

### III. INTERNATIONAL PAYMENTS

#### A. Report of the Working Group on International Negotiable Instruments on the work of its eighth session (Geneva, 3-14 September 1979) (A/CN.9/178)\*

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#### INTRODUCTION

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

2. The Working Group held its first session in Geneva in January 1973. At that session the Working Group considered articles of the draft uniform law relating to transfer and negotiation (arts. 12 to 22), the rights and liabilities of signatories (arts. 27 to 40), and the definition and rights of a "holder" and a "protected holder" (arts. 5, 6 and 23 to 26).<sup>3</sup>

3. The second session of the Working Group was held in New York in January 1974. At that session the Working Group continued consideration of articles of the draft uniform law relating to the rights and liabilities of signatories (arts. 41 to 45) and considered articles in respect of

presentment, dishonour and recourse, including the legal effects of protest and notice of dishonour (arts. 46 to 62).<sup>4</sup>

4. The third session was held in Geneva in January 1975. At that session the Working Group continued its consideration of the articles concerning notice of dishonour (arts. 63 to 66). The Group also considered provisions regarding the sum due to a holder and to a party secondarily liable who takes up and pays the instrument (arts. 67 and 68) and provisions regarding the circumstances in which a party is discharged of his liability (arts. 69 to 78).<sup>5</sup>

5. The fourth session of the Working Group was held in New York in February 1976. At that session the Working Group considered articles 79 to 86 and articles 1 to 11 of the draft uniform law, thereby completing its first reading of the draft text of that law.<sup>6</sup>

6. At the fifth session of the Working Group, held in New York in July 1977, the Working Group commenced its second reading of the draft uniform law (retitled at that session "draft convention on international bills of exchange and international promissory notes") and considered articles 1 to 24.<sup>7</sup>

7. The sixth session of the Working Group was held at the United Nations Office in Geneva from 3 to 13 January 1978. At that session, the Working Group, continuing its second reading of the text of the Draft Convention on International Bills of Exchange and International Promis-

\* 5 October 1979.

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its fourth session, *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417)* (UNCITRAL, report on the fourth session (1971)), para. 35 (Yearbook ... 1971, part one, II, A). For a brief history of the subject up to the fourth session of the Commission, see A/CN.9/53, paras. 1 to 7; report of the United Nations Commission on International Trade Law on the work of its fifth session, *Official Records of the General Assembly, Twenty-seventh Session, Supplement No. 17 (A/8717)*, report on the fifth session (1972), para. 61 (2) (c) (Yearbook ... 1972, part one, II, A).

<sup>2</sup> UNCITRAL, report on the fifth session (1972), para. 61 (1) (a) (Yearbook ... 1972, part one, II, A).

<sup>3</sup> Report of the Working Group on International Negotiable Instruments on the work of its first session (Geneva, 8-19 January 1973), A/CN.9/77 (Yearbook ... 1973, part two, II, 1).

<sup>4</sup> Report of the Working Group on International Negotiable Instruments on the work of its second session (New York, 7-18 January 1974), A/CN.9/86 (Yearbook ... 1974, part two, II, 1).

<sup>5</sup> Report of the Working Group on International Negotiable Instruments on the work of its third session (Geneva, 6-17 January 1975), A/CN.9/99 (Yearbook ... 1975, part two, II, 1).

<sup>6</sup> Report of the Working Group on International Negotiable Instruments on the work of its fourth session (New York, 2-12 February 1976), A/CN.9/117 (Yearbook ... 1976, part two, II, 1).

<sup>7</sup> Report of the Working Group on International Negotiable Instruments on the work of its fifth session (New York, 18-29 July 1977), A/CN.9/141 (Yearbook ... 1978, part two, II, A).

sory Notes, considered articles 5 and 6 and articles 24 to 53.<sup>8</sup>

8. The seventh session of the Working Group was held in New York in January 1979. At that session, the Working Group, continuing its second reading of the text of the Draft Convention on International Bills of Exchange and International Promissory Notes, considered articles 24 and 53 to 70.<sup>9</sup>

9. The Working Group held its eighth session at the United Nations Office in Geneva from 3 to 14 September 1979. The Working Group consists of the following eight members of the Commission: Egypt, France, India, Mexico, Nigeria, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America. With the exception of Nigeria, all the members of the Working Group were represented at the eighth session. The session was also attended by observers of the following states: Argentina, Austria, Brazil, Burma, Chile, Cuba, German Democratic Republic, Indonesia, Japan, Kenya, Pakistan, People's Republic of China, Spain and Thailand, and by observers from the International Monetary Fund, the Bank for International Settlements, the European Communities, the Hague Conference on Private International Law and the European Banking Federation.

10. The Working Group elected the following officers:  
Chairman . . . . . Mr. René Roblot (France)  
Rapporteur . . . . . Mr. Roberto Luis Mantilla-Molina  
(Mexico)

11. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.13): draft uniform law on international bills of exchange and international promissory notes, with commentary (A/CN.9/WG.IV/WP.2): draft uniform law on international bills of exchange and international promissory notes (first revision) (A/CN.9/WG.IV/WP.6 and Add.1 und 2): note by the Secretariat: desirability of preparing uniform rules applicable to international cheques (A/CN.9/WG.IV/CRP.5): draft convention on international bills of exchange and international promissory notes (first revision) articles 46 to 68, as reviewed by a drafting party (A/CN.9/WG.IV/WP.10): draft convention on international bills of exchange and international promissory notes (first revision) articles 24 and 68 to 86, as reviewed by a drafting party (A/CN.9/WG.IV/WP.12) and the respective reports of the Working Group on the work of its first (A/CN.9/77),\* second (A/CN.9/86),\*\* third (A/CN.9/99),\*\*\* fourth (A/CN.9/117),\*\*\*\* fifth (A/CN.9/141),† sixth (A/CN.9/147)†† and seventh (A/CN.9/157)††† sessions.

\* Yearbook . . . 1973, part two, II, 1.

\*\* Yearbook . . . 1974, part two, II, 1.

\*\*\* Yearbook . . . 1975, part two, II, 1.

\*\*\*\* Yearbook . . . 1976, part two, II, 1.

† Yearbook . . . 1978, part two, II, A.

†† Yearbook . . . 1978, part two, II, B.

††† Yearbook . . . 1979, part two, II, A.

<sup>8</sup> Report of the Working Group on International Negotiable Instruments on the work of its sixth session (Geneva, 3-13 January 1978), A/CN.9/147 (Yearbook . . . 1978, part two, II, B).

<sup>9</sup> Report of the Working Group on International Negotiable Instruments on the work of its seventh session (New York, 3-12 January 1979), A/CN.9/157 (Yearbook . . . 1979, part two, II, A).

## DELIBERATIONS AND DECISIONS

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

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

14. In the course of this session, the Working Group considered articles 1, 5, 9, 11 and 70 to 86.

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

## ARTICLES 70 TO 78 (DISCHARGE)

### *Article 70, paragraph (2)*

16. The text of article 70, paragraph (2), as considered by the Working Group, is as follows:

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

“(a) At or after maturity, or

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

17. The Working Group decided to add after the words “to the holder” the words “or to a party subsequent to himself”. This modification was deemed necessary because of the fact that a person having rights on the instrument need not necessarily be a holder. Thus, a guarantor who had paid the instrument and received possession of it was not a holder but had, under article 45, rights on the instrument against parties who were liable thereon to the party for whom he became a guarantor. Similarly, the drawer who paid an instrument upon dishonour by the drawee or the acceptor, had rights against the acceptor though he lacked the status of a holder, unless the bill was endorsed to him or the last endorsement was in blank.

### *Article 70, paragraph (5)*

18. The text of article 70, paragraph (5), as considered by the Working Group, is as follows:

“A person receiving payment of an instrument must deliver to the person making the payment the receipted instrument, any authenticated protest and a receipted account.”

19. The Working Group, after discussion, was agreed that a person who paid an instrument was entitled to receive possession of the instrument. The right to possession was justified by the fact that, if the instrument remained in the hands of the person receiving payment and that person transferred the instrument to a protected holder, the payor would be obliged to pay the instrument a second time upon presentment by the protected holder.

20. The Working Group was also agreed that the person from whom payment was demanded should not be required to pay if the instrument was not delivered to him and that withholding of payment in these circumstances should not constitute a dishonour by non-payment. Consequently, in such a case, the person who had refused to deliver the instrument would not be entitled to exercise a right of recourse against prior parties.

21. It was also agreed that, if the person from whom payment was demanded paid the instrument, though it was not delivered to him, such payment should constitute a discharge of liability on the instrument, subject to article 25. The following examples were given: the maker issues an instrument to the payee. The payee endorses the note to A, and A endorses it to B. B presents the instrument for payment to the maker. Example (a): the maker refuses payment. Upon protest, B asks payment from the payee. The payee pays but B retains the instrument. Subsequently, B requests payment from A. A may raise as a defence against B that the instrument was paid by the payee, and therefore he is discharged of his liability on the note (article 78). Example (b): B presents the note for payment to the maker. The maker pays but B retains possession of the note. B endorses the note to C who is not a protected holder. C presents the note for payment to the maker. Because C is not a protected holder, the maker may raise the defence that he paid the instrument and that such payment constitutes a discharge. If, on the other hand, C is a protected holder, then payment by the maker cannot be raised as a defence, neither by the maker nor by parties prior to C.

22. The Working Group, after consideration, decided to delete the adjective "authenticated" in view of the fact that article 58 no longer provided for an authenticated protest.

23. The Working Group, upon further examination of article 70, also concluded that the use of the words "due payment" in paragraphs (1), (2) and (4) of this article might give rise to misunderstanding and that it would be preferable to use the wording of an earlier draft of the article according to which a party was discharged of his liability on the instrument when he paid the holder or a party subsequent to himself the amount due pursuant to articles 67 or 68. The Group requested the Secretariat to redraft the article accordingly.

*Article 71, paragraph (1)*

24. The text of article 71, paragraph (1), as considered by the Working Group, is as follows:

"The holder is not obliged to take partial payment."

25. The Working Group adopted this paragraph without change.

*Article 71, paragraph (2)*

26. The text of article 71, paragraph (2), as considered by the Working Group, is as follows:

"If the holder does not take partial payment, the instrument is dishonoured by non-payment."

27. The Working Group adopted this paragraph without change. However, the view was expressed that, since the provision of this paragraph followed logically from the provision of paragraph (1), it could be deleted or, if it were maintained, it should be made part of paragraph (1).

*Article 71, paragraph (3)*

28. The text of article 71, paragraph (3), as considered by the Working Group, is as follows:

"If the holder takes partial payment from the drawee or the acceptor or the maker:

"(a) The acceptor or the maker is discharged of his liability on the instrument to the extent of the amount paid; and

"(b) The instrument is to be considered as dishonoured by non-payment as to the amount unpaid."

29. The Working Group adopted this paragraph without change. The question was raised whether provision should be made for partial payment by parties secondarily liable because of dishonour. The Group was of the opinion that no special rules were required to cover such cases.

*Article 71, paragraph (4)*

30. The text of article 71, paragraph (4), as considered by the Working Group, is as follows:

"The drawee or the acceptor or the maker making partial payment may require that mention of such payment be made on the instrument and that a receipt therefor be given to him."

31. The Working Group adopted this paragraph without change. The Working Group did not adopt a suggestion to delete the requirement that a receipt for partial payment be given to the payor.

*Article 71, paragraph (5)*

32. The text of article 71, paragraph (5), as considered by the Working Group, is as follows:

"When an instrument has been paid in part, a party who pays the unpaid amount is discharged of his liability thereon. In that case, the person receiving the payment must deliver the receipted instrument and any authenticated protest to the party making the payment."

33. The Working Group adopted this paragraph subject to the deletion of the word "authenticated" before the word "protest" and alignment with the redrafted text of article 70, paragraph (5).

*Article 72*

34. The text of article 72, as considered by the Working Group, is as follows:

“(1) The holder may refuse to take payment in a place other than the place where the instrument was duly presented for payment in accordance with article 53 (g).

“(2) If payment is not then made in the place where the instrument was duly presented for payment in accordance with article 53 (g), the instrument is considered as dishonoured by non-payment.”

35. The Working Group adopted this article without change.

#### Article 74

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

“(1) An instrument must be paid in the currency in which the amount of the instrument is expressed.

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

“(a) The instrument 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 instrument. Failing such an indication, the amount payable is to be calculated according to the rate of exchange for sight drafts on the date of maturity:

“(i) Ruling at the place where the instrument must be presented for payment in accordance with article 53 (g), 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 instrument must be presented for payment in accordance with article 53 (g).

“(c) If such an instrument is dishonoured by non-acceptance, the amount payable is to be calculated:

“(i) If the rate of exchange is indicated on the instrument [according to that rate] [at the option of the holder, according to that rate or according to the rate ruling on the date of dishonour or on the date of actual payment].

“(ii) If no rate of exchange is indicated on the instrument [according to the rate of exchange for sight drafts ruling at the date of actual payment] [according to the rate of exchange for sight drafts ruling at the date of actual payment, if such payment is made before maturity, and at the date of maturity, if such payment is made at or after the date of maturity] [at the option of the holder, according to the rate of exchange ruling at the date of dishonour or on the date of actual payment].

“(d) If such an instrument is dishonoured by non-payment, the amount is to be calculated:

“(i) If the rate of exchange is indicated on the instrument [according to that rate] [at the

option of the holder, according to that rate or according to the rate of exchange ruling on the date of maturity or on the date of actual payment].

“(ii) If no rate of exchange is indicated on the instrument [according to the rate of exchange for sight drafts ruling on the date of actual payment] [according to the rate of exchange for sight drafts ruling at the date of maturity] [at the option of the holder, according to the rate of exchange ruling on the date of maturity or on the date 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-acceptance or non-payment.]

“(4) The rate of exchange ruling at a certain date is the rate of exchange ruling [at the place where the instrument must be presented for payment in accordance with article 53 (g)] [at the place of actual payment] [at the option of the holder, at the place where the instrument must be presented for payment in accordance with article 53 (g) or at the place of actual payment].”

37. The question was raised whether the draft Convention in its current version allowed for an instrument to be drawn in or related to units of account, such as special drawing rights (SDRs) or European Monetary Units. It was generally agreed that the wording of article 1, paragraphs (2) (b) and (3) (b), and article 7 did not contemplate the drawing of a bill or the making of a note in such or similar units. Some support was expressed in favour of making it possible under the Convention to draw such bills or make such notes in view of the fact that this would make the bill or note more attractive for international payments.

38. The Working Group, after discussion, was of the view that it could not pronounce itself on the desirability of the proposed modifications without having at its disposal information from the banking community as to the likelihood of instruments being drawn or made in units of account. It, therefore, requested the Secretariat to consult the UNCITRAL Study Group on International Payments on current practice and possible future developments and to report to it thereon at the ninth session of the Working Group.

39. The further question was raised whether the fact that in many countries exchange control regulations prohibited payment in foreign currency would not run counter to the principle laid down in this article that an instrument must be paid in the currency in which its amount is expressed. The Group was agreed that the Convention should contain an express provision to the effect that the provisions of the Convention were subject to regulatory measures pertaining to exchange control as well as to regulatory measures which a Contracting State was bound to apply by virtue of international agreements to which it was a party. In this respect, reference was made to article 8, 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 this Agreement shall be unenforceable in the territories of any Member". The Working Group requested the Secretariat to draft an appropriate text reflecting its decision and to submit such text at its next session.

*Paragraph (1)*

40. The Working Group adopted paragraph (1) of article 74 without change. However, it was understood that this paragraph would have to be reviewed if it were decided at a later stage to allow for the drawing or making of an instrument in international units of account.

*Paragraph (2)*

41. As to paragraph (2), there was consensus that the drawer or the maker should be permitted to stipulate on the instrument that it must be paid in a specified currency other than the currency in which the amount of the instrument is expressed. It was also agreed that in such a case the provisions laid down in subparagraphs (a) and (b) should apply.

42. The Working Group did not reach consensus as to which provision should be adopted if an instrument containing a stipulation as to payment in a specified currency other than that of the amount of the instrument was dishonoured by non-acceptance. Whilst there was agreement that, if the instrument indicated the rate of exchange, the amount payable should be calculated according to the rate, two views were expressed in respect of the method of calculation of the amount payable in the event that no rate of exchange was indicated on the instrument.

43. Four representatives expressed the view that the holder should have the option in respect of the calculation of the amount payable, between the rate of exchange prevailing on the date of dishonour or on the date of actual payment. Two representatives were of the view that the amount payable should be calculated according to the rate of exchange for sight drafts ruling at the date of actual payment. In respect of the latter view, a distinction was made, by one representative, between payment before maturity and at, or after, maturity. Before maturity the amount payable should be calculated according to the rate of exchange for sight drafts ruling at the date of actual payment whilst at, or after, maturity the rate of exchange should be that prevailing at the date of maturity. However, in this connexion, it was observed that in the case of a bill payable after sight there would not be a maturity date if there was dishonour by non-acceptance.

44. In respect of an instrument dishonoured by non-payment, the Working Group was agreed that, if the instrument indicated a rate of exchange, that rate should be used to calculate the amount payable. There was no consensus as to which rate of exchange should be used if it was not indicated on the instrument. According to four representatives, the holder should have the option of choosing between the rate of exchange ruling on the date of maturity or on the rate of exchange prevailing on the date of actual payment. According to one representative, the amount of the instrument should be calculated according to

the rate of exchange for sight drafts ruling on the date of maturity. According to another representative, the applicable rate of exchange should be the one prevailing on the date of actual payment.

45. The Working Group requested the Secretariat to inquire whether in practice instruments were drawn in a currency other than the currency in which its amount is expressed without indication of the rate of exchange.

*Paragraph (3)*

46. It was observed that paragraph (3) of article 74 did not create a statutory right entitling a person to damages in the event of his suffering loss because of fluctuations in rates of exchange. There was, however, general agreement that the provision would serve a useful purpose in that it clarified that the rights of a holder were not necessarily limited to the rights set forth in article 74. The Working Group, therefore, decided to retain paragraph (3) and to delete the brackets.

*Paragraph (4)*

47. The Working Group was agreed that the draft Convention should set forth a rule specifying the place which should determine the rate of exchange if the amount payable is to be calculated according to a rate prevailing at a given date. One representative expressed the view that the rule should not apply in situations where no rate of exchange is indicated on the instrument or where a specific rate is indicated. No consensus could be reached as to which place should prevail: the place of presentment for payment or, at the option of the holder, the place of presentment or the place of actual payment. Four representatives were of the view that the holder should have the option of choosing between the rate of exchange ruling at the place where the instrument was presented for payment and that ruling at the place of actual payment. Two representatives expressed the view that the decisive rate of exchange should be the one ruling at the place of presentment.

*Possible supplementary rules*

48. It was noted that article 74 was based on the principle that an instrument was to be paid in the currency in which the amount of the instrument was expressed. However, there might be cases where, as had been noted previously, the exchange regulations of a country would prohibit the entering into monetary obligations in a foreign currency. In such cases, provided the instrument was enforceable, a party would, therefore, be called upon to discharge his obligation in local currency. This, in turn, could give rise to problems similar to those dealt with in article 74. It was, therefore, suggested that the draft Convention set forth additional provisions governing cases where the amount of the instrument, though expressed in a foreign currency, was to be paid in a local currency and if the amount payable was to be calculated according to a rate of exchange.

49. The Working Group, after discussion, requested the Secretariat to examine whether and to what extent currency exchange regulations would indicate the desirability of supplementary rules and whether in the context of the Convention such rules were feasible.

### Article 75

50. The text of article 75, as considered by the Working Group, is as follows:

“(1) If a party offers payment by placing the amount due in accordance with article 67 or 68 at the disposal of the holder and the holder refuses to take such payment:

“(a) Such party is not liable for any interest or costs or loss caused to the holder by reason of fluctuations in rates of exchanges; and

“(b) Any party who has a right of recourse against such party [is not liable for such interest, cost or loss] [is discharged of his liability on the instrument].

“(2) The provisions of paragraph (1) (b) also apply if the party tendering payment to the holder is the drawee.”

51. The Working Group, after discussion, decided to delete this article for the following reasons. It was felt that the situation covered under this provision raised a problem of suretyship, and only one out of many such problems, which should better be left to the applicable national laws on suretyship. In addition, none of the alternative provisions set out in paragraph (1) (b) met with general approval by the Group. Furthermore, it was realized that the concept of tender as adopted in paragraph (1) was not known in all legal systems and might create unnecessary difficulties. For example, the condition of placing the amount at the disposal of the holder, as laid down in that paragraph, could, under certain circumstances, be considered by some legal systems as payment which, under article 70, would entail consequences different from the ones envisaged in article 75.

### Article 76

52. The text of article 76, as considered by the Working Group, is as follows:

“[(1) A party is discharged of his liability on the instrument if the holder, at or after maturity, writes on the instrument an unconditional renunciation of his rights thereon against such party.

“(2) Such renunciation does not affect the right to the instrument of the party who renounced his rights thereon.]”

53. The Working Group, after discussion, decided to delete this article by reason of the fact that renunciations written on the instrument were hardly ever found in practice.

54. The Group did not adopt a suggestion to include in the Convention an article dealing with the legal effects of another type of renunciation, namely, the striking out of a party's signature on the instrument. It was agreed that such a provision merely stated the obvious and could even be harmful in that it could raise questions concerning the title of the holder.

### Article 77

55. The text of article 77, as considered by the Working Group, is as follows:

“[A party liable who rightfully becomes the holder of the instrument is discharged of liability thereon to any party who had a right of recourse against him.]”

56. The Working Group was divided on the question whether article 77 should be retained, possibly with some modifications, or whether it should be deleted. According to two representatives, the provision in article 77 could serve a useful purpose in that it adopted the principle of *confusio* for a defined set of circumstances. According to four representatives, the article should not be retained because it merely stated the obvious and could create certain difficulties, in particular, with regard to the undefined term “rightfully”. It was understood that this prevailing view was not opposed to a possible reconsideration at a later stage.

### Article 78

57. The text of article 78, as considered by the Working Group, is as follows:

“When a party is discharged of liability on an instrument, any party who had a right of recourse against him is also discharged.”

58. It was observed that this provision envisaged cases where the holder had received payment of the full amount of the instrument. Since the draft Convention allowed for partial payment, the provision should make it clear that the discharge of a party by reason of payment of the party against whom he had a right of recourse was a discharge “to the same extent”. The Working Group requested the Secretariat to redraft the article accordingly.

### ARTICLE 79 (LIMITATION (PRESCRIPTION))

#### Article 79, paragraph (1)

59. The text of article 79, paragraph (1), as considered by the Working Group, is as follows:

“A right of action arising on an instrument can no longer be exercised against a party after four years have elapsed after the date on which that party became first liable to pay the instrument.”

60. The Working Group was agreed that the period of limitation should be of a duration of four years.

61. As to the date from which the period should commence to run, the Group, after discussion, was of the view that the date on which a party became first liable to pay the instrument should not be retained because it would not be immediately clear what date it was. Instead, the Group decided that the proper date would be the date of maturity in cases where an action was brought against the acceptor or the maker and their guarantor, and the date of protest for dishonour or, where protest was dispensed with, the date of dishonour, in cases where an action was brought against an endorser, drawer or their guarantor. The Group requested the Secretariat to redraft paragraph (1) into two paragraphs reflecting actions brought against parties primarily liable and parties secondarily liable. Consistent with a decision taken at its fourth session, the Group was agreed that the maturity date of an instrument payable on demand was the date on which the instrument was pre-

mented for payment. According to one view, the limitation period of an instrument payable on demand should run from the date of its issue or from its date. It was noted that this paragraph could give rise to a situation in which the acceptor or the maker could be discharged before parties secondarily liable.

*Article 79, paragraph (2)*

62. The text of article 79, paragraph (2), as considered by the Working Group, is as follows:

“If an endorser or the drawer of a bill or the endorser of a note has taken up and paid the bill or the note within one year before the expiration of the period referred to in paragraph (1), such endorser or drawer may exercise his right of action against [the acceptor or the maker] [prior parties or the acceptor or the maker] within one year after the date on which he took up and paid the instrument.”

63. The Working Group agreed in principle with the provision that an endorser or the drawer of an instrument should not, in respect of the period of time within which he could bring an action on the instrument, suffer from the fact that a subsequent party had brought an action on the instrument at such point of time that the time limit within which he could bring his action was unreasonably short. Consequently, the provision that such endorser or drawer should have at least one year within which to bring his action, from the date on which he paid the instrument, should be maintained. However, the Group was of the view that the present wording of paragraph (2) did not make it sufficiently clear that such an endorser or drawer was entitled to a period of one year within which to bring his action even when the four-year period had expired. The Group, therefore, requested the Secretariat to redraft paragraph (2) accordingly.

64. The Working Group also decided that the minimum period of one year should be available to any endorser as against any prior party.

65. The Working Group further decided that paragraph (2) should also deal with the action by a guarantor, not only against a prior party but also against the party whose liability he had guaranteed.

66. Furthermore, it was noted that the draft Convention conferred a statutory right of action, in certain circumstances, to a party who had suffered loss or damage (see articles 22, 66 and 81). The Secretariat was requested to consider the feasibility of drafting a separate paragraph in respect of the limitation period for such rights of action outside the instrument.

67. The Working Group was of the opinion that it was for the law of each High Contracting Party to the Convention to determine the causes of interruption or suspension of a limitation period in the case of actions on instruments which came before its courts. Likewise, it was for such law to determine whether such interruption or suspension should operate in respect of all parties on the instrument or only against that party in respect of whom the period had been interrupted.

ARTICLES 80 TO 86 (LOST INSTRUMENTS)

*Article 80, paragraph (1)*

68. The text of article 80, paragraph (1), as considered by the Working Group, is as follows:

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

69. The Working Group considered whether the draft Convention should make provision for the payment of a lost instrument by the drawee. The general view was that, since a drawee is not liable on the instrument, payment by him would be at his own risk. According to this view, article 80 dealt with the situation where if certain conditions had been met there was an obligation on the parties liable to pay. Such obligation could not be imposed upon the drawee. Consequently, the draft Convention should not set forth any provision in this respect. The Working Group requested the Secretariat to modify articles 81, paragraphs (1) and (3), 82, paragraph (1), and 84 accordingly, by using the word “party” and not the word “person”.

70. One representative was of the view that the draft Convention should provide that the drawee who paid and was given a security received the security on behalf of the drawer whose account he would debit upon payment. The draft Convention should, therefore, provide for a right of the drawer to the security if it had been given to the drawee.

71. The Working Group adopted article 80, paragraph (1), without change. The Group noted that under this paragraph the party from whom payment was claimed not only could not raise the defence that the person claiming payment was not a holder but also was not entitled to withhold payment because of non-delivery of the instrument (article 70).

*Article 80, paragraph (2)*

72. The text of article 80, paragraph (2), as considered by the Working Group, is as follows:

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

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

“(ii) The facts which prevent production of the instrument; and

“(iii) The elements of the lost instrument pertaining to the requirements set out in article 1 (2) or 1 (3).

“(b) The party from whom payment of a lost instrument 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 instrument.

“(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 instrument, and any interest and expenses which may be claimed under articles 67 and 68, with the court or any other competent authority, and may determine the duration of such deposit. Such deposit is to be considered as payment to the person claiming payment.”

73. The Working Group adopted subparagraph (a), subject to modifying the order of subparagraphs (i), (ii) and (iii) by placing subparagraph (iii) before subparagraph (i). The Working Group adopted subparagraphs (b) and (c) without change.

74. The Working Group noted that under subparagraphs (c) and (d) the Court had discretion not only to determine whether security was called for but also, in case the security could not be given, to order that the party from whom payment was claimed was not required to pay.

75. The Working Group decided that, in subparagraph (d), after the words “competent authority” the words “or institution” should be added. The Group adopted subparagraph (d) subject to this change.

#### Article 81

76. The text of article 81, as considered by the Working Group, is as follows:

“(1) A [party] [person] who has paid a lost instrument and to whom the instrument 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 instrument is presented or on one of the two business days which follow and must state the name of the person presenting the instrument and the date and place of presentment.

“(3) Failure to notify renders the party [person] who has paid the lost instrument liable for any damages which the person whom he paid may suffer from such failure, provided that the total amount of the damages does not exceed the amount of the instrument and any interest and expenses which may be claimed under article 67 or 68.

“[add provisions on delay].”

77. It was proposed that article 81 should set forth provisions under which the duty to notify under paragraph (1) should comprise the delivery of the notification to the

address in the place where payment of the instrument was to be made and that the person who received payment on the lost instrument should inform the person paid of that address. The Working Group did not retain this proposal on the ground that it was in the interest of the person having received payment to indicate to the payor to what address notice should be given.

78. The proposal was made that if the person who had received payment objected to payment being made to the person presenting the instrument by reason of his having a better title to the instrument, the person to whom the instrument was presented was obliged to defer payment for a specified period of time. Under this proposal, therefore, the draft Convention would establish a compulsory moratorium which would enable the party sued on the instrument to determine whether or not to make payment. The proposal also provided for damages to be paid by the person who objected if it were decided by the Court that payment on the instrument should be made to the person presenting it.

79. The Working Group, after discussion, did not retain this proposal on the ground that the draft Convention should not set forth a special provision which in certain circumstances would oblige the party liable not to pay a protected holder of the instrument. The Group was of the view that the general principles of the draft Convention governing the allocation of risks, set forth in article 70, paragraph (4), provided an adequate solution.

80. The Working Group decided that the following provisions on delay in giving notice and dispensation should be added:

“(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 instrument 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.”

#### Article 82

81. The text of article 82, as considered by the Working Group, is as follows:

“(1) A [party] [person] who has paid a lost instrument in accordance with the provisions of article 80 and who is subsequently required to, and does, pay the instrument, or who 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, to reclaim the amount so deposited.

“(2) The person who has given security in accordance with the provisions of paragraph (2) (b) of article 80, may reclaim the security when the party for whose benefit the security was given no longer has the



right to realize the security under paragraph (1) and the acceptor or the maker can no longer be sued on the instrument by virtue of article 79, or when he cannot obtain payment from any party liable to him because of that party's raising a valid defence or that party's insolvency.]

"(3) If the amount was deposited with a Court or other competent authority in accordance with paragraph (2) (d) of article 80 and was not reclaimed under paragraph (1) (b) of this article within the period of time provided by article 79 during which the party who has deposited the amount and the acceptor or the maker can be sued on the instrument, the person for whose benefit the amount was deposited may request the Court which ordered the deposit to order that the amount deposited be paid out to him. The Court may grant such request upon such terms and conditions as it may require."

82. The Working Group considered what rules should apply where the holder who had lost the instrument demanded payment, in a recourse action, from a prior party and, in particular, in what situations the party who had paid a lost instrument could realize the security given for his benefit or, if he had deposited the amount under article 80, paragraph (2) (d), could reclaim the amount so deposited. The following example was given: the drawer issues an instrument to the payee who endorses it in blank and delivers it to A. B steals the instrument from A and delivers it to C who is a protected holder. The bill is not accepted. A, who lost the instrument, after due protest, demands payment from the payee under article 80. The payee pays A, and A gives security to the payee under article 80, paragraph (2) (b). Before the payee brings an action on the lost instrument against the drawer, the drawer pays the instrument to C. The Working Group, after discussion, was of the opinion that the payee had a right to retain the security and that A who has lost the instrument should bear the loss. The same solution would obtain if the drawer had drawn the instrument without recourse and the payee was required to pay C.

83. The Working Group considered which rule should obtain where the person who had paid the lost instrument could no longer recover from any party liable to him because of the operation of article 79. The Group was of the view that the person who had given the security was entitled to reclaim it if: (a) the party for whose benefit it was given was, by virtue of article 79, no longer liable on the instrument and (b) had, by virtue of article 79, no right of recourse against any party liable to him. In the example given in the preceding paragraph, therefore, the payee was not entitled to realize the security or to reclaim the amount deposited under article 80, paragraph (2) (d).

84. The Working Group requested the Secretariat to prepare a new draft of article 82 which would further distinguish between situations where a party secondarily liable loses his right of recourse by reason of the fact that the instrument was lost (in which case he would be entitled to realize his security) and where such a party loses that right by virtue of circumstances not connected with the loss of the instrument (in which case he would not *ipso facto* be entitled to realize his security). The Group also requested

the Secretariat to redraft paragraph (1) (a) of article 82 with a view to clarifying that the right to realize the security was proportional to the amount of reimbursement.

#### Article 83

85. The text of article 83, as considered by the Working Group, is as follows:

"A person claiming payment of a lost instrument duly effects protest for dishonour by non-payment by the use of a copy of the lost instrument or a writing establishing the elements of the lost instrument pertaining to the requirements set out in article 1 (2) or 1 (3)."

86. The Working Group decided that the writing to which the article referred should be a writing that satisfied the requirements of article 80, paragraph (2) (a). The Group requested the Secretariat to modify the article accordingly.

87. The Working Group was of the view that a person claiming payment should be entitled to use a copy of a lost instrument, not only for the purpose of effecting protest, but also for that of claiming payment. The Group, therefore, requested the Secretariat to modify article 80, paragraph (2) (a), accordingly.

88. It was observed that the articles of the draft Convention dealing with lost instruments did not expressly require the giving of notice of dishonour to prior parties. The view was expressed that it would be adequate if the commentary drew attention to the fact that the duty to give notice of dishonour also obtained in the case of dishonour of a lost instrument.

#### Article 84

89. The text of article 84, as considered by the Working Group, is as follows:

"A person receiving payment of a lost instrument in accordance with article 80 must deliver to the person paying the writing required under paragraph (2) (a) of article 80 receipted by him and any authenticated protest."

90. The Working Group adopted this article subject to replacing the word "person" in the second line by the word "party", by deleting the word "authenticated" before the word "protest", and by adding after this word the words "and a receipted account".

#### Article 85

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

"(a) A party who paid a lost instrument in accordance with article 80 has the same rights which he would have had if he had been in possession of the instrument.

"(b) Such party may exercise his rights only if he is in possession of the receipted writing referred to in article 84."

92. The Working Group adopted this article without modification.

93. The question was raised whether, if the lost instrument was found and put in circulation, the procedure provided for under article 80 *et seq.* should still apply. The Working Group, after discussion, was of the view that the procedure provided for in the case of a lost instrument solely prevented a party liable on the instrument from raising against the person who had lost the instrument the defence that such a person was not a holder because he was not in possession of the instrument. It followed that any other defence available to a party against a holder, e. g. a claim by a third party to the instrument, remained available to a party from whom payment was demanded under article 80. The Group concluded that it was not necessary to state in the section on lost instruments that the rights of a person who had lost the instrument were subject to the general rules and principles set forth elsewhere in the draft Convention.

94. The question was raised whether the Court, which under article 80, paragraph (2) (c), could be asked to determine whether security was called for and the nature and terms of a security, should be given the discretionary power of deciding whether the writing referred to in paragraph (2) (a) of article 80 was sufficient to oblige the party from whom payment was claimed to pay. The Working Group was of the view that the question whether the writing was sufficient for the purposes of article 80 was one of proof and that it was understood that the Court could make an order that payment should not be made.

#### Article 86

95. The text of article 86, as considered by the Working Group, is as follows:

"[(a) When an instrument was lost by the payee or by his endorsee for collection whether by destruction, wrongful detention or otherwise, the payee, upon due proof of the fact that he or his endorsee for collection lost the instrument, shall have the right to request the drawer or the maker to issue a duplicate of the lost instrument. The drawer or maker, upon issuing such duplicate may request the payee to give security in order to indemnify him for any loss which he may suffer by reason of the subsequent payment of the lost instrument.

"(b) The kind of security and its terms shall be determined by agreement between the drawer or maker issuing a duplicate of a lost instrument and the payee. Failing such an agreement, the kind of security and its terms shall be determined by the Court.

"(c) (i) The drawer or the maker when issuing a duplicate of a lost bill or note may write on the face thereof the word "duplicate" (or words of similar import).

(ii) When an instrument is marked as being a duplicate, it shall be considered as an instrument under this law, provided that a duplicate of a lost bill or note cannot be negotiated except for purposes of collection.

"(d) Refusal by the drawer or maker to issue a duplicate of a lost instrument shall render the drawer or

maker liable for any damages that the payee may suffer from such refusal (provided that the total amount of the damages shall not exceed the amount of the lost instrument).]"

96. The Working Group decided that this article should not be retained. It appeared that on the basis of the available evidence duplicates of an instrument only rarely occurred and that it would, therefore, not be justified that the draft Convention set forth a special article dealing with duplicates.

#### Other matters

97. The question was raised whether the draft Convention should contain provisions applicable to bills drawn in a set. The Working Group was of the view that, since bills drawn in a set were no longer in great use, the draft Convention should not set forth any provisions therefor.

#### FURTHER WORK IN RESPECT OF THE DRAFT CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES

98. The Working Group requested the Secretariat to make appropriate arrangements for the establishment of corresponding versions of the draft Convention in the four working languages of the Commission. It was noted with concern that neither the Working Group nor the Commission were in a position to establish corresponding versions in Arabic and Chinese as these languages are not working languages of the Commission. The Group expressed the view that it would be desirable to find ways and means to establish such versions before the draft Convention is considered at the diplomatic conference.

99. The Working Group, having terminated the consideration of the draft Convention in second reading, began reconsideration of those articles of the draft Convention which it had placed between brackets and other matters on which it had reserved decisions. With regard to the headings and sub-headings to be inserted in the draft Convention at appropriate places, the Working Group requested the Secretariat to prepare a document setting forth proposals.

100. With respect to the articles placed between brackets, the Working Group took the following decisions:

1. *Article 1, paragraphs (2) (a) and (3) (a)*: To leave the words "Convention of . . ." between brackets, by reason of the fact that the precise title or abbreviated title of the Convention would be decided on at a later stage;

2. *Article 5, paragraph (8)*: The definition of party to read as follows: "Party" means any person who has signed an instrument";

3. *Article 5, paragraph (9)*: The definition of maturity to read as follows: "Maturity" means the date of payment referred to in article 9 and, in the case of a demand bill, the date on which the instrument is presented for payment". One representative reserved his position in respect of this definition on the ground that it did not clearly indicate the maturity date of a bill drawn payable after sight;

4. *Article 5, paragraph (10)*: With respect to the definition of forged signature it was agreed to re-examine this definition in connexion with articles 22 and 28. In particular, it should be examined whether a signature placed on an instrument by an agent without authority should be assimilated to a forged signature;

5. *Article 5, paragraph (6)*: Opinions were equally divided on the question whether the draft Convention should expressly refer to the possibility of the making of a note made payable at a fixed period after sight. The Working Group, therefore, decided to place the paragraph between brackets for decision by the Commission;

6. *Article 11, paragraph (2) (a)*: This paragraph was modified as follows: "A party who signed the instrument 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."

#### DESIRABILITY OF PREPARING UNIFORM RULES APPLICABLE TO INTERNATIONAL CHEQUES

101. The Working Group recalled that the Commission, at its fifth session, had requested the Group to consider the desirability of preparing uniform rules applicable to international cheques, and to consider whether this could best be achieved by extending the application of the draft Convention on International Bills of Exchange and International Promissory Notes to international cheques or by drawing up a separate text on international cheques. The Working Group also noted that the Commission, at its twelfth session, had authorized the Working Group to proceed with the drafting of rules, if the Group was of the view that the formulation of uniform rules for international cheques was desirable and the application of the draft Convention could be extended to include international cheques.

102. The Working Group noted that the UNCITRAL Study Group on International Payments had stated, on the basis of replies received to a questionnaire, that the cheque was widely used for settling international commercial transactions. Moreover, the replies to the questionnaire showed substantial support for the establishment of uniform rules applicable to international cheques. The Group was also of

the view that the fact that the draft Convention on International Bills of Exchange and International Promissory Notes had now been completed by it would considerably facilitate the drawing up of uniform rules on cheques.

103. The Working Group, therefore, requested the Secretariat to commence preparatory work in respect of cheques. It was agreed that it should decide later, in the light of the issues raised by the drafting of uniform rules, whether it would request the Commission to enlarge the mandate of the Working Group so as to enable such rules to be embodied in a separate draft convention or whether the draft Convention on International Bills of Exchange and International Promissory Notes should be modified so as to include international cheques.

104. In respect of the preparatory work to be carried out by the Secretariat, the Working Group was of the view that studies should be prepared showing the difference in substance between the Geneva Uniform Law on Bills of Exchange and Promissory Notes and the Geneva Uniform Law on Cheques, and to carry out similar work in respect of the Bills of Exchange Act and the relevant provisions of the Uniform Commercial Code. Such preparatory work should preferably be made available to the Working Group in time for its ninth session. The Secretariat should consider if, because of the time factor involved, it would be necessary to have recourse to consultants. In addition, the Secretariat should place before the Working Group draft articles applicable to international cheques, taking into account the draft Convention on International Bills of Exchange and International Promissory Notes adopted by the Working Group and the special features of the law on cheques.

#### FUTURE WORK

105. Pursuant to a decision of the Commission at its twelfth session,<sup>10</sup> the Working Group was agreed that it should hold its ninth session at Headquarters in New York from 2 to 11 January 1980.

<sup>10</sup> Report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17 (A/34/17)*, para. 124 (b) (Yearbook . . . 1979, part one, II, A).

### B. Report of the Working Group on International Negotiable Instruments on the work of its ninth session (New York, 2-11 January 1980) (A/CN.9/181)\*

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\* 13 March 1980.