

## II. INTERNATIONAL PAYMENTS\*

### A. Report of the Working Group on International Negotiable Instruments on the work of its tenth session (Vienna, 5-16 January 1981) (A/CN.9/196)\*\*

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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 (articles 12 to 22), the

rights and liabilities of signatories (articles 27 to 40), and the definition and rights of a "holder" and a "protected holder" (articles 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 (articles 41 to 45) and considered articles in respect of presentment, dishonour and recourse, including the legal effects of protest and notice of dishonour (articles 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 (articles 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 (articles 67 and 68) and provisions regarding the circumstances in which a party is discharged of his liability (articles 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

\* For consideration by the Commission see Report, chapter II (part one, A, above).

\*\* 16 February 1981. Referred to in Report, paras. 12, 13, 14, 15 (part one, A, above). See also Note by the Secretariat: Alternative methods for the final adoption of conventions emanating from the work of the Commission (A/CN.9/204), reproduced in this volume, part two, VIII.

<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), 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. See also 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), para. 61 (2) (c) (Yearbook . . . 1972, part one, II, A).

<sup>2</sup> 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), 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).

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 in Geneva in January 1978. At that session the Working Group, continuing its second reading of the text of the draft Convention on International Bills of Exchange and International Promissory Notes, considered articles 5 and 6 and articles 24 to 53.<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 eighth session of the Working Group was held in Geneva in September 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 1, 5, 9, 11 and 70 to 86.<sup>10</sup> In response to a decision by the Commission at its twelfth session,<sup>11</sup> the Working Group, at its eighth session, requested the Secretariat to commence preparatory work in respect of uniform rules applicable to international cheques.

10. The ninth session of the Working Group was held in New York in January 1980. At that session the Working Group, continuing its third reading of the text of the draft Convention on International Bills of Exchange and International Promissory Notes, considered articles 13 to 85 and article 5(10) in connexion with article 22.<sup>12</sup> The Working Group also considered articles 1 to 30 of the uniform rules applicable to international

cheques as drafted by the Secretariat (A/CN.9/WG.IV/WP.15).

11. The Working Group held its tenth session at Vienna from 5 to 16 January 1981. The Working Group consisted of the following eight members of the Commission: Chile, Egypt, France, India, Nigeria, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America. All members of the Working Group were represented at the tenth session. The session was also attended by observers of the following States: Argentina, Australia, Austria, People's Republic of China, Cuba, German Democratic Republic, Germany, Federal Republic of Italy, Japan, Luxemburg, Malaysia, Netherlands, Pakistan, Philippines, Poland, Republic of Korea, Spain, Switzerland, Thailand, Trinidad and Tobago, and Turkey, and by observers from the International Monetary Fund, the Bank for International Settlements, the Hague Conference on Private International Law, the European Banking Federation and the International Chamber of Commerce.

12. The Working Group elected the following officers:

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

Rapporteur: ..... Mr. Essam El-Din Hawas (Egypt)

13. The Working Group had before it the following documents: provisional agenda (A/CN.9/WG.IV/WP.18); draft uniform law on international bills of exchange and international promissory notes, with commentary (A/CN.9/WG.IV/WP.2); draft uniform law on international bills of exchange and international promissory notes (first revision) (A/CN.9/WG.IV/WP.6 and Add. 1 and 2); 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); 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), seventh (A/CN.9/157), eighth (A/CN.9/178), and ninth (A/CN.9/181) sessions; draft convention on international bills of ex-

<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, I).

<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).

<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).

<sup>10</sup> 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 (Yearbook . . . 1980, part two, III, A).

<sup>11</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. 44 (Yearbook . . . 1979, part one, II, A).

<sup>12</sup> 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 (Yearbook . . . 1980, part III, B).

\* Yearbook references for the reports mentioned in this paragraph are as follows: A/CN.9/77: Yearbook . . . 1973, part two, II, I; A/CN.9/86: Yearbook . . . 1974, part two, II, I; A/CN.9/99: Yearbook . . . 1975, part two, II, I; A/CN.9/117: Yearbook . . . 1976, part two, II, I; A/CN.9/141: Yearbook . . . 1978, part two, II, A; A/CN.9/147: Yearbook . . . 1978, part two, II, B; A/CN.9/157: Yearbook . . . 1979, part two, II, A; A/CN.9/178: Yearbook . . . 1980, part two, III, A; A/CN.9/181: Yearbook . . . 1980, part two, III, B.

change and international promissory notes, articles 5 (8-10), 9 (6), 11 (2), 70 (2, 5), 71, 72 and 74-86 as adopted by the Working Group at its eighth session (A/CN.9/WG.IV/WP.16); text of articles 25 (1) (a), 70, 74 bis, and 78 as redrafted by the Secretariat (A/CN.9/WG.IV/WP.17) and two notes by the Secretariat setting forth uniform rules applicable to international cheques (A/CN.9/WG.IV/WP.15 and 19).

### Deliberations and decisions

14. At the present session, the Working Group continued its preliminary exchange of views on articles 34 to 86 of the uniform rules applicable to international cheques, and draft articles A to F relating to crossed cheques, as drafted by the Secretariat (A/CN.9/WG.IV/WP.15 and A/CN.9/WG.IV/WP.19).

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 attended the session.

#### I. UNIFORM RULES APPLICABLE TO INTERNATIONAL CHEQUES

*Draft articles 34, X, 41-45, 53-66 bis, 67-68, 70, 70 bis, 71-72, 74, 74 bis, 74 ter, 74 quater, 78-85\**

##### *Article 34, paragraph (1)*

16. The text of article 34, paragraph (1), as considered by the Working Group, is as follows:

“(1) The drawer engages that upon dishonour of the cheque by non-payment, [and upon any necessary protest], he will pay to the holder the amount of the cheque, and any interest and expenses which may be recovered under article 67 or 68.”

17. The Working Group considered the nature of the liability of the drawer on a cheque. It noted that under the provisions of the draft Convention on International Bills of Exchange and International Promissory Notes the liability of the drawer of a bill was of a secondary nature in that his liability crystallized only in the event of a due presentment of the instrument by the holder and subsequent dishonour by the drawee. The Working Group was of the view that the uniform rules applicable to international cheques should state that:

1. The undertaking of the drawer was to pay the amount of the cheque to the holder upon dishonour by non-payment;

\* Each draft article is numbered to correspond to the draft article in the draft Convention on International Bills of Exchange and International Promissory Notes which relates to the same or a similar issue covered by the draft article of these uniform rules. Accordingly, when a draft article in the draft Convention has no relation to cheques, there is an interruption in the numbering sequence of the draft articles of these uniform rules, and when a draft article in these uniform rules has no relation to bills of exchange or promissory notes, it is identified by a letter (e.g. articles A to F on crossed cheques). (Footnote in original.)

2. The drawer of a cheque would be discharged of liability upon failure of the holder to present the cheque; in the event of delay in presentment the drawer would not be discharged except to the extent of the loss suffered because of the delay.

18. The Group was of the view that a parallel rule should apply with regard to the failure and delay in making protest.

19. The Working Group requested the Secretariat to redraft article 34, paragraph (1) accordingly.

##### *Article 34, paragraph (2)*

20. The text of article 34, paragraph (2), as considered by the Working Group, is as follows:

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

21. The Working Group adopted this provision without change. One representative proposed to delete this paragraph on the ground that, in his view, a cheque on which the drawer excluded or limited his liability was not a cheque under the draft Convention.

##### *Article X*

22. The text of article X, as considered by the Working Group, is as follows:

“(1) A cheque cannot be accepted. A statement of acceptance on a cheque is without effect as an acceptance.

“(2) 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.”

23. The Working Group noted that article X, paragraph (1), as proposed by the Secretariat, followed article 4 of the Geneva Uniform Law on Cheques in that a cheque was not capable of being accepted by the drawee and that any statement purporting to be an acceptance was without effect. The Group, after discussion, was unable to agree on a uniform rule according to which either the Geneva uniform rule should be maintained or section 3-411 of the Uniform Commercial Code of the United States of America, under which either the drawer or a holder could procure acceptance (certification), should be followed. Consequently, the Group was of the view that the proposed draft Convention should permit Contracting Parties to allow for acceptance of a cheque by a drawee-bank and, if so, to determine the legal effects thereof.

24. The Working Group further noted that there existed in several countries a practice under which drawee-banks certified or confirmed a cheque or stamped a cheque with a visa. The Group was of the view that also in this respect Contracting Parties should be given the faculty to allow for such statements and to determine the legal effects thereof, as, for example, provided for under article 6 of Annex II to the Geneva Convention providing a Uniform Law on Cheques.

25. The Working Group requested the Secretariat to redraft article X accordingly.

#### Article 41

26. The text of article 41, as considered by the Working Group, is as follows:

“(1) The endorser engages that upon dishonour of the cheque by non-payment, and upon any necessary protest, he will pay to the holder the amount of the cheque, and any interest and expenses which may be recovered under article 67 or 68.

“(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.”

27. The question was raised whether in respect of the undertaking of the endorser to pay the cheque upon dishonour it was necessary to require also that protest be made. The Working Group, after discussion, was of the view that protest should be required because of the evidentiary effect of protest that dishonour had taken place. The Group adopted this article without change.

#### Article 42

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

“(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 is dishonoured by non-payment.

“(2) The damages according to paragraph (1) may not exceed the amount referred to in article 67 or 68.

“(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.”

29. The Working Group adopted this article without change.

#### Article 43, paragraph (1)

30. The text of article 43, paragraph (1), as considered by the Working Group, is as follows:

“(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, except the drawee.”

31. The Working Group considered the following questions:

1. Whether payment of a cheque may be guaranteed not only for the account of a party but also for the account of a drawee;

2. Whether also the drawee could guarantee payment.

32. As to question 1, the Working Group noted that in the context of the draft Convention on International Bills of Exchange and International Promissory Notes it had decided that payment of a bill could be guaranteed for the account of the drawee. In such a case the person guaranteeing payment by the drawee became a party primarily liable.

33. The Working Group, after discussion, was of the view that the proposed draft Convention on International Cheques should not allow for a guarantee being given for the account of the drawee-bank. The Group concluded that, in the absence of evidence of a regular banking practice in this respect, it would not be justified to draw up elaborate rules on the ensuing relationship between the guarantor for the drawee and the drawee, the guarantor and the drawer, and the nature of the guarantor's liability.

34. As to question 2, the Working Group was of the opinion that article 43 should permit the drawee to become a guarantor. Consequently, the Group decided to delete the words “except the drawee” at the end of paragraph (1).

#### Article 43, paragraphs (2) and (3)

35. The text of article 43, paragraphs (2) and (3), as considered by the Working Group, is as follows:

“(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.”

36. The Working Group adopted these paragraphs without change.

#### Article 43, paragraph (4)

37. The text of article 43, paragraph (4), as considered by the Working Group, is as follows:

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

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

“(c) A signature alone on the back of the cheque is an endorsement.”

38. The Working Group adopted this paragraph without change. The question was raised whether, if by virtue of article X a State permitted acceptance of a cheque by the drawee and if in that State, under its own legislation, acceptance could be effected by the mere signature of the drawee on the face of the cheque, such signature constituted an acceptance or a guarantee for payment by the drawee. The Working Group, after discussion, was of the view that the rule set forth in paragraph (4) (a) that a signature alone on the face of the cheque, other than that of the drawer, was a guarantee should be maintained. Therefore, the signature of a drawee signing as an acceptor should only be considered to be an acceptance if that signature was accompanied by the word “accepted” or words of similar import.

39. The further question was raised as to what would be the effect of a blank signature on a cheque. The Working Group was of the view that the provision set out in paragraph (4) (c) should be maintained and that, therefore, such signature should be considered as an endorsement. As to the question whether a cheque made payable to bearer could be converted into a cheque payable to order by means of a special endorsement of the holder, the Group was of the view that, once the cheque had been made payable to bearer by the drawer, a special endorsement could not convert it into a cheque payable to the order of the named endorsee. The Working Group requested the Secretariat to draft appropriate wording, along the lines of article 20 of the Geneva Uniform Law on Cheques.

#### Article 43, paragraph (5)

40. Text of article 43, paragraph (5), as considered by the Working Group, is as follows:

“(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.”

41. The Working Group adopted this paragraph without change.

#### Article 44

42. The text of article 44, as considered by the Working Group, is as follows:

“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.”

43. The Working Group adopted this article without change.

#### Article 45

44. The text of article 45, as considered by the Working Group, is as follows:

“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.”

45. The Working Group adopted this article without change.

#### Article 53

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

“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 or at a clearing-house on a business day at a reasonable hour;

“(f) A cheque must be presented for payment within . . . of its stated date;

“(g) 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.”

47. It was noted that paragraph (a) laid down that presentation of a cheque to a clearing-house was due presentation. Two questions were raised in this respect: 1. whether it should be specified that in such a case presentation was only due presentation if it was made to a clearing-house of which the drawee-bank was a member, and 2. whether, if presentation at a clearing-house was maintained, this would not have to be reflected in paragraph (g) concerning the place where the cheque must be presented for payment. The Working Group was in agreement with the substance of these observations and decided to delete in paragraph (a) the words “or at a clearing-house” and to add a new paragraph (h) to read as follows:

“(h) Presentation for payment may be made at a clearing-house of which the drawee is a member.”

48. As a consequence of the rule adopted for cheques in respect of presentation at a clearing-house, the Working Group decided to make corresponding modifications to article 53 of the draft Convention on International Bills of Exchange and International Promissory Notes.

49. Concerning paragraph (f), different views were expressed as to the period of time within which a cheque

must be presented for payment. Under one view, the time-limit should be as brief as possible because a cheque was essentially a payment instrument and the rules should prevent any speculation on the part of the holder to delay presentment so as to benefit from possible currency fluctuations in his favour. Under another view, the time-limit within which presentment should be made should take into account delays due to slow means of communication and the absence in some countries of a well-developed system of collection. The Group, after discussion, considered various proposals and decided to propose in the draft rules, by way of compromise, that a cheque should be presented within 120 days of its stated date.

50. The Working Group adopted the article subject to the above modifications.

*Article 54, paragraph (1)*

51. The text of article 54, paragraph (1), as considered by the Working Group, is as follows:

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

52. The Working Group adopted this provision without change.

*Article 54, paragraph (2)*

53. The text of article 54, paragraph (2), as considered by the Working Group, is as follows:

“(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.]

“(c) If the cause of delay continues to operate beyond . . . , after the expiration of the time-limit for presentment for payment.”

54. The Working Group adopted paragraph (2) (a) without change, maintaining the brackets.

55. It was suggested that the drawer would waive presentment by implication if he had countermanded payment. However, the contrary view was expressed that

the fact that the drawer had countermanded payment should not dispense the holder from presenting the cheque to the drawee. One representative expressed the view that a waiver of presentment on the cheque by the drawer contradicted the nature of the cheque.

56. As to paragraph (c), the Working Group decided that presentment for payment could be dispensed with if the cause of delay referred to in paragraph (1) of article 54 had continued to operate beyond thirty days.

*Article 55*

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

“If a cheque is not duly presented for payment, the endorsers and their guarantors are not liable thereon.”

58. The Working Group considered whether due presentment was necessary in order to make the drawer liable on the cheque. It was noted that under the Geneva Uniform Law on Cheques the failure of the holder to make due presentment discharged the drawer of liability on the cheque. However, article 20 of Annex II to the Geneva Convention providing a Uniform Law on Cheques permitted a High Contracting Party “not to make it a condition for the exercise of the right of recourse against the drawer that the cheque must be presented and the protest drawn up . . . and to determine the effects of this recourse.”

59. Under the British Bills of Exchange Act 1882 (section 74 (1)), “where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.” Therefore, under this rule, the drawer of a cheque was not discharged by mere delay in presentment except to the extent the drawer had suffered damage as a result of the delay.

60. Under the Uniform Commercial Code, section 3-502, where without excuse presentment was delayed beyond the time when it was due “any drawer who because the drawee or payor bank becomes insolvent during the delay is deprived of funds maintained with the drawee or payor bank to cover the instrument may discharge his liability by written assignment to the holder of his rights against the drawee or payor bank in respect of such funds, but such drawer is not otherwise discharged.”

61. The Working Group, after discussion, was of the opinion, in view of the provisions in the various statutes referred to above, that the rule that the drawer would be discharged of liability in the event of failure by the

holder to duly present the cheque would not be justified. On the other hand, it would equally not be justified to hold the drawer liable on the cheque if no presentment had been made at all. The Group was of the view that the rule laid down in the Geneva Uniform Law on Cheques should be tempered by a provision that delay in making due presentment would not lead to the discharge of the drawer's liability, but that in such a case the drawer had a right to reduce his liability by the amount of the loss he had suffered as a consequence of the delay. Consequently the Group decided that the Secretariat, in re-drafting the provisions so as to cover the liability of the drawer, should base itself on the following principles:

1. Presentment is necessary in order to make the drawer liable on the cheque;

2. In the absence of presentment, the drawer is discharged of liability on the cheque; and

3. Delay in making presentment does not discharge the drawer of his liability, but if such delay had given rise to loss or damages the amount of the cheque for which the drawer is liable would be reduced by the amount of loss or damages suffered.

62. The Working Group decided that parallel rules should obtain in respect of the duty of the holder to make protest for dishonour by non-payment.

#### Article 56

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

“(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;

“(c) If presentment for payment is dispensed with pursuant to article 54 (2) and the cheque is unpaid.

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

64. The Working Group adopted this article without change, in the light of the debate on article 54 (2) (a).

#### Article 57

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

“If a cheque has been dishonoured by non-payment, the holder may exercise a right of recourse [against the endorsers and their guarantors] only after the cheque has been duly protested for dishonour in accordance with the provisions of articles 58 to 61.”

66. The Working Group adopted this article subject to the deletion of the words “against the endorsers and

their guarantors” and to aligning the provisions relating to protest for dishonour with the decision taken in respect of article 55.

#### Article 58, paragraphs (1), (2) and (3)

67. The text of article 58, paragraphs (1), (2) and (3), as considered by the Working Group, is as follows:

“(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 to certify dishonour of a negotiable instrument 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.”

68. The Working Group adopted these provisions without change.

#### Article 58, paragraph (3 bis)

69. The text of article 58, paragraph (3 bis), as considered by the Working Group, is as follows:

“(3 bis) Where a cheque is presented to a clearing-house, protest may be made by a dated declaration by the clearing-house to the effect that the cheque had been presented to it and has not been paid.”

70. The Working Group decided to modify this provision by substituting for the words “protest may be made” the words “protest may be replaced”. The Working Group also decided that a similar provision should be inserted in the draft Convention on International Bills of Exchange and International Promissory Notes.

#### Article 58, paragraph (4)

71. The text of article 58, paragraph (4), as considered by the Working Group, is as follows:

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

72. The Working Group decided to insert in the paragraph a reference to paragraph (3 bis).

*Article 59*

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

“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.”

74. The Working Group adopted this article without change.

*Article 60*

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

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

“(2) Failure to protest a cheque does not discharge the drawer or his guarantor of liability thereon.”

76. The Working Group, in accordance with its decisions taken in respect of articles 34 (1) and 55, decided to delete paragraph (2) and to request the Secretariat to re-draft paragraph (1) so as to include the drawer, based on the following principles: 1. protest is necessary to charge the drawer or his guarantor; 2. the provision for late protest in such a case should be drafted in the light of the discussion on articles 34 (1) and 55.

*Article 61, paragraph (1)*

77. The text of article 61, paragraph (1), as considered by the Working Group, is as follows:

“(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.”

78. The Working Group adopted this provision without change.

*Article 61, paragraph (2)*

79. The text of article 61, paragraph (2), as considered by the Working Group, is as follows:

“(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 in making protest continues to operate beyond . . . after the date of dishonour;

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

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

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

80. The Working Group adopted the substance of this paragraph subject to the following decisions:

1. In sub-paragraph (2) (b), protest for dishonour would be dispensed with if the cause of the delay referred to in paragraph (1) continued to operate beyond thirty days after the date of dishonour. It was suggested that sub-paragraph 2 (b) should become sub-paragraph (2) (a).

2. To retain the provisions of sub-paragraph (2) (c).

3. To delete in sub-paragraph (2) (e) the reference to article 49, paragraph (2).

4. To delete sub-paragraph (2) (f) (see decision below, paragraph 159).

81. In respect of sub-paragraph (2) (a), one representative reserved her position on the ground that, in her view, the possibility under that provision of protest being waived on the cheque by implication was unacceptable.

*Articles 62, 63 and 64*

82. The text of articles 62, 63 and 64, as considered by the Working Group, is as follows:

*“Article 62*

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

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

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

*“Article 63*

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

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

*“Article 64*

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

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

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

83. The Working Group adopted these articles without change.

*Article 65, paragraph (1)*

84. The text of article 65, paragraph (1), as considered by the Working Group, is as follows:

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

85. The Working Group adopted this provision without change.

*Article 65, paragraph (2)*

86. The text of article 65, paragraph (2), as considered by the Working Group, is as follows:

“(2) Notice of dishonour is dispensed with

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

“(i) If made on the 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 after the exercise of reasonable diligence notice cannot be given;

“[(c) As regards the drawer of a cheque, if the drawer and the drawee are the same person.]”

87. The Working Group decided to retain the words “the drawer” occurring in paragraph (2), sub-paragraph (a).

88. One representative reserved her position on the ground that, in her view, the possibility of notice of dishonour being waived on the cheque by implication was unacceptable.

89. The Working Group adopted, subject to the decision taken in regard to the words “the drawer”, the provisions of sub-paragraph (a).

90. The Working Group also decided to retain sub-paragraph (c) of paragraph (2).

*Articles 66 and 66 bis*

91. The text of articles 66 and 66 bis, as considered by the Working Group, is as follows:

*“Article 66*

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

*“Article 66 bis*

“The holder may exercise his rights on the 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.”

92. The Working Group adopted these articles without change.

*Article 67*

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

“(1) The holder may recover from any party liable the amount of the cheque with interest, if interest has been stipulated for.

“(2) When payment is made after the cheque has been dishonoured the amount of the cheque with interest, if interest has been stipulated for, from the date of dishonour to the date of payment, or, in the absence of such stipulation, interest at the rate specified in paragraph (4) calculated from the date of dishonour on the sum specified in paragraph (2).

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

“(4) The rate of interest shall be [2] per cent per annum above the official rate (bank rate) or other similar appropriate rate effective in the main domestic centre of the country where the cheque was payable, or if there is no such rate, then at the rate of [ ] per cent

per annum, to be calculated on the basis of the number of days in accordance with the custom of that centre."

94. It was recalled that, during its consideration of article 7, the Working Group had left open the question whether the proposed draft Convention should allow for the stipulation of interest on a cheque and that it had been decided to take up the matter in the context of article 67. Various views were expressed on this issue. Under one view, the proposed draft Convention should permit the stipulation of interest so that in countries where this practice existed it could continue under the Convention. In addition, the draft Convention on International Bills of Exchange and International Promissory Notes permitted the stipulation of interest on bills of exchange payable on demand.

95. The contrary view was expressed that the proposed Convention should not permit a stipulation of interest because the cheque was essentially a payment instrument and not a credit instrument. Also, in view of automated cheque processing procedures obtaining in many countries, the handling of cheques might well be hampered if banks had to calculate the amount payable because of a stipulation of interest. If a creditor wished to be paid by an instrument containing an interest-clause, he could demand a bill payable at sight drawn on a bank.

96. The Working Group, after deliberation, decided that the proposed draft Convention should not set forth a provision allowing for the stipulation of interest.

97. As a result of this decision, the Working Group decided to delete, in paragraph (1) of article 67, the words "with interest, if interest has been stipulated for".

98. In consequence of the aforementioned decision in respect of the stipulation of interest, the Working Group decided to modify paragraph (2) of article 67 accordingly. The Group further decided to replace, in this paragraph, the words "date of dishonour" by the words "date of presentment" on the following grounds. Under article 5, paragraph (9) of the draft Convention on International Bills of Exchange and International Promissory Notes the maturity date of a demand bill was the date on which the instrument was presented for payment. Under article 67, paragraph (1) (b) (ii) of the draft Convention on International Bills of Exchange and International Promissory Notes interest payable on a demand bill which had been dishonoured would run from the date of presentment. Therefore, since the cheque was a demand instrument, a similar rule should obtain in respect of cheques.

99. Consequently, the Working Group decided to replace paragraphs (2) and (3) of article 67 by the following wording:

"(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 (4) calculated from the date of presentment to the date of payment and any expenses of protest and of the notices given by him."

100. It was observed that under article 67, paragraph (1) (b) of the draft Convention on International Bills of Exchange and International Promissory Notes interest payable on a non-demand instrument would run from the date of maturity. However, in the case of parties primarily liable (acceptor and maker) this rule could give rise to unacceptable results as in the case where presentment for payment of an accepted bill or of a note was made after maturity. It was proposed, therefore, that article 67, paragraph (1) (b) should be modified so as to make interest run from the date of presentment.

101. The Working Group requested the Secretariat to prepare an explanatory memorandum setting forth the issues raised by the above proposal and to prepare, if appropriate, alternative drafts.

102. The Working Group did not retain a proposal that the proposed draft Convention on International Cheques should set forth the possibility of a stipulation on the cheque for interest payable after dishonour of the cheque.

103. The Working Group decided that paragraph (4) of article 67 be retained but that it may be re-considered at a later stage. The view was expressed that the current text might not permit in all circumstances the determination of the applicable rate of interest.

#### Article 68

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

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

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

"(b) Interest on that sum at the rate specified in article 67, paragraph (4) from the date on which he made payment;

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

"(2) . . ."

105. The Working Group adopted this article but decided to add a paragraph (2), similar to paragraph (2) of article 68 of the draft Convention on International Bills of Exchange and International Promissory Notes, reading as follows:

"(2) Notwithstanding article 25 (4), if a party takes up and pays the cheque in accordance with article 67 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."

*Article 70, paragraphs (1) and (3)*

106. The text of article 70, paragraphs (1) and (3), as considered by the Working Group, is as follows:

“(1) A party is discharged of his liability on the cheque when he pays the holder or a party subsequent to himself the amount due pursuant to articles 67 and 68.

“(3) A party is not discharged of his liability if he 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.”

107. The Working Group decided to adapt the wording of these paragraphs to that of paragraphs (1) and (3) of article 70 of the draft Convention on International Bills of Exchange and International Promissory Notes which had been approved at its ninth session. Consequently, the Working Group adopted the following text:

“(1) A party is discharged of his liability on the cheque when he pays the holder or a party subsequent to himself who has taken up and paid the cheque the amount due pursuant to articles 67 and 68.

“(3) A party is not discharged of his 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.”

*Article 70, paragraph (4)*

108. The text of article 70, paragraph (4), as considered by the Working Group, is as follows:

“(4) (a) A person receiving payment of a cheque under paragraph (1) of this article must, unless agreed otherwise, deliver to the person making such payment the cheque, any protest, and a receipted account.

“(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.

“(c) If payment is made but the payor fails to obtain the cheque, the payor is discharged but the discharge cannot be set up as a defence against a protected holder.”

109. It was observed that sub-paragraph (a) of paragraph (4) envisaged the situation of payment of a cheque upon dishonour. It was suggested that this provision should also deal with the obligation placed upon a person receiving payment from the drawee. The Working Group accepted this proposal and decided that a similar modifi-

cation should be made to article 70, paragraph (1) (a) of the draft Convention on International Bills of Exchange and International Promissory Notes. However, it was noted that the requirement that the person receiving payment deliver to the person paying a receipted account would only be applicable in situations where a party paid in a recourse action. The Working Group concurred with this observation and requested the Secretariat to draft separate provisions relating to payment by the drawee and payment by a party.

110. The Working Group adopted sub-paragraph (b) of paragraph (4) without change.

111. As to sub-paragraph (c), the Working Group reaffirmed its view that, where a cheque had been paid and the person paid had retained the cheque and had subsequently transferred it to a protected holder, such protected holder had a right to be paid and the defence of prior payment could not be set up against him. However, it was observed that this result already followed from article 25 relating to the rights of a protected holder and that, therefore, sub-paragraph (c) was superfluous. The Working Group concurred with this observation and noted that, if the person to whom the cheque had been transferred was not a protected holder, the defence of discharge because of payment could be set up against him (article 24). However, the Working Group requested the Secretariat to re-examine articles 24 and 25 in order to ascertain whether these results clearly emerged from the wording of these articles.

*New article 70 bis*

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

“If the drawee without knowledge that an endorsement is forged or is made by a person in a representative capacity without authority [or that a third person has asserted a valid claim to the cheque] pays a cheque drawn on him to the holder, he does not, in doing so, incur any liability by reason only of such forged or unauthorized endorsement [or the assertion of such claim].”

113. In examining this article, the Working Group considered the regime applicable under the draft Convention to payment of an instrument on which an endorsement had been forged. Under article 22 of the draft Convention on International Bills of Exchange and International Promissory Notes, as adopted by the Working Group, a party who has suffered damages because of the forged endorsement on a bill of exchange has a right to recover compensation from the person who forged the endorsement and from the person who took the bill directly from such person. Thus, where the bill had been stolen from the payee and the thief forged the payee's endorsement and transferred the bill to A, who received payment from the drawee, the payee had a right

to recover compensation for damages against both the thief and A, even if A was a protected holder. However, if the thief had not transferred the instrument to A but had himself received payment from the drawee, then the question arose whether the action of the payee would lie not only against the thief but also against the drawee. In other words, could the drawee be considered as a person who took the bill directly from the forger?

114. The Working Group concluded that the present wording of article 22 did not make it immediately clear whether or not article 22 extended to a person who took an instrument directly from the forger by reason of the fact that he paid the instrument. Divergent views were expressed as to what should be the proper rule.

115. Under one view, the drawee who paid a bill under a forged endorsement directly to the forger should be liable to the payee because the drawee when he takes the instrument from the forger should be in a similar position as an endorser who takes from the forger. The legal effects of such a solution would differ if the draft Convention should distinguish between payment by the drawee with knowledge and without knowledge that an endorsement was forged. New article 70 *bis*, as proposed by the Secretariat, owed its existence to this distinction in that it provided that, if the drawee paid an instrument without knowledge that an endorsement was forged, he did not incur any liability by reason only of the forged endorsement. It was suggested that thought should also be given to the appropriateness of having different rules in this respect according to whether the instrument was a bill or note or a cheque. In the case of a bill or note, the drawee or acceptor or the maker had the faculty of ascertaining to whom he paid the instrument.

116. Under another view, the drawee should not be held liable because the maxim "know your endorser", on which the right to recover compensation under article 22 was based, should not apply to the drawee. As under the first view, different rules would obtain if the draft Convention distinguished between payment by the drawee with knowledge and without knowledge that an endorsement was forged. If the drawee paid with knowledge of the forgery, he should bear the risk of loss since he paid knowingly a person who had no right to the instrument, i.e. the forger. In other words, the drawee could then not debit the drawer's account, and the drawer was not discharged. On the other hand, if the drawee paid the instrument without knowledge of the forgery, he should not bear the risk of loss but that risk should be on the payee who lost the instrument and the drawer was discharged. The view was expressed that, if this approach was adopted for bills and notes, it should also be adopted for cheques.

117. Under a third view, payment by the drawee to the forger should subject the drawee to liability to pay compensation to the payee whose signature was forged

only in the case where such payment by the drawee was made with knowledge that the signature of the payee was forged. Under this view, like under the second view, the risk of forgery would be borne by the person who lost the instrument if payment was made without knowledge of the forgery. On the other hand, if payment was made with knowledge of the forgery the risk of loss would be on the drawee. However, unlike the results obtaining under the second view, it was for purposes of discharge of the drawer immaterial whether payment by the drawee was with or without knowledge of the forgery.

118. The Working Group was of the view that the various issues raised during the discussions required further consideration. It therefore requested the Secretariat to draft alternative provisions based on the views expressed and also to take into account the issue of paid stolen bearer instruments. The Working Group also requested the Secretariat to submit an explanatory memorandum of the alternative draft provisions.

*Article 71, paragraph (1)*

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

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

120. The Working Group adopted this paragraph without change.

*Article 71, paragraph (2)*

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

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

122. It was observed that this paragraph, though it expressed correctly the intended rule, was drafted awkwardly. The Working Group requested the Secretariat to re-draft this provision so as to express more clearly the idea that the cheque is dishonoured by non-payment if the holder who is offered partial payment does not take it.

*Article 71, paragraph (3)*

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

"(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."

124. The Working Group adopted this paragraph without change.

*Article 71, paragraph (4)*

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

“(4) If the holder takes partial payment from a party to the cheque other than the drawee,

“(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 a certified copy of the cheque, and of any authenticated protest, in order to enable subsequent recourse to be exercised.”

126. The Working Group adopted this paragraph subject to deleting the words “other than the drawee”.

#### *Article 71, paragraph (5)*

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

“(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.”

128. The following example was given: The drawer issues a cheque payable to the order of the payee, the payee endorses it to A and A to B; B presents the cheque for payment to the drawee. Upon dishonour by the drawee, B demands payment from the drawer and the drawer pays partially without requiring that mention of the partial payment be made on the cheque. Subsequently B demands payment from the payee who pays the whole amount. The question was put whether paragraph (5) should not require that mention of partial payment must be made on the cheque so as to prevent B from being paid the full amount of the cheque.

129. It was noted in this respect that normally a party paying partially would require that mention of the partial payment be made on the cheque so as to protect himself against a subsequent protected holder. Furthermore, if one were to make the mention of partial payment on the cheque obligatory, the question immediately arose what would be the sanction of non-conformity with such obligation. The Working Group, after discussion, decided to retain paragraph (5) in its present wording.

#### *Article 71, paragraph (6)*

130. The text of article 71, paragraph (6), as considered by the Working Group, is as follows:

“(6) Where a party pays the unpaid amount, the person receiving the unpaid amount who is in possession of the cheque must deliver to him the receipted cheque and any authenticated protest.”

131. It was proposed that the rule set out in this paragraph should equally apply in the case where a drawee paid the unpaid amount. The Working Group accepted this proposal and requested the Secretariat to amend also paragraph (6) of article 71 of the draft Convention on International Bills of Exchange and International Promissory Notes accordingly.

#### *Article 72*

132. 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 cheque was duly presented for payment in accordance with article 53 (g).

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

133. The Working Group adopted this article without change.

#### *Article 74*

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

“(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 on the date of presentment:

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

“(c) If such a cheque is dishonoured by non-payment, the amount 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.

“(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.

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

135. It was observed that article 74 did not specify at what rate of exchange a cheque should be paid if it had been drawn in a currency which was not that of the place of payment but because of exchange control regulations applicable in the place of payment had to be paid in local currency. It was suggested that one way of dealing with this question would be to add under article 74 *bis* additional provisions based on the provisions of paragraph (2) (b) and (c) of article 74. The Working Group decided to reconsider this issue in the light of draft provisions to be prepared by the Secretariat. The Group noted that this issue was not only relevant to the provisions applicable to cheques but also to those applicable to bills and notes.

136. With respect to paragraph (2) (b), one representative proposed to replace the words “for sight drafts” by the word “customary” or “usual”. With respect to paragraph (4), one representative proposed that the substance of this paragraph should be accommodated within the provision of paragraph (2) (c) of article 74 which should also reflect the provision of paragraph (2) (b). The Working Group requested the Secretariat to take this proposal into consideration when redrafting article 74.

137. The Working Group adopted article 74 subject to the above considerations.

#### *Article 74 bis*

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

“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.”

139. The Working Group adopted this article without change. But it was noted that there might be provisions of mandatory law unconnected with exchange control which should be accommodated.

#### *New article 74 ter*

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

“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]

“[the drawee has the option either to pay or not to pay until the time-limit for presentment of the cheque has expired. After the expiration of the time-limit for presentment the drawee is under a duty not to pay.]”

141. The Working Group considered the question whether the proposed draft Convention should set forth a rule on countermand. The Group noted that all legal systems contained such a rule though the legal effects of countermand were different. It would therefore be justified that the proposed draft Convention set forth a uniform rule on countermand of payment.

142. The Working Group expressed its preference for the rule that, where the drawer had countermanded his order to the drawee to pay a cheque drawn on him, the drawee was under a duty not to pay. The alternative rule proposed by the Secretariat, namely that upon countermand the drawee had the option either to pay or not to pay the cheque, did not commend itself in that it did not bring about the required degree of uniformity. The Working Group requested the Secretariat to specify in the commentary that a countermand once notified to the drawee remained effective until revoked by the drawer.

#### *New article 74 quater*

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

“[If the drawee receives notice of the death of the drawer the drawee is under a duty not to pay.]

“[The death of the drawer does not affect the order to pay contained in the cheque drawn by him.]”

144. The Working Group considered the question whether the proposed draft Convention should set forth a provision governing the duty of the drawee not to pay a cheque upon notice of the death of the drawer. It was noted that a similar question as to the duty of the drawee would arise in cases where the drawer had become insolvent or incapacitated or where a corporation which had drawn a cheque was in liquidation. The Working Group, after discussion, was of the view that these questions should be left to national law and that, therefore, the proposed draft Convention should not set forth a specific provision in this respect. However, the observer of the Hague Conference on Private International Law indicated his willingness to prepare a short study on the conflicts aspects of this issue which could assist the Working Group in deciding whether the proposed draft Convention should contain a provision on the applicable law.

#### *Article 78*

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

“(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 of a cheque by the drawee to the holder of the amount due in whole or in part discharges all parties to the cheque to the same extent.”

146. The Working Group adopted this article without change.

#### Article 79

147. The text of article 79, as considered by the Working Group, is as follows:

“(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, after the date of presentment;]

“(b) Against [the drawer or] an endorser or [their] his guarantor, after the date of protest for dishonour or, where protest is dispensed with the date of dishonour.

“(2) (a) If a party has taken up and paid the cheque in accordance with article 67 or 68 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] after the date on which he took up and paid the cheque;

“(b) (for subsequent consideration).”

148. It was observed that article 79 was patterned on article 79 of the draft Convention on International Bills of Exchange and International Promissory Notes. In examining the original provision, it was noted that it did not provide for a limitation period in respect of rights of action arising on a note payable on demand. The Working Group was of the view that the liability of the maker on the note existed from the date of the note. Therefore, the right of action arising on a demand note against the maker would lapse after four years from such date. In respect of a bill payable on demand which had been accepted, the period during which a right of action could be exercised against the acceptor should run from the date on which the bill had been accepted. The Working Group requested the Secretariat to amend article 79 of the draft Convention on International Bills of Exchange and International Promissory Notes accordingly.

149. As to the period during which a right of action arising on a cheque could be exercised, the Working Group was of the view that, for the sake of uniformity, the four-year period should be retained. With regard to the period during which a right of action against the drawer could be exercised, the Working Group considered two proposals. Under one proposal, a right of action could no longer be exercised after four years had elapsed after the date of presentment or after four years and 120 days had elapsed after the date of the cheque, whichever was earlier. Thus, the period of limitation would, in fact, be four years after the date of present-

ment if presentment had been made within the period of 120 days within which a cheque must be presented and would be four years and 120 days after the date of the cheque if no presentment had been made within the period of 120 days. Under the second proposal considered by the Working Group, article 79 should set forth a limitation period of four years from the date of the cheque. The Group was of the view that, though the first proposal was consistent with underlying principles of liability, the second proposal had the advantage of being simpler to apply in practice. The Working Group, after discussion, decided to adopt a limitation period of four years from the date of the cheque.

150. The Working Group adopted the provision of paragraph (1) (b) of article 79 under which a right of action against an endorser could no longer be exercised after four years had elapsed after the date of protest for dishonour or, where protest was dispensed with, the date of dishonour.

151. The Working Group adopted the provision contained in paragraph (2) (a), to become paragraph (2), and retained the words “one year” which had been placed between brackets.

#### Article 80

152. The text of article 80, as considered by the Working Group, is as follows:

“(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); these elements may be satisfied by presenting 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 articles 67 and 68, 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.

“New (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.”

153. The Working Group adopted paragraphs (1) and (2) of this article without change but did not retain new paragraph (3) since under paragraph (2)(c) the Court could determine whether security was called for in cases provided for in new paragraph (3) and in other similar cases.

#### Article 81

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

“(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 total amount of the damages does not exceed the amount of the cheque and any interest and expenses which may be claimed under article 67 or 68.

“(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.”

155. The Working Group adopted this article without change.

#### Article 82

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

“(1) A party who has paid a lost cheque in accordance with the provisions of article 80 and who is subsequently required to, and does, pay the cheque, or who loses his right to recover from any party liable to him and such loss of right was due to the fact that the cheque was lost, 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 is entitled to reclaim 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.”

157. The Working Group adopted this article subject to replacing, for the sake of clarity, in paragraph (1) the words “who loses” by the words “who then loses”.

#### Article 83

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

“A person claiming payment of a lost cheque duly effects protest for dishonour by non-payment by the use of a writing that satisfies the requirements of article 80, paragraph (2)(a).”

159. The Working Group adopted the article without change. The question was raised whether article 61(2)(f), according to which protest for dishonour by non-payment is dispensed with if the person claiming payment under article 80 cannot effect protest by reason of his inability to satisfy the requirements of article 83, was justified in view of the fact that such person must, according to article 80(2)(a), satisfy these very requirements in order to be able to utilize the provisions concerning lost instruments. The Working Group was of the view that the provision of article 61(2)(f) contradicted the provisions of article 80(2)(a) and decided, therefore, to delete article 61(2)(f) of the proposed draft Convention on International Cheques and also of the draft Convention on International Bills of Exchange and International Promissory Notes.



*Article 84*

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

“A person receiving payment of a lost cheque in accordance with article 80 must deliver to the party paying the writing required under paragraph (2) (a) of article 80 receipted by him and any protest and a receipted account.”

161. The Working Group adopted this article without change.

*Article 85*

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

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

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

163. The Working Group adopted this article without change.

*Draft articles A to F (crossed cheques)*

164. The Working Group decided that the proposed draft Convention on International Cheques should contain provisions on crossed cheques and considered the draft articles on crossed cheques (A to F) prepared by the Secretariat.

*Article A, paragraph (a)*

165. The text of article A, paragraph (a), as considered by the Working Group, is as follows:

“(a) A cheque is crossed when it bears across its face two parallel [transverse] lines.”

166. The Working Group adopted this paragraph subject to retaining the word “transverse” which had been placed between brackets. It was understood that the term “transverse lines” included perpendicular, but not horizontal lines.

*Article A, paragraph (b)*

167. The text of article A, paragraph (b), as considered by the Working Group, is as follows:

“(b) 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.”

168. The Working Group adopted this paragraph subject to maintaining the words “or the words ‘and

company’ or any abbreviation thereof” which had been placed between brackets. It was noted that such a general crossing was used in the United Kingdom and certain other Commonwealth countries.

*Article A, paragraph (c)*

169. The text of article A, paragraph (c), as considered by the Working Group, is as follows:

“(c) A cheque may be crossed generally or specially by the drawer or the holder.”

170. The Working Group adopted this paragraph without change. The question was raised whether the guarantor of the drawer or of the endorser should have the faculty of crossing a cheque. The Working Group, after discussion, was of the opinion that a guarantor should not have this faculty.

*Article A, paragraphs (d), (e) and (f)*

171. The text of article A, paragraphs (d), (e) and (f), as considered by the Working Group, is as follows:

“(d) The holder may convert a general crossing into a special crossing.

“(e) A special crossing may not be converted into a general crossing.

“(f) The banker to whom a cheque is crossed specially may again cross it specially to another banker for collection.”

172. The Working Group adopted these paragraphs without change.

173. The Working Group did not retain a proposal to add to article A a further paragraph according to which a banker receiving for collection an uncrossed cheque or a cheque crossed generally may cross it specially to himself. It was noted that in such a case the cheque would often have been endorsed and, thus, the banker become a holder. Where a collecting bank that was not a holder crossed it to itself, it did so as an agent of the holder.

*Article B*

174. The text of article B, as considered by the Working Group, is as follows:

“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 regarded as not having taken place]

“[the rules on material alteration apply].”

175. The Working Group noted that the proposed text presented two different approaches to the question as to what would be the effect of an obliteration of a

crossing or of the name of the banker to whom the cheque was crossed. Under the approach taken by article 37 of the Geneva Uniform Law on Cheques the obliteration was regarded as not having been made. The view was expressed that this approach might lead to practical difficulties in that it was not in all circumstances possible for the paying banker to discern from the face of the cheque the name of the original banker to whom the cheque had been crossed. Under the approach of the British Bills of Exchange Act 1882 (section 78) the crossing on a cheque was considered a material part of the cheque and, therefore, its obliteration was considered to be a material alteration.

176. The Working Group, while recognizing the logic of the approach of the Bills of Exchange Act, was of the view that it would be difficult, if not impossible, to apply to the obliteration of a crossing the rules on material alteration set forth in article 29. The Group, after discussion, decided to follow the Geneva approach and, therefore, to retain the words "the obliteration is regarded as not having taken place" which had been placed between brackets and not to retain the second alternative relating to material alteration.

#### *Article C, paragraph (1)*

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

"(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 take a crossed cheque only from his customer or from another banker."

178. The Working Group adopted this paragraph without change.

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

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

"(2) The drawee who pays or the banker who takes 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 due under article 67 or 68."

180. The Working Group adopted this paragraph subject to replacing the words "due under article 67 or 68" by the words "of the cheque".

#### *Article D*

181. The Working Group decided to adjourn consideration of this article until the re-consideration of article 70 *bis*.

#### *Article E*

182. The text of article E, as considered by the Working Group, is as follows:

"[If the crossing on a cheque contains the words 'not negotiable' the transferee becomes a holder but cannot become a protected holder in his own right.]"

183. The Working Group decided to retain this article. It was noted that a crossing containing the words "not negotiable" was frequently found in the banking practice of common law countries.

184. The following questions were raised: What was the legal effect of:

1. A statement on the cheque that it was not negotiable without there being a crossing?

2. A statement on the cheque that it was not negotiable and the cheque was crossed but the crossing did not contain these words?

3. A crossing on a cheque containing the words "not transferable", "pay (x) only" or words of similar import?

185. As to question 1, according to article 16 the transferee would not become a holder except for purposes of collection. As to question 2, the same legal effect would obtain. As to question 3, the Working Group was of the view that the proposed draft Convention should not deal with this question; therefore, article E would not apply to such a crossing and under article 16 the transferee would not become a holder except for purposes of collection.

#### *Article F, paragraph (1)*

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

"[(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 a case the cheque can only be paid by the drawee by means of a book-entry.]"

187. The Working Group decided to retain this paragraph on the ground that the practice of making a cheque payable by a book-entry only, by means of a statement on the cheque that it is payable in account, was found in a number of countries. The Group also decided to retain, in paragraph (1) (a), the word "transversally" which had been placed between brackets.

*Article F, paragraph (2)*

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

“[(2) The drawee who pays such a cheque other 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 due under article 67 or 68.]”

189. The Working Group decided to retain this paragraph subject to replacing the words “due under article 67 or 68” by the words “of the cheque”.

190. The Working Group accepted a proposal that article F should contain a further paragraph dealing with the legal effects of an obliteration of the words “payable in account”. The Group adopted the following paragraph:

“(3) If a cheque shows on its face the obliteration of the words ‘payable in account’, the obliteration is regarded as not having taken place.”

*Legal issues arising outside the cheque*

191. The Working Group, at its ninth session, had requested the Secretariat to study legal issues arising outside the cheque and to report to it. The following issues were submitted by the Secretariat and discussed by the Working Group at its tenth session.

*A. Relationship between drawer and drawee-bank*

192. It was noted that this relationship was primarily of a contractual nature and was founded wholly or in part on the customs and usages of banks, on general conditions or on private agreements between bank and customer. Though the determination of the legal nature of the relationship between bank and customer had in most jurisdictions important legal consequences (such as the ownership of the funds deposited with the bank), the Working Group decided that the proposed draft Convention should not deal with this issue.

*B. Bank's duty to honour cheques*

193. The primary feature of the contract between bank and customer was the duty of the drawee-bank to honour cheques drawn on it by the customer (drawer). Payment of a cheque out of funds previously deposited or out of credit-lines entitled the bank to debit its customer's account. The Working Group noted that the negotiable instruments law in some countries established a liability of the drawee-bank to the drawer for damages resulting from the inexecution of the drawer's order and slander of credit where the bank wrongfully dishonoured a cheque. The Working Group, after discussion, was of the view that the proposed draft Convention should not set forth a provision in this respect.

*C. Availability of funds*

194. The Working Group considered the question whether the funds available for payment should be available at the time the cheque was issued or at the time of the bank's decision to pay or to dishonour the cheque. It was noted that article 5 of Annex II to the Geneva Convention providing a Uniform Law on Cheques left to High Contracting Parties the determination of the moment at which the drawer must have funds available with the drawee and that the Uniform Law itself was silent on that point. Article 3 of the Geneva Uniform Law on Cheques merely stated that “a cheque must be drawn on a banker holding funds at the disposal of the drawer and in conformity with an agreement, express or implied, whereby the drawer is entitled to dispose of those funds by cheque”. The Working Group was of the view that the proposed draft Convention should not deal with this question.

*D. Obligation of the drawer to provide cover*

195. It was noted that cover (“provision”) resulted from funds that the drawee held at the disposal of the drawer or from a credit which the drawee had extended to the drawer. It was also noted that many legislations provided for civil or penal sanctions in cases where a cheque was drawn on insufficient funds. The Working Group was of the view that the question whether any, and if so which, sanctions should be laid down in the case of cheques drawn on insufficient funds should be left to national law.

196. In this connexion, it was observed that under the Geneva Uniform Law on Cheques (article 3) absence of cover did not affect the validity of the instrument as a cheque. The question was raised whether, if the proposed draft Convention did not set forth a similar provision and if a State which had ratified the Convention denied the validity of a cheque drawn on insufficient funds, an international cheque would suffer the same fate in that country. The Working Group was of the view that the proposed draft Convention should contain a provision which would make it clear that absence of cover does not affect the validity of the instrument as a cheque.

*E. Duty of collecting bank to protest and send notice of dishonour*

197. It was noted that section 4-202 of the Uniform Commercial Code of the United States of America stated the basic responsibilities of a collecting bank. Amongst these responsibilities was the duty of a collecting bank to use ordinary care in sending notice of dishonour and making or providing for any necessary protest. It was observed that, in view of the short period of time within which protest must be made under the draft Convention and in view of the consequences of unexcused failure to protest, the duty of collecting banks in this respect

assumed a certain importance. However, the Working Group was of the view that the making of protest and sending of notice of dishonour was part of the customs and practices of collecting banks as reflected in the rules of the International Chamber of Commerce on the collection of commercial paper. The Working Group, therefore, concluded that it was not necessary to set forth any specific rules in this respect.

#### F. *Final payment of an instrument by the drawee-bank*

198. It was noted that section 4-213 of the Uniform Commercial Code set forth rules which defined what action with respect to an item constituted final payment. Under the Uniform Commercial Code, final payment of an item was important in that it was one of several factors which determined such questions as the effectiveness of notices, stop-orders and set-offs, and the point at which the provisional settlement of an item became final. The Working Group decided that the proposed draft Convention should not deal with these issues.

#### G. *Customer's duty to discover and report unauthorized or forged signatures and material alterations*

199. The Working Group considered the question of contributory negligence on the part of the drawer or a person from whom the cheque had been stolen. It was noted that the Uniform Commercial Code contained in section 3-406 a provision in respect of negligence contributing to material alteration or unauthorized signing. The Working Group was of the view that the principles of general law should apply and the question, therefore, be left to national law, whether legislation or case law.

#### *Post-dated cheques*

200. It was noted that under article 1 of the proposed draft Convention a cheque was an instrument payable on demand and that one of the formal requirements of a cheque was that it be dated. The question was raised what would be the legal effect of a cheque which was post-dated and, in particular, whether the refusal of the drawee-bank to pay a cheque before its stated date was to be considered as a dishonour. The Working Group was agreed that the fact that a cheque was post-dated or antedated did not invalidate the instrument as a cheque. Different views were expressed with respect to the question whether refusal by the drawee-bank to pay a cheque before its stated date amounted to dishonour.

201. Under one view, since the cheque was a demand instrument the holder was entitled to disregard the date written on the cheque and, consequently, a refusal by the drawee-bank to pay on demand constituted dishonour by non-payment. Furthermore, where the drawee-bank paid the cheque before its stated date, parties liable on the

cheque would be discharged. This was so although presentment of the cheque by the holder before the stated date could constitute a violation of the agreement between the drawer and the payee.

202. Under another view, the drawing of post-dated cheques occurred not infrequently and corresponded to commercial practices. The expectation of the parties was that the time-limit when a cheque was payable was determined by the stated date. Therefore, non-payment on presentment before the stated date did not constitute dishonour since the instrument was in accordance with the agreement of the parties not payable at such date of presentment.

203. Proponents of both views were, however, agreed that the question whether the drawee-bank could in such a case debit the account of the drawer was governed by the contract between the drawee-bank and its customer. The Working Group requested the Secretariat to prepare alternative drafts corresponding to the views expressed by members and observers of the Working Group.

#### *Other issues*

204. Reference was made to article 32(2) of the Geneva Uniform Law on Cheques according to which, if a cheque has not been countermanded, the drawee may pay it even after the expiration of the time-limit for presentment. The question was raised whether under the draft Convention the drawee-bank which paid a cheque after the expiration of the time-limit for presentment (120 days) paid validly and could debit the account of the drawer. The Working Group was of the view that it followed from the provision relating to the liability of the drawer, according to which a late presentment was necessary to charge the drawer, that payment by the drawee-bank upon late presentment entitled the drawee-bank to debit the drawer's account. On the other hand, if the drawee-bank paid after the expiration of the limitation period obtaining as between the holder and the drawer, the question whether the drawee-bank was entitled to debit the drawer's account was governed by the agreement between the drawee-bank and the drawer.

205. The question was raised whether, where the bank upon presentment of the cheque did not pay immediately but consulted its customer (the drawer), such absence of immediate payment constituted dishonour. It was stated in reply that it was irrelevant for purposes of dishonour that the bank did not pay immediately because it wished to consult its customer.

206. The question was raised whether, where a holder upon due presentment of a cheque demanded payment over the counter and the drawee-bank refused to pay in cash but instead offered, for instance, to credit the account of the holder, such refusal constituted dishonour by non-payment. It was stated in reply that such refusal

constituted a dishonour because the holder was entitled to receive payment in money.

207. The question was raised whether a bank on which a cheque was drawn by another bank with which it had made appropriate arrangements could justifiably dishonour a cheque if it had not been advised by the drawing bank of the drawing of such cheque at the time of presentment. It was stated in reply that this depended on the agreement between the banks concerned and was in any event an issue arising outside the law on cheques.

## II. FUTURE WORK

208. The Working Group noted that the Commission at its thirteenth session had authorized the Group to hold a further session if required in the course of 1981. The Group was of the view that one further session would be required to consider in second reading the draft uniform rules on international cheques. It therefore decided to hold its eleventh session in New York from 3 to 14 August 1981.

209. Having regard to the work still to be accomplished, the Working Group was of the view that it will probably be able, at its eleventh session, to terminate the work on international negotiable instruments which the Commission conferred on it by its decisions made at its fifth session (1972) and its twelfth session (1979).

210. At its fifth session the Commission also requested the Working Group to consider whether the drawing up of uniform rules applicable to international cheques would best be achieved by extending the application of the draft Convention on International Bills of Exchange and International Promissory Notes for international cheques, or by drawing up a separate text on international cheques. The Working Group considered this issue at its ninth and tenth sessions, and expresses the following opinion: The Working Group notes that although there is considerable similarity between the law governing bills of exchange and promissory notes on the one hand, and cheques on the other, there are inherent in the use of cheques special features which distinguish these instruments from bills of exchange and promissory notes. One important feature is that the bill of exchange and promissory note are primarily credit instruments and that the essential feature of the cheque is that it is a payment instrument. Moreover, in civil law countries the bill of exchange and promissory note on the one hand, and the cheque on the other, are traditionally seen as different instruments and are traditionally governed by separate legal texts. The Working Group therefore suggests to the Commission that it should agree on the adoption of two separate draft texts, one setting forth uniform rules on international bills of exchange and

another setting forth uniform rules applicable to international cheques. However, it could be left to later decisions whether these separate sets of rules should be incorporated, in separate parts, in one Convention, or whether they should be set forth in two Conventions. One representative requested that there be prepared a combined text of both drafts, for working purposes only.

211. The Working Group heard a statement by the Secretary of the Commission in respect of possible courses of action which the Commission might wish to discuss when deciding upon its own work in respect of the draft texts drawn up by the Working Group, and when making recommendations in due course to the General Assembly. He noted that in view of the technical complexity of the subject-matter, substantive consideration of the texts prepared by the Working Group in the Commission and subsequently in a Diplomatic Conference to be convened by the General Assembly would in all likelihood require a period of time far in excess of the time allotted in the past to the conclusion of such conventions as the Convention on the Limitation Period in the International Sale of Goods, the United Nations Convention on the Carriage of Goods by Sea, 1978, and the United Nations Convention on Contracts for the International Sale of Goods. Consequent upon the length of time needed for the successful conclusion of a convention or conventions in the area of international negotiable instruments, there would be a substantially increased financial implication to the United Nations. Therefore, thought could be given to the advisability of adopting other appropriate procedures which would, whilst not affecting the quality of the work, reduce the period of time needed for the conclusion of such a convention or conventions. The Secretary of the Commission, without foreclosing other possible procedures, and subject to further consideration, referred to the possibility of simplifying the procedures traditionally followed for the adoption of United Nations Conventions. He informed the Working Group that he intended to consult with the Legal Counsel of the United Nations about the possibilities which might be open to the Commission in this respect, and would submit a note on this issue to the Commission at its next session.

212. The Working Group noted that it would accord with past practice for the Secretary-General to transmit the draft texts adopted by the Working Group upon their completion, together with a commentary, to Governments and interested international organizations for comments.

213. In this connexion, the Working Group suggests to the Commission that, at the appropriate time, it might wish to consider, in the light of the comments received, whether, for purposes of accelerating the work, it should request the Working Group to study and consider those comments and report to the Commission.

## B. Note by the Secretary-General: electronic funds transfer (A/CN.9/199)\*

1. The Commission, at its eleventh session, included as an item in its programme of work the legal problems arising out of electronic funds transfer.<sup>1</sup> At its twelfth session the Commission noted that the UNCITRAL Study Group on International Payments, a consultative body composed of representatives of banking and trade institutions, was engaged in studying the question.<sup>2</sup> At its thirteenth session the Commission requested the Secretariat to submit to it at its fourteenth session a progress report on the matter, so that it might give directions on the scope of further work after having considered the Study Group's conclusions.<sup>3</sup>

2. The Study Group made a preliminary study of some of the legal aspects of electronic funds transfer at its meetings in September 1978 and April 1979. The Study Group considered that its work should be expanded to reflect the best available practical experience of setting up and operating electronic payment systems. Therefore, it requested the Secretariat to solicit such information by means of a questionnaire to be circulated to central banks and other appropriate organizations.

3. The questionnaire was sent on 19 March 1980. The Study Group had before it at its meeting at Toronto, Canada, from 23 to 27 June 1980, a number of replies which had already been received. However, since additional replies were expected, it was decided that an analysis of replies should be prepared by the Secretariat for the next meeting of the Study Group at which time more definite conclusions might be reached.<sup>4</sup>

\* 29 April 1981. Referred to in Report, para. 34 (part one, A, above).

<sup>1</sup> Report of the United Nations Commission on International Trade Law on the work of its eleventh session, *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*, para. 67 (Yearbook . . . 1978, part one, II, A).

<sup>2</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. 55 (Yearbook . . . 1979, part one, II, A).

<sup>3</sup> Report of the United Nations Commission on International Trade Law on the work of its thirteenth session, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*, para. 163 (Yearbook . . . 1980, part one, II, A).

<sup>4</sup> The list of organizations which submitted replies to the questionnaire is contained in an annex to this note.

4. The next meeting of the Study Group is scheduled to be held at Munich from 17 to 21 August 1981 at which time the analysis of replies to the questionnaire will be considered. In certain respects the replies will be supplemented by information drawn from the publication entitled "Payment Systems in Eleven Developed Countries" prepared for the Bank for International Settlements by the Group of Computer Experts of the Central Banks of the Group of Ten Countries and Switzerland.

5. Since the Study Group will not have met between the thirteenth and fourteenth sessions of the Commission, the Secretariat is unable to submit to the Commission at this time any information in addition to that previously submitted which would aid the Commission in giving directives on the scope of further work.

6. The Secretariat will request the Study Group at its meeting in August to recommend to the Commission whether the Commission should undertake substantive work in this field at the present time and, if so, what the nature of that work might be. The Secretariat will submit the recommendation of the Study Group to the Commission at its next session.

## ANNEX

### Institutions which replied to questionnaire on electronic funds transfer systems

1. Reserve Bank of Australia
2. Creditanstalt-Bankverein, Austria
3. Canadian Bankers' Association
4. State Bank of Czechoslovakia
5. National Bank of Denmark
6. Finland Bank
7. Bank of France
8. Deutsche Bank, Germany, Federal Republic of
9. National Bank of Hungary
10. Bank of Italy
11. Central Bank of Jordan
12. Central Bank of Kuwait
13. Netherlands Bank
14. Databank Systems Limited, New Zealand
15. Bank of Norway
16. Bank of Portugal
17. Bank of Sweden
18. Bankers' Automated Clearing Services Ltd., United Kingdom
19. Federal Reserve Bank of New York, United States of America

## C. Report of the Secretary-General: universal unit of account for international conventions (A/CN.9/200)\*

1. At its eleventh session the Commission adopted the proposal of the delegation of France that the Commission "should study ways of establishing a system for determining a universal unit of constant value which

would serve as a point of reference in international conventions for expressing amounts in monetary terms."<sup>1</sup>

<sup>1</sup> A/CN.9/156; Report of the United Nations Commission on International Trade Law on the work of its eleventh session, *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17 (A/33/17)*, para. 67 (Yearbook . . . 1978, part one, II, A).

\* 12 May 1981. Referred to in Report, para. 25 (part one, A, above).