, the question arises whether a refusal by the drawee to pay before the stated date constitutes or not a dishonour by non-payment. Article 47 adopts the approach that a post-dated cheque is not due before its stated date. Consequently, refusal by the drawee to pay the cheque upon its presentment before the stated date does not constitute dishonour by non-payment. In the result, the holder cannot effectuate protest and no liability arises of parties to the cheque upon the drawee's refusal to pay in these circumstances.

* * *

Section 2. Recourse

A. Protest

Article 48

If a cheque has been dishonoured by non-payment, the holder may exercise a right of recourse only after the cheque has been duly protested for dishonour in accordance with the provisions of articles 49 to 51.

Relevant legislation

BEA - sections 48 and 51(2)
UCC - section 3-501(2) and (3)
ULC - article 40

Cross references

Dishonour by non-payment: article 46
Holder: articles 6(5) and 16
Protest for dishonour: articles 49 to 51

Commentary

1. The effect of dishonour by non-payment is that it entitles the holder to a right of recourse against the drawer, endorsers and guarantors. The making of a protest is necessary in order for the holder to be entitled to exercise that right. Protest where protest is necessary is a condition precedent to the liability of the drawer, endorsers and guarantors.

Protest and notice of dishonour

2. Under article 40 of the ULC, non-payment must be evidenced by either a formal instrument (protest) or a declaration dated and written by the drawee on the cheque and specifying the date of presentment or by a dated declaration made by a clearing-house stating that the cheque has been delivered in due time and has not been paid. Under article 20 of annex II to the Geneva Convention of 1931, High Contracting Parties may reserve the right to make or not to make protest or an equivalent declaration a condition for the exercise of the right of recourse (upon dishonour by non-payment) against the drawer.

3. Under the UCC (section 3-501(2)), notice of dishonour is necessary to charge any endorser but failure to give such notice discharges the drawer only to the extent stated in section 3-502(1)(b). This section expressly limits the rule that the drawer is discharged where he has sustained loss through the delay to loss sustained through insolvency of the drawee. Under the BEA, the exercise of the right of recourse consequent upon dishonour requires, as a general rule, notice of dishonour. If notice of dishonour is not given the drawer and endorsers are discharged (section 48). Under both the UCC (section 3-501(3)) and the BEA (section 51(1),(2)), protest is required only in the case of foreign cheques.

4. Under this Convention the exercise of a right of recourse is conditional upon effectuating protest and failure to protest results in the discharge of the drawer, an endorser and their guarantors. See, however, article 52(2) regarding the effect of delay in protesting a cheque for non-payment on the liability of the drawer or his guarantor. Notice of dishonour is, under this Convention, not a condition precedent to liability of parties to the cheque but may give rise to an action for damages suffered by a party because of not having received notice (cf. art. 57).

* * *

Article 49

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

- (a) The person at whose request the cheque is protested;
- (b) The place of protest; and
- (c) The demand made and the answer given, if any, or the fact that the drawee could not be found.

(2) A protest may be made:

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

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

(3) Unless the cheque stipulates that protest must be made, a protest may be replaced by a declaration written on the cheque and signed and dated by the drawee; the declaration must be to the effect that payment is refused.

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

Relevant legislation

BEA - section 51(7)

UCC - section 3-509

ULC - article 40; article 21 of annex II to the Geneva Convention of 1931

Cross references

Protest as a condition precedent to the liability of parties: articles 48 and 52

Dishonour by non-payment: article 46

Commentary

1. Under article 49 protest may be made (a) in the form of a written statement, on the cheque itself or in a separate document, signed by a person authorized by the law of the place of dishonour to certify dishonour or (b) in the form of a written declaration on the cheque, signed by the drawee, to the effect that payment is refused. Paragraphs (1) and (2) deal with the protest mentioned under (a) above and paragraphs (3) and (4) with the declaration written on the cheque mentioned under (b) above.

2. The object of protest is to provide proof that the cheque was duly presented for payment and of dishonour by the drawee consequent upon such presentment. However, if presentment for payment is dispensed with under article 44(2), protest for dishonour by non-payment is also dispensed with (cf. art. 51(2)(d)).

3. Pursuant to article 59 the holder in a recourse action may recover from any party liable any expenses of protest.

4. If the holder of a cheque takes partial payment (cf. art. 62(3)) he must protest the cheque as to the balance of its amount.

* * *

Article 50

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

Relevant legislation

BEA - sections 51(4) and 93
UCC - section 3-509(4) and (5)
ULC - article 41

Cross references

Form of protest: article 49
Dishonour by non-payment: article 46

Commentary

Article 50 lays down the time-limits within which a cheque must be protested for dishonour. Failure to observe these time-limits deprives the holder of his right of recourse against the endorser and their guarantors but delay in protesting the dishonour does not discharge the drawer except to the extent of the loss suffered by the delay (cf. art. 52(2)).

* * *

Article 51

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

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

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

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

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

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

(b) If the cause of delay under paragraph (1) in making protest continues to operate beyond 30 days after the date of dishonour;

(c) As regards the drawer of a cheque, if the drawer and the drawee are the same person;

(d) If presentment for payment is dispensed with in accordance with article 44 (2).

Relevant legislation

BEA - section 51(9)
UCC - section 3-511
ULC - article 48

Cross reference

Time-limit within which protest must be made: article 50

Commentary

Paragraph (1)

1. When delay in protesting a cheque for dishonour is excused the liability of parties is not affected on the ground that there was no protest. Delay is excused when the holder is prevented from effecting protest by circumstances beyond his control which he could neither avoid nor overcome. When the cause of delay ceases to operate protest must be made with reasonable diligence. However, if such cause continues to operate beyond 30 days from the date of dishonour, protest is altogether dispensed with and a right of recourse may be exercised against the drawer, the endorsers, and the guarantors of the drawer and the endorsers.

Paragraph (2)

2. Paragraph (2) states the cases where protest is dispensed with. The effects of waiver of protest by the drawer, his endorser or guarantor on or off the cheque are, as regards the person or party waiving protest and the holder whom the waiver benefits, identical to the effects of a waiver of presentment for payment (see para. 4 of the commentary to art. 44).

3. Where the drawer and the drawee are the same person protest is dispensed with as regards the drawer by reason of the fact that the drawer having dishonoured the cheque in his capacity as drawee cannot require proof of the dishonour.

* * *

Article 52

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

(2) Delay in protesting a cheque for non-payment does not discharge the drawer or his guarantor of liability except to the extent of the loss suffered by the delay.

Relevant legislation

BEA - section 51(2)

UCC - sections 3-501(3) and (4), and 3-502

ULC - article 40; article 20 of annex II to Geneva Convention of 1931

Cross reference

Due protest: articles 49 and 50

Commentary

1. Failure on the part of the holder to make due protest under articles 49 and 50, unless dispensed with under article 51, results in the absence of liability of parties liable on the cheque.

2. Delay in protesting a cheque for non-payment, other than a delay giving rise to dispensation under article 51(2)(b), results in the absence of liability of the endorsers and their guarantors, but not of the drawer or his guarantor, except to the extent of the loss suffered by the delay. This provision emphasizes the special nature of the drawer's liability on the cheque which is not purely a secondary liability since the drawer is liable even where there was an unexcused delay in presenting or protesting.

* * *

B. Notice of dishonour

Article 53

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

(2) An endorser or a guarantor who receives notice must give notice of dishonour to the party immediately preceding him and liable on the cheque.

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

Relevant legislation

BEA - section 49
UCC - sections 3-501 and 3-508
ULC - article 42

Cross reference

Dishonour by non-payment: article 46

Commentary

1. As noted in the commentary to article 48 (paras. 2-4), the Convention follows the approach of the ULC in considering protest as one of the conditions precedent to the liability of parties secondarily liable. In line with the ULC, the duty of the holder to give due notice of dishonour is not a condition precedent to the liability of the parties entitled to notice but the holder is liable for damages which such parties may have suffered as a consequence of his failure to give due notice. Article 53 should, therefore, be read in conjunction with article 57 which states the consequences of failure to give due notice of dishonour.

2. According to article 53 notice of dishonour must be given by the holder to any prior party and by any party, who has himself received notice, to the party immediately preceding him and liable on the cheque. However, the notice operates for the benefit of any party who has a right of recourse against the party who received notice of dishonour.

Example. The payee endorses the cheque to A. A endorses it to B, B to C and C to D. Upon dishonour of the cheque by the drawee, D must, under article 53, give notice of dishonour to the drawer, the payee, A, B and C and failure to do so will render D liable for damages to the party paying the cheque. When C receives notice of dishonour from D, C, in turn, must give notice of dishonour to B. Notice sent by D to the drawer enures for the benefit of the payee, A, B and C.

3. The rule stated in paragraph (2) specifies that notice must be given to an immediately preceding party who is liable on the cheque. Therefore, in the example given above (para. 2), if B had endorsed the cheque without recourse, C, having received notice from D, must now give notice to A.

* * *

Article 54

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

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

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

Relevant legislation

BEA - section 49(5), (6), (7) and (15)

UCC - section 3-508 (3) and (4)

ULC - article 42

Cross references

Notice of dishonour - articles 53 to 57

Dishonour by non-payment - article 46

Commentary

1. This article retains the substance of the relevant provisions of the BEA, UCC and ULC. It is not necessary that the notice be given in any particular form. It may be given in writing or orally provided that the communication identifies the cheque and conveys the fact that it has been dishonoured by non-payment. The return of the dishonoured cheque with an indication on or off the cheque that it was dishonoured constitutes sufficient notice.

2. Written notice is duly given when it is sent even though it is not received by the addressee. However, the burden of proof that due notice has been given falls on the person who, under article 53, is obliged to give notice.

* * *

Article 55

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

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

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

Relevant legislation

BEA - section 49(12)
UCC - section 3-508(2)
ULC - article 42

Cross references

Time-limit for protest: article 50
Protest dispensed with: article 51(2)

Commentary

1. Article 55 sets forth the period of time within which notice of dishonour can duly be given. It is commercially desirable that parties liable on the cheque as a consequence of dishonour be advised without delay that they have become liable. Inquiries amongst banking and trade circles have led to the conclusion that a period of three days (i.e. the day of protest or, where protest is dispensed with, the day of dishonour, and the two business days that follow) is an adequate and practicable period in which to give notice; it will, in most cases, enable the holder's agent in a foreign country where the cheque was payable to inform his principal of the dishonour and will enable the holder to give notice to prior parties. According to article 50 protest must be made on the day on which the cheque is dishonoured (say, Tuesday) or on one of the two business days which follow (Wednesday or Thursday). Pursuant to article 55 notice of dishonour may duly be given on the day of protest (latest possible day: Thursday) or within the two business days which follow (i.e. either Friday or Monday of the following week at the latest).

2. When a party has received notice he in turn may duly give notice on the day on which he received notice or on one of the two business days which follow the day of receipt of notice.

* * *

Article 56

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

(2) Notice of dishonour is dispensed with:

- (a) If after the exercise of reasonable diligence notice cannot be given;
- (b) If the drawer, an endorser or guarantor has waived notice of dishonour expressly or by implication; such waiver:
 - (i) If made on the cheque by the drawer, binds any subsequent party and benefits any holder;
 - (ii) If made on the cheque by a party other than the drawer, binds only that party but benefits any holder;
 - (iii) If made outside the cheque, binds only the party making it and benefits only a holder in whose favour it was made.
- (c) As regards the drawer of a cheque, if the drawer and the drawee are the same person.

Relevant legislation

BEA - section 50

UCC - section 3-511

Cross reference

Time-limit for giving notice: article 55

Commentary

1. Paragraph (1) sets forth the ground justifying delay in giving notice of dishonour. The provision is similar to paragraph (1) of article 44 in respect of delay in making presentment for payment and paragraph (1) of article 51 in respect of delay in protesting a cheque. When delay is excused the liability of the person who is obliged to give notice (i.e. for damages, cf. art. 57) is not affected on the ground that there was no due notice.

2. Paragraph (2) states the cases in which notice of dishonour is dispensed with. In such cases the person obliged to give notice is not liable for damages under article 57.

3. As to the legal effects of waiver on or off the cheque see the commentary to article 44 (para.4).

* * *

Article 57

Failure to give notice of dishonour renders a person who is required to give such notice under article 53 to a party who is entitled to receive such notice liable for any damages which that party may suffer from such failure, provided that such damages do not exceed the amount referred to in article 59 or 60.

Relevant legislation

BEA - section 48

UCC - section 3-501(2)

ULC - article 42

Cross references

By whom and to whom notice of dishonour must be given: article 53

Form of notice: article 54

When to give notice: article 55

Delay in giving notice: article 56(1)

Notice dispensed with: article 56(2)

Commentary

1. The consequences of failure to give notice differ sharply between the Anglo-American law and the Geneva Uniform Law. Under the BEA and the UCC, the giving of notice of dishonour is necessary to charge parties and is thus a condition precedent to their liability on the cheque to the holder or to any other party who has acquired a right of recourse against them. Under the ULC, failure to give notice does not discharge a party's liability on the cheque, but merely makes the party who failed to give notice liable for the damages resulting

from such failure. Under the ULC, therefore, a holder or any other party who acquires a right of recourse, but failed to give notice, may exercise such right of recourse upon due protest.

2. Article 57 follows the ULC approach. Due notice of dishonour is not a condition precedent to liability of parties on the cheque but renders the person who failed to give notice liable for damages resulting from such failure. The amount of damages is limited to the amount of the cheque and may include the interest and expenses due under article 59 or 60.

* * *

Section 3. Amount payable

Article 58

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

Relevant legislation

ULC - article 44

Cross references

Parties liable on the cheque: Section 2. of Chapter Four

Liability of the drawer: article 37

Liability of the endorser: article 38

Liability of the guarantor: article 41

Commentary

The liability of the parties to a cheque and the conditions in which they become liable are stated in Section 2. of Chapter Four of this Convention. Article 58 is intended to make clear that the holder in exercising his rights on the cheque may proceed against all parties together or against all parties individually or against any individual party without being required to observe the order in which they have become liable. The right of recourse against the endorsers and their guarantors is conditional upon the holder's having duly presented the cheque and protested the dishonour, except in those cases where presentment and protest is dispensed with. However, the right of recourse against the drawer and his guarantor is conditional upon the holder's having presented the cheque and protested the dishonour, except in those cases where presentment and protest is dispensed with.

* * *

Article 59

(1) The holder may recover from any party liable the amount of the cheque.

(2) When payment is made after the cheque has been dishonoured, the holder may recover from any party liable the amount of the cheque with interest at the rate specified in paragraph (3) calculated from the date of presentment to the date of payment and any expenses of protest and of the notices given by him.

(3) The rate of interest shall be [2] per cent per annum above the official rate (bank rate) or other similar appropriate rate effective in the main centre of the country where the cheque is payable. If there is no such rate, the rate of interest shall be [2] per cent per annum above the official rate (bank rate) or other similar appropriate rate effective in the main centre of the country in the currency of which the cheque is payable. In the absence of any such rates, the rate of interest shall be [] per cent per annum.

Relevant legislation

BEA - section 57

UCC - no equivalent provision, but see section 3-122

ULC - article 45

Cross references

Holder: articles 6(5) and 16

Commentary

1. Article 59 lays down what sums of money are owed to the holder upon due presentment for payment and what sums of money he may recover, in a recourse action upon dishonour by non-payment, from a party liable to him. Upon presentment the holder is entitled to be paid the amount of the cheque. According to article 62 the holder is not obliged to take partial payment. Upon the dishonour of a cheque by non-payment the holder may recover from any party liable on the cheque (cf. article 46(2)), Paragraph(2) lays down what the holder may recover in these cases. When the cheque is paid after it was dishonoured, the holder may recover the amount of the cheque; and delay interest at the rate specified in paragraph (3) calculated from the date of presentment on the amount of the cheque; and any expenses consequent upon the making of protest and the giving of any notice of dishonour.

2. The expenses referred to in paragraph (2) do not include bank charges, costs of collection and lawyers' fees but only any legitimate and necessary expenses actually incurred with the making of protest or the giving of notice of dishonour.

3. Paragraph (3) specifies the rate at which interest is to be calculated when the holder recovers in a recourse action upon dishonour by non-payment. The actual percentage points are placed between brackets for further consideration at a future conference of plenipotentiaries which may be called to conclude a convention on the basis of the UNCITRAL draft Convention.

* * *

Article 60

A party who pays a cheque in accordance with article 59 may recover from the parties liable to him:

(a) The entire sum which he was obliged to pay in accordance with article 59 and has paid;

(b) Interest on that sum at the rate specified in article 59, paragraph (3), from the date on which he made payment;

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

Relevant legislation

BEA - section 57
UCC - no equivalent provision, but see section 3-122
ULC - article 46

Commentary

1. Article 60 lays down what sums of money a party who has paid a cheque may recover from the drawer, prior endorsers, and the guarantors of the endorsers. Thus, if the payee has taken up and paid the cheque he may recover from the drawer the sum the drawer was compelled to pay pursuant to article 59 and interest on that sum from the date on which the payee made payment.

2. For the purposes of this article it is not necessary that when the party paid the cheque it was endorsed to him or endorsed in blank (cf. art. 23).

* * *

CHAPTER SIX. DISCHARGE

Section 1. Discharge by payment

Article 61

(1) A party is discharged of liability on the cheque when he pays the holder, or a party subsequent to himself who has paid the cheque and is in possession thereof, the amount due pursuant to article 59 or 60.

(2) A party is not discharged of liability if he pays a holder who is not a protected holder and knows at the time of payment that a third person has asserted a valid claim to the cheque or that the holder acquired the cheque by theft or forged the signature of the payee or an endorsee, or participated in such theft or forgery.

(3) (a) A person receiving payment of a cheque must, unless agreed otherwise, deliver:

(i) To the drawee making such payment, the cheque;

(ii) To any other person making such payment, the cheque, a receipted account and any protest.

(b) The person from whom payment is demanded may withhold payment if the person demanding payment does not deliver the cheque to him. Withholding payment in these circumstances does not constitute dishonour by non-payment under article 46.

(c) If payment is made but the person paying, other than the drawee, fails to obtain the cheque, such person is discharged but the discharge cannot be set up as a defence against a protected holder.

Relevant legislation

BEA - sections 59 and 60
UCC - section 3-603

Cross references

Knowledge: article 7

Claim by third person: article 27(2,3)

Commentary

1. A person who signs a cheque assumes the obligation to pay the cheque if certain conditions are met (see Chapter Four, Section 2.). If a party pays the cheque in accordance with his undertaking, he is discharged of his liability. Article 61 lays down when payment constitutes a discharge of liability.

Paragraph (1)"discharged of liability on the cheque"

2. "Discharge" is a technical term used in the Convention for the termination of an undertaking on the cheque. Thus, discharge presupposes liability of the person paying. There is therefore no discharge if the drawee pays since he is not liable on the cheque. Also, there is no discharge if a party whose liability has not crystallized for lack of presentment and protest pays the cheque.

3. The fact that a party is discharged of liability runs with the cheque and has effect against any person subsequent to him; however, the discharge cannot be invoked against a protected holder (cf. art. 28(1)(a)).

4. Payment discharges not only the payer of his liability but also, according to article 67(1), all parties who have a right of recourse against him. A further effect is that any guarantor of the payer or of another party to whom the payer is liable is discharged to the same extent (cf. art. 41(1)).

5. Payment of a cheque is often intended to discharge an obligation underlying the cheque. Article 61 does not deal with the effect of payment of the cheque on the underlying transaction, nor does it deal with the effect of dishonour by non-payment on the underlying transaction. Article 61 only deals with the consequences of payment on the liability of parties on the cheque itself.

"pays the holder"

6. Discharge under article 61 is consequent upon payment, i.e. by the payment of money as defined in article 6(9). Thus, it would not suffice to pay in kind or to give another negotiable instrument.

7. Payment is to be made to the person who is the holder as defined in article 16. Thus, for example, payment to the payee in possession of the cheque is payment to the holder. The same is true in respect of payment to a person in possession of a cheque on which the last endorsement is in blank and on which there appears an uninterrupted series of endorsements, even if any of the endorsements was forged. On the other hand, if a cheque on which the last endorsement is a special endorsement is delivered to a person other than the person to whom it is endorsed, payment to that person is not payment to the holder and, therefore, does not discharge the payer under article 61.

8. There is one special set of circumstances where payment to a "non-holder" constitutes discharge of liability: if a holder has lost the cheque, he may nevertheless claim payment under certain conditions (see art. 73), and payment to such ex-holder discharges the party paying (art. 78). In this context, reference should be made to article 73(2)(d), according to which, under certain conditions, payment may be effected by way of deposit with a court or other competent body.

"a party subsequent to himself who has paid the cheque and is in possession thereof"

9. The person receiving payment is usually the holder. If a cheque is dishonoured by the drawee, the holder has a right of recourse against the drawer, the endorsers and their guarantors. When the drawer of a cheque, or any guarantor, pays, the cheque must be delivered to the payer. In the absence of an endorsement to the payer - and such endorsement is not necessary - the payer, though in possession of the cheque, is not a holder. However, such payer, if in possession of the cheque, has a right to payment against prior parties. Article 61 provides that payment by such parties to him discharges the party paying of his liability on the cheque.

Paragraph (2)

10. Paragraph (2) deals with the question whether discharge may be affected or prevented by a claim of a third party to the cheque. If the party paying had no knowledge of such claim, payment by such party constitutes discharge, provided that the other requirements of article 61 are met. Among other things the party must pay to the holder and not, for example, to a person in possession of a cheque on which there appears an interrupted series of endorsements. Even if the payer did not know that one of the endorsements was forged, he is not discharged since he did not pay to the holder. Thus, for there to be discharge, a party must examine the regularity of the endorsements but is not required to examine their genuineness.

11. If, on the other hand, the party paying had knowledge of a claim of a third party, the decisive factor is whether or not he was under an obligation to pay. Thus, he is discharged if he paid a protected holder under circumstances in which he, the payer, could not have raised the defence of ius tertii in an action on the cheque by the protected holder (cf. art. 28(2)).

12. In respect of payment of a cheque to which there is a claim by a third party, payment to the holder who is not a protected holder discharges the payer only if he cannot raise the defence of ius tertii under article 27(3) against such holder. This is so because in such a case the payer is obliged to pay and payment by him should therefore discharge him of liability.

Example A. A cheque made payable to bearer is stolen from A. The thief is therefore a holder. Payment by the drawer to the thief with knowledge of the theft does not discharge the drawer.

Example B. A induces the payee to endorse the cheque to A. A demands payment from the drawer who knows about the fraud. The payee has not asserted a claim to the cheque. Payment by the drawer to A discharges the drawer of liability.

Paragraph (3), sub-paragraph (a)

13. A holder who receives payment from a party or the drawee must deliver the cheque to the payer. The payer's right to possession is justified by the fact that, if the cheque remained in the hands of the person receiving payment and that person transferred the cheque to a protected holder, the payer, if a party, would be obliged to pay the cheque a second time upon presentment by the protected holder (cf. arts. 28, 61(3)(c)).

14. If the payer is a party, the person receiving payment must deliver, in addition to the cheque, a receipted account and any protest (sub-paragraph (ii)). These documents are necessary to enable the payer to exercise rights on the cheque against parties liable to him (cf. art. 60).

Sub-paragraph (b)

15. The person from whom payment is demanded is not required to pay if the cheque is not delivered to him. Withholding payment in these circumstances does not constitute dishonour by non-payment. Consequently, in such a case the person who refuses to deliver the cheque would not be entitled to exercise a right of recourse against parties liable to him. However, if the cheque is not delivered because it has been lost, the special rules on lost cheques apply (articles 73-78).

Sub-paragraph (c)

16. If the person from whom payment is demanded pays the cheque although it is not delivered to him, such payment constitutes a discharge of liability on the cheque but such discharge may not be raised as a defence against a protected holder (cf. art. 28).

Example C. The drawer issues a cheque to the payee. The payee endorses the cheque to A who endorses it to B. B presents the cheque for payment to the drawee who refuses payment. Upon protest, B asks payment from the payee. The payee pays but B retains the cheque. Subsequently, B requests payment from A. A may raise as a defence against B that the cheque was paid by the payee, and that he therefore is discharged of liability on the cheque (cf. art. 67).

Example D. The drawer issues a cheque to the payee. The payee endorses it to A who endorses it to B. B presents the cheque for payment to the drawee. The drawee pays but B retains possession of the cheque. B endorses the cheque to C who is not a protected holder. C presents the cheque for payment to the drawee. The drawee refuses to pay. C brings an action against the drawer. Because C is not a protected holder, the drawer may raise the defence that the cheque was already paid and that such payment discharged him. If, on the other hand, C is a protected holder, then payment by the drawee cannot be raised as a defence, neither by the drawer nor by parties prior to C.

* * *

Article 62

(1) The holder is not obliged to take partial payment.

(2) If the holder who is offered partial payment does not take it, the cheque is dishonoured by non-payment.

(3) If the holder takes partial payment from the drawee, the cheque is to be considered as dishonoured by non-payment as to the amount unpaid.

(4) If the holder takes partial payment from a party to the cheque,

(a) The party making payment is discharged of his liability on the cheque to the extent of the amount paid; and

(b) The holder must give such party a certified copy of the cheque and of any authenticated protest.

(5) The drawee or a party making partial payment may require that mention of such payment be made on the cheque and that a receipt therefor be given to him.

(6) If the balance is paid, the person who receives it and who is in possession of the cheque must deliver to the payor the receipted cheque and any authenticated protest.

Relevant legislation

BEA - section 47
UCC - section 3-507
ULC - article 34

Cross references

Discharge by payment: article 61
Dishonour by non-payment: article 46
Authenticated protest: article 49(3)

Commentary

1. A party's undertaking is to pay the cheque in full as provided in articles 59 and 60. Accordingly, a holder is entitled to receive the full amount; he is not obliged to take partial payment which would impose on him the burden of having to claim the remaining part of the sum from another party.
2. Consequently, if he does not accept partial payment, the cheque is dishonoured by non-payment and the holder has rights against parties liable to him for the full amount. If, however, he elects to take partial payment, any party liable is discharged pro tanto (paragraph (4)(a) and article 67) and the cheque is dishonoured to the extent of the amount unpaid (paragraph (3)).
3. If partial payment is made the payer is not entitled to receive the cheque since the holder needs it in order to obtain payment of the amount unpaid. In order to give the payer the protection which he would have by receiving the cheque (article 61(3)), he may require that his partial payment be stated on the cheque and that he be given a receipt for it. As regards payment of the remaining part of the cheque, the payer of it is entitled to receive the receipted cheque.
4. If partial payment is made by a person other than the drawee or the drawer, that person has, as a party secondarily liable, a right of recourse. Since he does not receive the cheque (see above, para. 3), he needs some other document to exercise his right of recourse as to the amount paid by him. Therefore, the holder must give such party a certified copy of the cheque and of any protest, if protest was made as a separate document (paragraph (4)(b)).

* * *

Article 63

(1) The holder may refuse to take payment in a place other than the place where the cheque was presented for payment in accordance with article 43.

(2) If in such case payment is not made in the place where the cheque was presented for payment in accordance with article 43, the cheque is considered as dishonoured by non-payment.

Relevant legislation

BEA - section 45(4)

UCC - section 3-504

ULC - article 9 of annex II to Geneva Convention of 1931

Cross references

Presentment for payment: article 43

Dishonour by non-payment: article 46

Commentary

Article 43 specifies the proper place for due presentment for payment (see paragraphs (c) and (d)). Since it is commercially reasonable to require that payment be made at such place, article 63 provides that an offer to pay the cheque in some other place may be rejected by the holder, who may then treat the cheque as dishonoured by non-payment. However, if the holder accepts payment at another place, the payer is discharged of liability on the cheque according to article 61.

* * *

Article 64

(1) A cheque must be paid in the currency in which the amount of the cheque is expressed.

(2) The drawer may indicate on the cheque that it must be paid in a specified currency other than the currency in which the amount of the cheque is expressed. In that case:

(a) The cheque must be paid in the currency so specified;

(b) The amount payable is to be calculated according to the rate of exchange indicated on the cheque. Failing such an indication, the amount payable is to be calculated according to the rate of exchange for sight drafts (or if there is no such rate, according to the appropriate established rate of exchange) on the date of presentment:

(i) Ruling at the place where the cheque must be presented for payment in accordance with article 43 (c), if the specified currency is that of that place (local currency); or

(ii) If the specified currency is not that of that place, according to the usages of the place where the cheque must be presented for payment in accordance with article 43 (c).

(c) If such a cheque is dishonoured by non-payment, the amount payable is to be calculated:

(i) If the rate of exchange is indicated on the cheque, according to that rate;

(ii) If no rate of exchange is indicated on the cheque, at the option of the holder, according to the rate of exchange ruling on the date of presentment or on the date of actual payment at the place where the cheque must be presented for payment in accordance with article 43 (c) or at the place of actual payment.

(3) Nothing in this article prevents a court from awarding damages for loss caused to the holder by reason of fluctuations in rates of exchange if such loss is caused by dishonour for non-payment.

Relevant legislation

BEA - section 72(4)
UCC - section 3-107(2)
ULC - article 36

Cross references

Currency: article 6(9)
Rate of exchange indicated on the cheque: article 8(a)
Dishonour by non-payment: article 46

Commentary

1. This article lays down rules in respect of payment of a cheque denominated in a currency which is not that of the place of payment. In respect of such cheque the following questions arise:

(a) May a person liable on the cheque discharge that liability by paying in the currency of the place of payment or must he pay in the currency in which the amount of the cheque is expressed?

(b) If payment is made upon presentment in local currency, what should be the rate of exchange between the currency in which the amount of the cheque is expressed and the currency of the place of payment?

(c) If the cheque is dishonoured by non-payment and a change in the rate of the specified currency vis-à-vis the currency of the place of payment takes place after the date of dishonour, what are then the obligations of the parties liable on the cheque?

Paragraph (1)

2. When a cheque is drawn payable in a currency which is not that of the place of payment, in which currency ("foreign" or "local") should payment be made upon presentment in order to discharge parties of their liability on the cheque? In theory, one can envisage the following answers:

(a) The party liable must pay in the specified foreign currency. The rationale behind this approach is that when a cheque is drawn payable in a foreign currency, the parties manifest thereby their intention that the cheque be paid in that currency.

(b) The party liable must pay in local currency. The rationale behind this approach is that the mere specification of a foreign currency on a cheque does not necessarily manifest an intention that the cheque should be paid in such currency. Such intention should be manifested by an express provision requiring payment in the specified foreign currency. According to this view, the specification of the amount of the cheque in a foreign currency serves only the purpose of providing a criterion according to which the value of the local currency is to be measured.

(c) The party liable has an option to pay in either local or foreign currency. The rationale behind this approach is that the fact that a cheque was drawn payable in a foreign currency should permit the person liable to pay either in that currency or in the currency of the place of payment.

(d) The holder has an option to demand payment in either local or foreign currency. The rationale is that the absence of a strong and clear indication of the obligation to pay in foreign currency should operate in favour of the holder.

3. Paragraph (1) states the basic rule that a cheque drawn payable in a currency other than that of the place of payment is, in the absence of an express stipulation to the contrary, to be paid in that currency. Enquiries made amongst banking circles revealed that under current commercial and banking practices instruments are frequently paid in the currency in which the amount of an instrument is expressed even though it is not stipulated on the instrument that payment be made in such currency. The rule, it is submitted, is a most suitable one at a time of frequent fluctuations between currencies.

4. It follows from the rule stated in paragraph (1) that if the drawee offers to pay the cheque, denominated in a specified currency, in the currency of the place of payment, the holder may consider the cheque to be dishonoured by non-payment.

5. The rule is subject to exchange control regulations imposing restrictions on payment in a currency other than that of the place of payment (cf. art. 65).

Paragraph (2)(a) and (b)

6. The drawer of a cheque may stipulate on it that it is to be paid in a specified currency other than the currency in which the amount of the cheque is expressed. In such a case the cheque is to be paid in the specified currency. Thus if a cheque is denominated in Swiss francs and contains a stipulation that it is to be paid in rubles, the cheque must be paid in rubles. Under article 8(b) the sum so payable is deemed to be a definite sum for the purposes of article 1. In such a case the question arises as to what rate of exchange should be applicable. If a rate of exchange is indicated on the cheque the amount payable is to be calculated according to that rate. Under article 8(a) the sum so payable is deemed to be a definite sum for the purposes of article 1. If no rate of exchange is indicated on the cheque the amount payable is to be calculated according to the rate of exchange for sight drafts (or, in the absence of such rate, according to the appropriate established rate of exchange) on the date of presentment. The rate of exchange is the rate ruling at the place where the cheque must be presented for payment in accordance with article 43(c) (see paragraph (2)(b)(i) and (ii)).

Paragraph 2(c)

7. Where a cheque is dishonoured by non-payment the holder has, upon due protest (cf. art. 48), a right of recourse against prior parties (cf. art. 46(2)). The question then arises as to what rate of exchange should prevail when payment is made: the rate specified on the cheque (if so specified), the rate ruling on the date of presentment or on the date of actual payment. The further question arises whether provision should be made for one or several possible rates of exchange or whether the holder or the payer should be entitled to exercise an option between two or more of these rates and, if so, under what circumstances. Yet another question is whether the rules applicable to the rate of exchange should be the same for all parties liable on the cheque or whether a distinction should be made between the drawer and parties secondarily liable. Lastly, the question arises whether the rate of exchange should be that prevailing at the place where the cheque should have been paid upon due presentment for payment or that prevailing at the place where payment is actually made.

8. Sub-paragraph (c)(i) provides that, in the case of dishonour by non-payment, if a rate of exchange is indicated on the cheque that rate prevails. If the rate of exchange is not indicated on the cheque, sub-paragraph (c)(ii) provides that the holder has the option of demanding that payment be made at either the rate of exchange ruling on the date of presentment or on the date of actual payment. The holder is given the option of choosing between two rates of exchange in order to protect him against any loss he may suffer because of speculation by the party liable. Sub-paragraph (c)(ii) further sets forth a rule as to the place which determines the rate of exchange if the amount payable is to be calculated according to a rate prevailing at a given date. Upon dishonour the holder has the option of choosing between the rate of exchange ruling at the place where the cheque must be presented for payment under article 43(c) and that ruling at the place of actual payment.

Paragraph (3)

9. Under certain legal systems a holder may be awarded damages compensating him for loss suffered because of fluctuations in rates of exchange if such loss is caused by dishonour by non-payment. Paragraph (3) preserves such right to damages which a holder may have under the applicable law. It must be noted, however, that paragraph (3) does not create a statutory right entitling a holder to damages in the event of his suffering loss because of fluctuations in rates of exchange.

* * *

Article 65

(1) Nothing in this Convention prevents a Contracting State from enforcing exchange control regulations applicable in its territory, including regulations which it is bound to apply by virtue of international agreements to which it is a party.

(2) (a) If, by virtue of the application of paragraph (1) of this article, a cheque drawn in a currency which is not that of the place of payment must be paid in local currency, the amount payable is to be calculated according to the rate of exchange for sight drafts (or if there is no such rate, according to the appropriate established rate of exchange) on the date of presentment ruling at the place where the cheque must be presented for payment in accordance with article 43 (c).

(b) If such a cheque is dishonoured by non-payment:

(i) The amount is to be calculated, at the option of the holder, according to the rate of exchange ruling on the date of presentment or on the date of actual payment;

(ii) Paragraph (3) of article 64 is applicable where appropriate.

Cross references

Currency: article 6(9)

Dishonour by non-payment: article 46

Commentary

Paragraph (1)

1. As noted in the commentary to article 64 (para.5), the provisions regarding payment in a currency that is not the currency of the place of payment are subject to exchange control regulations imposing restrictions on payment in such currency. Therefore, article 65 sets forth a general provision to this effect. The regulatory provisions referred to in this article are not only those of the Contracting State itself but include those which the Contracting State is bound to enforce by virtue of international agreements to which it is a party. An example of the latter type of regulatory provisions is Article VIII, section 2(b), of the Articles of Agreement of the International Monetary Fund according to which "exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with the Fund Agreement shall be unenforceable in the territories of any member".

Paragraph (2)

2. This paragraph envisages situations where in accordance with article 64 a cheque is to be paid in a currency which is not the currency of the place of payment but where by virtue of the application of paragraph (1) of article 65 it is to be paid in local currency. For these situations paragraph (2) sets forth rules regarding the rate of exchange to be applied and on which date that are similar to the rules set forth in article 64(2) and (3).

* * *

Article 66

If the drawer countermands the order to the drawee to pay a cheque drawn on him, the drawee is under a duty not to pay.

Relevant legislation

BEA - section 75

UCC - section 4-403

ULC - article 32

Commentary

1. The BEA, UCC and ULC all contain rules as to the legal effect of an order by the drawer to the drawee-bank to stop payment of a cheque payable for his account. The systems differ as to the duty of the drawee-bank when it receives such an order.

2. Under the UCC (section 4-403) a customer has the right to stop payment of a cheque, and the drawee-bank has a corresponding duty to comply with such order, provided the order is received by the bank at such time and in such manner as to afford it a reasonable opportunity to act. There is no right to stop payment after the cheque has been "certified", i.e. accepted. Payment of a cheque by the drawee-bank in violation of the stop payment order is improper payment. In such a case the drawee-bank must recredit the drawer's account but is entitled to subrogation to prevent unjust enrichment (section 4-407).

3. Similar rights obtain under the BEA to the extent that the drawee-bank is obliged to comply with its customer's order countermanding payment.

4. According to the ULC the countermand of a cheque is without effect until the expiration of the time-limit for presentment. The holder of a cheque is thus protected against a stop payment order by the drawer until that time-limit has expired. There are within the various countries following the Geneva Uniform Law different interpretations in respect of the duty of the drawee-bank to comply with the countermand.

5. Article 66 follows the approach of the common law jurisdictions that the drawee-bank must comply with the countermand of the drawer. If the bank disregards the countermand and pays the cheque it may not debit the account of the drawer. It should be noted that a countermand once notified to the drawee remains effective until revoked by the drawer.

* * *

Section 2. Discharge of a prior party

Article 67

(1) When a party is discharged wholly or partly of his liability on the cheque, any party who has a right of recourse against him is discharged to the same extent.

(2) Payment by the drawee of the whole or a part of the amount of the cheque to the holder, or to any party who has paid the cheque in accordance with article 59, discharges all parties of their liability to the same extent.

Relevant legislation

BEA - section 37
UCC - section 3-208
ULC - article 47

Cross reference

Discharge: article 61

Commentary

1. The discharge of a party of his liability on the cheque affects also the rights of parties subsequent to him. When a party signed the cheque he was entitled to assume that, if he paid the cheque, he would have a right of recourse against prior parties. The discharge of a prior party impairs this right of recourse. It is reasonable therefore that in such a case parties subsequent to the party discharged are also discharged.

Example. The payee endorses a cheque to A who endorses it to B. Payment by the drawer to B operates as a discharge of the payee and A.

2. Similarly, payment by the drawee discharges all parties of their liability (paragraph (2)).

3. Where payment is made only in part, the discharge of the subsequent parties is to the extent of that partial payment.

* * *

CHAPTER SEVEN. CROSSED CHEQUES AND CHEQUES PAYABLE IN ACCOUNT

Section 1. Crossed cheques

Article 68

- (1) A cheque is crossed if it bears across its face two parallel transverse lines.
- (2) A crossing is general if it consists of the two lines only or if between the two lines the word "banker" or an equivalent term or the words "and Company" or any abbreviation thereof is inserted; it is special if the name of a banker is so inserted.
- (3) A cheque may be crossed generally or specially by the drawer or the holder.
- (4) The holder may convert a general crossing into a special crossing.
- (5) A special crossing may not be converted into a general crossing.
- (6) The banker to whom a cheque is crossed specially may again cross it specially to another banker for collection.

Relevant legislation

BEA - sections 76 to 81
ULC - articles 37 and 38

Commentary

1. The practice of crossing cheques is known and has received statutory recognition in both civil law and common law countries though the legal effects of crossings may be different. One function of crossing a cheque is common to all legal systems which know the practice: to lessen the risk that the drawee-bank pays a cheque to a person who is not the true owner of it in that the drawee-bank is obliged to make payment either to a bank or to its own customer. Consequently if the drawee-bank pays not in accordance with the crossing and the person to whom it pays the crossed cheque is not the true owner of it, the drawee-bank does not make due payment and, therefore, may not debit the drawer's account. The difference between civil law and common law systems lies in the fact that, in common law systems, if the drawee-bank pays a cheque in accordance with the crossing in good faith and without negligence it may raise that fact as a defence if so paying it did not make payment to the true owner. The same defence is available to a collecting

bank. The need for such a defence does not arise in the systems based on the Geneva Uniform Law because of the general rules set forth in articles 19 and 35 of the ULC (see commentary to article 25, paras. 8-10).

2. This Convention provides for the possibility of crossing a cheque in order to achieve the purpose of crossings common to all systems: to lessen the risk that cheques are paid to the wrong person. The Convention therefore makes provision for the manner in which an international cheque may be crossed and sets forth the basic rule that payment by a drawee-bank not in accordance with the crossing imposes liability on the drawee-bank. Liability is also imposed on a collecting bank which collects a cheque not in accordance with the crossing. Because of the provisions of the Convention relating to the legal effects of a forged endorsement, the Convention need not, and does not, retain the defence available in common law systems to a drawee-bank or collecting bank that it paid or collected a cheque in good faith and without negligence in accordance with the crossing. However, under article 25(2) the liability of the drawee-bank which pays the person who forged an endorsement and of the collecting bank which collects as an agent of such forger is not regulated by this Convention. Therefore, such a drawee-bank or collecting bank may, under some applicable national laws, be liable to the true owner and may then be in a position to raise the defence of payment in accordance with the crossing in good faith and without negligence.

3. Paragraph (1) states the manner in which a crossing of a cheque is effected, in accordance with general practice: the crossing consists of two parallel transverse lines drawn across the face of the cheque. Transverse lines include vertical but not horizontal lines.

4. A crossing may be either general or special. It is general if it consists of two parallel transverse lines only or with the word "banker" or an equivalent term or the words "and Company" or any abbreviation thereof inserted between those lines. It is special if the name of a banker is inserted between the two parallel transverse lines.

5. A general crossing may be converted into a special crossing but not vice versa. The banker to whom a cheque is crossed specially may in turn cross it specially to another banker for collection.

6. Only the drawer and a holder may cross a cheque either generally or specially. However, only a holder may convert a general crossing into a special crossing. Thus the drawee or a guarantor, if he is not a holder, may not cross a cheque or convert the crossing from general into special. If he does so the rules on material alteration apply (cf. art. 33).

* * *

Article 69

If a cheque shows on its face the obliteration either of a crossing or of the name of the banker to whom it is crossed, the obliteration is considered as not having taken place.

Relevant legislation

BEA - section 78
ULC - article 37

Commentary

Once a cheque has been crossed the crossing, in that it produces legal effects, becomes an integral part of the cheque. Therefore the holder may not obliterate the crossing or convert a special crossing into a general crossing by striking out the name of the banker. Any such obliteration or striking out is deemed not to have taken place.

* * *

Article 70

(1) (a) A cheque which is crossed generally is payable only to a banker or to a customer of the drawee.

(b) A cheque which is crossed specially is payable only to the banker to whom it is crossed or, if such banker is the drawee, to his customer.

(c) A banker may not take a crossed cheque except from his customer or from another banker and may not collect such a cheque except for such a person.

(2) The drawee who pays, or the banker who takes or collects, a crossed cheque in violation of the provisions of paragraph (1) of this article incurs liability for any damages which a person may have suffered as a result of such violation, provided that such damages do not exceed the amount of the cheque.

Relevant legislation

BEA - section 79

ULC - article 38

Commentary

1. This article sets forth the legal effects of a general or special crossing of a cheque and the consequences of inobservance of such crossing.

2. The effect of crossing a cheque is that the drawee-bank is directed to pay the cheque only to a holder who is a banker or to its customer and, if the cheque is crossed specially, to the banker named in the crossing or to the customer of the named banker if that banker is the drawee. The purpose of this rule is to protect the true owner to the extent that if payment is made to someone not entitled to it he, the true owner, may more easily trace the person to whom payment was made and recover from him.

3. If the drawee-bank pays, or a collecting bank collects, a crossed cheque not in accordance with the crossing it will be liable for damages which the true owner may have suffered because of the inobservance. Such damages may not exceed the amount of the cheque.

* * *

Article 71

If the crossing on a cheque contains the words "not negotiable" the transferee becomes a holder but cannot become a protected holder. However, such transferee may acquire the rights of a protected holder under article 29.

Relevant legislation

BEA - section 81

Commentary

The addition of the words "not negotiable" to a crossed cheque has the following effect:

- (a) The holder may transfer the cheque notwithstanding the provision of article 18; and
- (b) the transferee cannot become a protected holder in his own right.

* * *

Section 2. Cheques payable in account

Article 72

(1) (a) The drawer or the holder of a cheque may prohibit its payment in cash by writing transversally across the face of the cheque the words "payable in account" or words of similar import.

(b) In such case the cheque may only be paid by the drawee by means of a book-entry.

(2) The drawee who pays such a cheque otherwise than by means of a book-entry incurs liability for any damages which a person may have suffered as a result thereof, provided that such damages do not exceed the amount of the cheque.

(3) If a cheque shows on its face the obliteration of the words "payable in account", the obliteration is considered as not having taken place.

Relevant legislation

ULC - article 39

Commentary

1. This article provides an exception to the rule that the payee is entitled to payment of the cheque in cash. The drawer or the holder may, by writing transversally across the face of the cheque the words "payable in account" (or words of similar import), direct the drawee-bank to pay the cheque only by means of a book-entry. If the drawee-bank fails to observe the direction so given, it will be liable for damages to the true owner of the cheque. Such damages may not exceed the amount of the cheque.

2. Obliteration of the words directing the drawee-bank to pay the cheque only by means of a book-entry is deemed not to have taken place.

* * *

CHAPTER EIGHT. LOST CHEQUES

Article 73

(1) When a cheque is lost, whether by destruction, theft or otherwise, the person who lost the cheque has, subject to the provisions of paragraphs (2) and (3) of this article, the same right to payment which he would have had if he had been in possession of the cheque. The party from whom payment is claimed cannot set up as a defence against liability on the cheque the fact that the person claiming payment is not in possession thereof.

(2) (a) The person claiming payment of a lost cheque must state in writing to the party from whom he claims payment:

(i) The elements of the lost cheque pertaining to the requirements set forth in article 1 (2); for this purpose the person claiming payment of the lost cheque may present to that party a copy of that cheque;

(ii) The facts showing that, if he had been in possession of the cheque, he would have had a right to payment from the party from whom payment is claimed;

(iii) The facts which prevent production of the cheque.

(b) The party from whom payment of a lost cheque is claimed may require the person claiming payment to give security in order to indemnify him for any loss which he may suffer by reason of the subsequent payment of the lost cheque.

(c) The nature of the security and its terms are to be determined by agreement between the person claiming payment and the party from whom payment is claimed. Failing such an agreement, the court may determine whether security is called for and, if so, the nature of the security and its terms.

(d) If the security cannot be given, the court may order the party from whom payment is claimed to deposit the amount of the lost cheque, and any interest and expenses which may be claimed under article 59 or 60, with the court or any other competent authority or institution, and may determine the duration of such deposit. Such deposit is to be considered as payment to the person claiming payment.

(3) The person claiming payment of a lost cheque in accordance with the provisions of this article need not give security to the drawer who has inserted in the cheque, or to an endorser who has inserted in his endorsement, such words as "not negotiable", "not transferable", "not to order", "pay (X) only", or words of similar import.

Relevant legislation

BEA - section 70

UCC - section 3-804

ULC - articles 7 and 16 of annex II to Geneva Convention of 1931

Cross references

Defences against liability: articles 27 and 28

Discharge by payment: article 61

Commentary

1. Under the Convention the rights on a cheque are vested in the holder, i.e. the payee or endorsee who is in possession of the cheque or the possessor of a bearer cheque (cf. arts. 6(5) and 16). Thus a holder when losing possession of the cheque is no longer a holder. The question, then, is what are the rights of such an "ex-holder".

2. Legal systems generally recognize that the loss of a cheque does not entail loss of the rights thereon. However, they differ as to the procedures and conditions under which the ex-holder may exercise his rights. Most legal systems of civil law tradition provide for a special cancellation procedure: upon request by the ex-holder, accompanied by a statement setting forth the essential elements of the lost cheque and the circumstances of its loss, the court may issue a cancellation order which terminates the validity and effect of the lost cheque and serves the ex-holder as a substitute for the lost cheque. On the other hand, under the BEA and the UCC, no such cancellation procedure is required. The ex-holder may maintain an action on the lost cheque but may be required to give security to the payer so as to cover the risk of the payer of having to pay twice, i.e. to the ex-holder and to a holder in due course of the lost cheque.

3. The latter approach has been adopted in the Convention which requires the giving of security and of a written statement by the ex-holder (article 73(2)). The institution of cancellation, as embodied in national laws of civil law tradition, seemed less appropriate in the context of an international negotiable instrument because cancellation takes place by a judicial decision which would not necessarily be known in countries other than the country in which it was rendered.

Paragraph (1)

4. Article 73, paragraph (1), expresses the idea, common to all systems, that the loss of a cheque does not result in loss of the rights on it. Loss of the cheque is to be understood in a wide sense. It includes, in addition to normal loss, any loss by destruction, theft or any other dispossession against the possessor's will.

5. Under paragraph (1), the ex-holder has, subject to the provisions of paragraph (2), the same right to payment as he would have had if he had been in possession of the cheque. Retention of his legal position means not only that he retains his rights on the cheque but also that he retains any burden, i.e. to make presentment (cf. art. 45), to make protest (cf. art. 48), to give notice of dishonour (cf. art. 53(1)), and continues to be subject to the same claims and defences as before.

Example A. The drawer draws a cheque payable to payee (P), P endorses it to A who loses it. Under article 73, paragraph (1), A has the right to claim payment from the drawer and P; but, before he may claim payment he must make presentment for payment and any necessary protest if payment is refused (art. 76). In an action brought against the drawer and P, each party may raise any defence which he could raise if A would be in possession of the cheque. On the other hand, if the drawer or P pays, such payment constitutes a discharge and is a defence available against any holder who is not a protected holder.

6. The provisions on lost cheques are applicable only to situations where an ex-holder claims payment from a party, but not to cases where payment is sought from the drawee. This is clear from the use of the word "party" instead of "person". The underlying reason is that, since a drawee is not liable on the cheque, payment by him would be at his own risk.

Paragraph (2)

7. According to paragraph (1), the ex-holder's exercise of his rights is subject to the provisions of paragraph (2) which lays down two requirements. The ex-holder must give security to the person from whom he claims payment as regulated in sub-paragraphs (b) and (c). An alternative method of security is envisaged in sub-paragraph (d). He must also supply that person with a written statement the contents of which are set forth in sub-paragraph (a). Such statement is intended to substitute for the lost cheque.

Sub-paragraph (a)

8. Under sub-paragraph (a), the ex-holder must state in writing certain elements of the lost cheque (i) and certain facts (ii, iii). If he does not do so, he may not exercise his rights under article 73. This would, for example, include the case where he does not **remember the sum of the cheque or the date of the cheque**.

9. The procedure under the provisions on lost cheques may only be used if the cheque at the time it was lost was a complete cheque, i.e. complied with the formal requisites set forth in article 1(2). Therefore a cheque cannot be completed by the use of the written statement.

10. Sub-paragraph (ii) requires that the ex-holder show that he was a holder of the cheque. For example, he must show that, at the time of the loss of an order cheque, he held it through an uninterrupted series of endorsements (cf. art. 16(1)(c)). Finally, sub-paragraph (iii) requires from the ex-holder to state that he lost the cheque and how.

Sub-paragraphs (b), (c) and (d)

11. In addition to the above written statement the ex-holder must give security to the person from whom he claims payment. This requirement arises from the fact that under the Convention a party must pay the ex-holder. However, the lost cheque may get into the hands of a **protected holder against whom such party could not raise the first payment as a defence** (cf. art 28(1)(a)). The security is intended to provide for such contingency and to cover the risk of his being obliged to pay a second time.

Example B. In the situation described in example A. (above, para. 5), the lost cheque is found by B who forges A's signature and endorses it to C. C endorses it to D. If D is a protected holder, he has a right to claim payment.

12. According to sub-paragraph (c), it is for the parties to settle the matters relating to the security, i.e. whether it is needed and, if so, its nature and terms. However, if the parties cannot agree, a court may make a determination. For example, it may decide, if security is needed, that a bank guarantee in a specified amount be given.

13. Sub-paragraph (d) provides an alternative way of covering the risk of double payment in those cases where security cannot be given. A court may order that the party from whom payment is claimed deposit the amount of the lost cheque and any interest and expenses recoverable under article 59 or 60 with the court or with another authority or institution which is competent under national law to receive and hold such deposit. According to sub-paragraph (d), the deposit is then to be considered as payment to the claimant. Such payment has the same legal effects under the Convention as any ordinary payment.

Paragraph (3)

14. A cheque in which the drawer or an endorser has inserted the words "not negotiable", "not transferable", "not to order", "pay (X) only", or words of similar import may not be transferred except for purposes of collection, and the transferee does not become a holder except for such purposes (cf. art.18). It follows that such holder for collection may not qualify as a protected holder in his own right (cf. art. 22 (1)(c)). Thus, if the lost cheque is presented for payment by such holder the party from whom payment is demanded may refuse to pay. Therefore, a person claiming payment of a lost cheque containing the above words need not give security.

* * *

Article 74

(1) A party who has paid a lost cheque and to whom the cheque is subsequently presented for payment by another person must notify the person to whom he paid of such presentment.

(2) Such notification must be given on the day the cheque is presented for payment or on one of the two business days which follow and must state the name of the person presenting the cheque and the date and place of presentment.

(3) Failure to notify renders the party who has paid the lost cheque liable for any damages which the person whom he paid may suffer from such failure, provided that the damages do not exceed the amount referred to in article 59 or 60.

(4) Delay in giving notice is excused when the delay is caused by circumstances which are beyond the control of the person who has paid the lost cheque and which he could neither avoid nor overcome. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

(5) Notice is dispensed with when the cause of delay in giving notice continues to operate beyond 30 days after the last date on which it should have been given.

Commentary

Paragraph (1)

1. Article 74 imposes upon the party who has paid the cheque to the ex-holder the obligation to notify him of a subsequent presentment of the cheque for payment. The purpose of that notification is to enable the ex-holder to assert a claim to the cheque, to prevent a party from paying the cheque to a holder (cf. art. 27(3)) or to claim damages under article 25.

Paragraph (2)

2. Paragraph (2) sets forth the required particulars and the time-limit for the notification. Speedy notification is imperative in such situations where someone appears with the lost cheque since the surrounding circumstances normally make this a matter of urgency.

Paragraph (3)

3. If the party who paid the lost cheque fails to give the notification he is liable for damages which the ex-holder might suffer because of that failure. Damages may result, for example, from circumstances such as these: The payee (P) loses the cheque and receives payment from the drawer under article 73; the thief forges P's signature and endorses the cheque to A; A endorses the cheque to B who presents it for payment to the drawee. The drawee dishonours the cheque and payment is demanded from the drawer. Under paragraph (1) it is the duty of the drawer to notify P that B has presented the cheque to him. Such notification may, for example, enable P to claim damages from A who, at the time of notification, is solvent. If the drawer fails to notify and A becomes insolvent, P may claim damages from the drawer to compensate him for not having been able to recover damages from A when he was still solvent.

4. Such action for damages based on failure to notify is an action off the cheque like, for example, the actions provided for under articles 25, 39 and 57.

Paragraphs (4) and (5)

5. Paragraphs (4) and (5) set forth the circumstances under which delay in giving notice is excused or under which notice is dispensed with, similar to the provisions of article 44.

* * *

Article 75

(1) A party who has paid a lost cheque in accordance with the provisions of article 73 and who is subsequently required to, and does, pay the cheque, or who, by reason of the loss of the cheque, then loses his right to recover from any party liable to him, has the right:

(a) If security was given, to realize the security; or

(b) If the amount was deposited with the court or other competent authority or institution, to reclaim the amount so deposited.

(2) The person who has given security in accordance with the provisions of paragraph (2) (b) of article 73 is entitled to obtain release of the security when the party for whose benefit the security was given is no longer at risk to suffer loss because of the fact that the cheque is lost.

CommentaryParagraph (1)

1. This provision sets forth the circumstances under which a party who paid a lost cheque in accordance with article 73 may realize the security given to

him or claim the amount deposited under article 73, paragraph (2)(d). The first of these situations is where a party had to pay a second time. The other situation is where a party who received security loses his right of recourse by reason of payment by a prior party. For example, a cheque endorsed by the payee to A and by A to B is lost by B. B asks payment from A under article 73 and is paid upon giving security to A. C acquires the lost cheque under circumstances which make him a protected holder. C demands payment from the drawer and is paid by him. Payment by the drawer discharges the payee. Therefore, because A loses his right of recourse against the payee and the drawer, A may realize the security.

Paragraph (2)

2. This provision deals with the circumstances under which an ex-holder who gave security and received payment is entitled to obtain release of the security. He may do so when the party who paid and received the security is no longer at risk to be obliged to pay a second time. This is the case, for example, where the time periods provided in article 79 have expired or where proof is brought that the lost cheque was in fact destroyed.

* * *

Article 76

A person claiming payment of a lost cheque duly effects protest for dishonour by non-payment by the use of a written statement that satisfies the requirements of article 73, paragraph (2) (a).

Cross reference

Protest: article 49

Commentary

1. The fact that the cheque is lost does not dispense the ex-holder of the obligation to protest the cheque in the event of dishonour by non-payment. Article 76 lays down rules as to how protest is to be effected in this case: it is to be effected by use of the same item as is used for presentment, i.e. the written statement which satisfies the requirements of article 73, paragraph (2)(a), and, as provided therein, may be a copy of the lost cheque.

2. In the lost cheque situation, in general, the ordinary rules apply except for the replacement of the lost cheque by the written statement. Thus, e.g., a declaration made in accordance with article 49, paragraph (3), is deemed to be a protest for the purpose of the Convention (cf. art. 49(4)) also in the case of a lost cheque.

* * *

Article 77

A person receiving payment of a lost cheque in accordance with article 73 must deliver to the party paying the written statement required under article 73, paragraph (2) (a), receipted by him and any protest and a receipted account.

Cross reference

Payment: article 61

Commentary

Under article 61, paragraph (3), the person receiving payment must deliver the cheque (and any protest and a receipted account) to the payer; if he does not do so, the person from whom payment is demanded may withhold payment. Article 77 makes it clear that the person obliged to pay may not withhold payment on the mere ground that the person claiming payment is unable to deliver the (lost) cheque; therefore, such withholding would constitute dishonour. However he must deliver the written statement which substitutes for the lost cheque.

* * *

Article 78

(1) A party who has paid a lost cheque in accordance with article 73 has the same rights which he would have had if he had been in possession of the cheque.

(2) Such party may exercise his rights only if he is in possession of the receipted written statement referred to in article 77.

Cross reference

Right of recourse: article 60

Commentary

This provision establishes in respect of parties who took up and paid a lost cheque rights similar to those of the ex-holder under article 73. Thus, where an endorser, upon dishonour by the drawee, pays the ex-holder, the endorser has in turn, against prior parties, those rights on the lost cheque which he would have had if he had acquired, upon payment, possession of the cheque.

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CHAPTER NINE. LIMITATION (PRESCRIPTION)

Article 79

(1) A right of action arising on a cheque can no longer be exercised after four years have elapsed:

- (a) Against the drawer or his guarantor, from the date of the cheque;
- (b) Against an endorser or his guarantor, from the date of protest for dishonour or, where protest is dispensed with, the date of dishonour.

(2) If a party has paid the cheque in accordance with article 59 or 60 within one year before the expiration of the period referred to in paragraph (1) of this article, such party may exercise his right of action against a party liable to him within one year from the date on which he paid the cheque.

Relevant legislation

UCC - section 3-122

ULC - articles 52, 53 and 56; article 26 of annex II to Geneva Convention of 1931

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Cross references

Protest for dishonour by non-payment: article 50

Dispensation of protest: article 51(2)

Exercise of right of recourse: article 48

Commentary

1. This article lays down special rules in respect of the period of time within which an action arising on the cheque must be brought and the point of time from which such period starts to run. The article does not deal with actions off the cheque (e.g. those arising by virtue of article 25, 39, 57 or 74(3)) nor does the article deal with other aspects of limitation or prescription such as the causes of an interruption or suspension of the limitation period.

2. The general period of limitation is four years for actions against any party liable on the cheque. This period is, however, extended in those cases where an action may be brought by a party who paid the cheque against a party liable to him.

Example A. A cheque is issued by the drawer to the payee. The payee transfers the cheque to A who transfers it to B. Upon presentment for payment the cheque is dishonoured by the drawee. B, upon protesting the dishonour, exercises his right of recourse against A who pays the cheque. Under article 79 B may exercise his right of recourse on the cheque within four years against (a) the drawer or his guarantor from the date of the cheque; (b) an endorser or his guarantor from the date of protest for dishonour or, where protest is dispensed with, the date of dishonour. If B exercises his right of recourse against A within a period of three years, A in turn may exercise his right of recourse within the remaining period of time of four years. However, if B exercises his right of recourse against A after a period of three years has elapsed, A may exercise his right of recourse within a period of one year from the date on which he paid the cheque to B.

Example B. In example A., B exercises his right of recourse against A after three and a half years from the date of protest for dishonour by non-payment. A who pays B may now exercise his right of recourse against the payee within one year from the date he paid the cheque. If A should exercise his right of recourse against the payee after, say, nine months from the date he, A, paid the cheque and the payee should pay, then the payee in turn would have one year from the date he paid the cheque within which he may bring an action on the cheque against the drawer.

3. Article 79 sets forth rules regarding the point of time at which an action on the cheque accrues. The basic rule in this respect is that this point of time is the date on which a party became liable on the cheque. Thus an action

(a) against the drawer of a cheque accrues on the date of the cheque;

(b) against parties secondarily liable accrues on the date of protest for dishonour by non-payment or, if protest is dispensed with, the date of dishonour.

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