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COMMENTARY
ON
DRAFT CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE
AND INTERNATIONAL PROMISSORY NOTES
Report of the Secretary-General

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INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL), at its first session, decided to include in its work programme, as a priority topic, the law of international payments. The Commission selected, as one of the items falling within the scope of international payments, the harmonization and unification of law relating to negotiable instruments. 1/ At the request of the Commission the International Institute for the Unification of Private Law (UNIDROIT) prepared a "Preliminary report on the possibilities of extending the unification of the law of bills of exchange and cheques". 2/

2. At its second session the Commission considered the preliminary report prepared by UNIDROIT and concluded that a solution to problems arising out of the existence of different systems of negotiable instruments law might lie in the creation of a new negotiable instrument to be used in international transactions only. The Commission decided to make a further study of the possibility of creating such an instrument, based upon an enquiry aimed at securing the views and suggestions of Governments and banking and trade institutions. 3/ In compliance with this request the Secretariat, in consultation with representatives of international organizations and banking institutions drew up a detailed questionnaire enquiring about (a) current methods and practice for making and receiving international payments, (b) problems encountered in settling international transactions by means of negotiable instruments, and (c) the substance of possible new uniform rules. The text of the questionnaire and the analysis of the replies received from Governments and banking and trade institutions to the questionnaire are set forth in documents A/CN.9/38 and Add.1 and A/CN.9/48.

3. At its third 4/ and fourth 5/ sessions the Commission continued its consideration of the harmonization and unification of the law of negotiable instruments in the light of the above-mentioned documents. At its fourth

1/ Report of the United Nations Commission on International Trade Law on the work of its first session (1968), Official Records of the General Assembly, Twenty-third Session, Supplement No. 16 (A/7216), para. 48(III.).

2/ The preliminary report is reproduced in an annex to A/CN.9/19 (Unification of the law of bills of exchange and cheques: note by the Secretary-General and preliminary report by the International Institute for the Unification of Private Law (UNIDROIT)).

3/ Report of the Commission on the work of its second session (1969), Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18 (A/7618), paras. 79, 86 and 87.

4/ Report of the Commission on the work of its third session (1970), Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 17 (A/8017), paras. 103-118.

5/ Report of the Commission on the work of its fourth session (1971), Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 17 (A/8417), paras. 24-35.

session the Commission requested the Secretary-General to prepare a draft of uniform rules applicable to a special negotiable instrument for optional use in international transactions. 6/

4. In the course of the preparatory work on such draft uniform rules, carried out in close consultation with banking and trade circles through the vehicle of a Study Group on International Payments, 7/ further questionnaires on specific aspects of negotiable instruments were prepared and addressed to banking and trade institutions throughout the world. The evidence on law and practice thus obtained greatly contributed to the formulation of the "draft uniform law on international bills of exchange and commentary" on that draft, 8/ which the Secretariat in 1972 submitted to the Commission's fifth session.

5. The Commission, at its fifth session, established a Working Group on International Negotiable Instruments consisting of 8 Member States of the Commission 9/ and entrusted the Working Group with the preparation of a final draft uniform law on international bills of exchange and promissory notes. 10/

6. The Working Group on International Negotiable Instruments held eleven sessions between 1973 and 1981. The documents setting forth the reports of the Group on the work of its sessions are the following:

- Report of the Working Group on the work of its first session (Geneva, 8-19 January 1973), A/CN.9/77;
- Report of the Working Group on the work of its second session (New York, 7-18 January 1974), A/CN.9/86;
- Report of the Working Group on the work of its third session (Geneva, 6-17 January 1975), A/CN.9/99;
- Report of the Working Group on the work of its fourth session (New York, 2-12 February 1976), A/CN.9/117;

6/ Ibid., para. 35.

7/ The meetings of the Study Group, held between 1969 and 1979, have been attended by experts provided by interested international organizations and banking and trade institutions: European Economic Communities, European Banking Federation, International Monetary Fund, Organization of American States, UNIDROIT, Hague Conference on Private International Law, International Bank for Economic Co-operation (Moscow), Bank for International Settlements (Basle), International Chamber of Commerce, Accepting Houses Committee (London), Bank of England, Deutsche Bank, National Westminster Bank (London), Federal Reserve Bank of New York, Italian Bankers' Association.

8/ A/CN.9/67.

9/ The members of the Working Group were Egypt, France, India, Mexico (replaced by Chile at the tenth session), Nigeria, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America.

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

- Report of the Working Group on the work of its fifth session (New York, 18-29 July 1977), A/CN.9/141;
- Report of the Working Group on the work of its sixth session (Geneva, 3-13 January 1978), A/CN.9/147;
- Report of the Working Group on the work of its seventh session (New York, 3-12 January 1979), A/CN.9/157;
- Report of the Working Group on the work of its eighth session (Geneva, 3-14 September 1979), A/CN.9/178;
- Report of the Working Group on the work of its ninth session (New York, 2-11 January 1980), A/CN.9/181;
- Report of the Working Group on the work of its tenth session (Vienna, 5-16 January 1981), A/CN.9/196;
- Report of the Working Group on the work of its eleventh session (New York, 3-14 August 1981), A/CN.9/210.

7. At an early stage, thought was given to the feasibility of restricting the uniform rules to a much narrower scope than that of any of the existing formulations of negotiable instruments law. This approach had been advocated by a UNIDROIT Sub-Commission in a 1955 report referred to in UNIDROIT's "Preliminary report on the possibilities of extending the unification of the law of bills of exchange and cheques". ^{11/}This report concluded that the essential differences between the major systems were few, ^{12/} and suggested that the rules applicable to international negotiable instruments should be less numerous than those of the laws now in force. Consequently, the uniform rules would deal only with certain questions where divergences among the existing legal systems have proved to be the most troublesome in the international circulation of bills or notes. After careful consideration and consultations with the UNCITRAL Study Group this approach was not accepted. A comparison of the Anglo-American and Geneva systems does indeed reveal a similarity in basic principles that govern the contractual rights and obligations embodied in negotiable instruments and the concept of negotiability that is attributed to them. And it is undoubtedly true that a lawyer or merchant dealing with a bill or note under another system will recognize an instrument that is familiar to him. Yet, closer analysis of the existing formulations shows that they vary considerably in terms of the issues covered and that when identical issues are compared they differ with only few exceptions in substance. Furthermore, parts of negotiable instruments law involve a network of interrelationships on the instrument. This network needs to be dealt with as a unit; selecting only some of these issues for inclusion in the uniform rules and remitting all other issues to the applicable law would lead to uncertainty and, since the uniform rules and those of national law may not mesh precisely with each other, to difficulties.

^{11/} See para. 1 above.

^{12/} The examination by the Sub-Commission showed that these differences came down to two specific points: the regulation of protest and forged endorsement. Cf. Report of UNIDROIT, A/CN.9/19, Annex.

8. The draft prepared by the Working Group therefore purports to be a self-contained system of negotiable instruments law. It reflects a deliberate policy to minimize departures from the content of the existing principal legal systems. Where these systems concur in a given rule, that rule generally has been followed in the draft unless, as in rare instances, contemporary commercial practice indicates a justified departure from such a rule. In the instances where the systems differ, a choice or a compromise between divergent rules was based on available evidence of current commercial practice and needs.

9. Though in common law jurisdictions cheques are traditionally considered to be bills of exchange and are governed by the provisions relating to bills of exchange and certain provisions specific to cheques, the civil law jurisdictions have traditionally considered bills of exchange and cheques as separate instruments fulfilling separate functions governed each by a separate body of legal rules. The Commission, after considering the various options open to it, decided at its fourteenth session that the uniform rules on international bills of exchange and international promissory notes and the uniform rules on international cheques should be drawn up as separate texts and not as a consolidated text. 13/

10. The Working Group on International Negotiable Instruments adopted the draft Convention on International Bills of Exchange and International Promissory Notes (A/CN.9/211) and the draft Convention on International Cheques (A/CN.9/212) at the close of its eleventh session (August 1981), after a Drafting Group had reviewed both drafts and established corresponding language versions (in Chinese, English, French, Russian and Spanish).

11. The Commission at its fourteenth session requested the Secretary-General, after the completion of the texts by the Working Group, to circulate them, together with a commentary, to all Governments and interested international organizations for comments. At the request of the Secretariat the commentary on the two draft Conventions was prepared by Professor Aharon Barak and Professor Willem Vis who as former members of the Commission's Secretariat and subsequently as consultants assisted the Working Group on International Negotiable Instruments in the drawing up of the draft Conventions. The commentary on the draft Convention on International Bills of Exchange and International Promissory Notes is set forth in the present report, the commentary on the draft Convention on International Cheques is set forth in document A/CN.9/214.

13/ Report of the Commission on the work of its fourteenth session (1981), Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17), para. 22.

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

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

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

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

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

Abbreviations used in the commentary

BEA:	Bills of Exchange Act, 1882 (United Kingdom)
Convention:	Draft Convention on International Bills of Exchange and International Promissory Notes, as adopted by the UNCITRAL Working Group on International Negotiable Instruments (A/CN.9/211)
Geneva Convention of 1930:	Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930)
UCC:	Uniform Commercial Code (United States)
ULB:	Uniform Law on Bills of Exchange and Promissory Notes, set forth in Annex I to the Geneva Convention of 1930

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COMMENTARY

ON

DRAFT CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE
AND INTERNATIONAL PROMISSORY NOTES

CHAPTER ONE. SPHERE OF APPLICATION AND FORM OF THE INSTRUMENT

Article 1

- (1) This Convention applies to international bills of exchange and to international promissory notes.
- (2) An international bill of exchange is a written instrument which:
 - (a) Contains, in the text thereof, the words "international bill of exchange (Convention of ...)";
 - (b) Contains an unconditional order whereby the drawer directs the drawee to pay a definite sum of money to the payee or to his order;
 - (c) Is payable on demand or at a definite time;
 - (d) Is dated;
 - (e) Shows that at least two of the following places are situated in different States:
 - (i) The place where the bill is drawn;
 - (ii) The place indicated next to the signature of the drawer;
 - (iii) The place indicated next to the name of the drawee;
 - (iv) The place indicated next to the name of the payee;
 - (v) The place of payment;
 - (f) Is signed by the drawer.
- (3) An international promissory note is a written instrument which:
 - (a) Contains, in the text thereof, the words "international promissory note (Convention of ...)";
 - (b) Contains an unconditional promise whereby the maker undertakes to pay a definite sum of money to the payee or to his order;
 - (c) Is payable on demand or at a definite time;
 - (d) Is dated;

(e) Shows that at least two of the following places are situated in different States:

- (i) The place where the note is made;
- (ii) The place indicated next to the signature of the maker;
- (iii) The place indicated next to the name of the payee;
- (iv) The place of payment;

(f) Is signed by the maker.

(4) Proof that the statements referred to in paragraph (2) (e) or (3) (e) of this article are incorrect does not affect the application of this Convention.

Relevant legislation

BEA - section 3
UCC - section 3-103
ULB - articles 1 and 2

Cross references

Definite sum of money: article 6
Payable on demand: article 8 (1) and (2)
Payable at a definite time: article 8 (3)
Money: article 4 (11)

Commentary

1. This article provides the rules for determining when a written instrument qualifies as an "international bill of exchange" or an "international promissory note" under the Convention. If an instrument so qualifies the Convention is applicable. Definitions of an international bill of exchange and of an international promissory note are set forth in paragraphs (2) and (3), respectively, which make clear that the use of an instrument governed by the provisions of this Convention is entirely optional. The initial choice to use an instrument subject to the Convention is exercised by the drawer of a bill or the maker of a note. He may do so if certain international elements are present, but he is under no obligation to draw a bill or make a note under the Convention. Persons other than the drawer or the maker are bound by the provisions of the Convention by virtue of their signature on the international instrument or by taking it up. As regards the applicability of this Convention, see also article 2.

Paragraph (1)

2. This paragraph is of a declaratory character.

Paragraph (2)

3. This paragraph defines an international bill of exchange, i.e. it lays down the basic formal requisites with which an instrument must comply in order to be an international bill of exchange governed by this Convention. Non-compliance of an instrument with these requisites makes the Convention inapplicable. However it is to be noted that an incomplete instrument may be completed in accordance with article 11.

The inapplicability of this Convention is the sole consequence of non-compliance with paragraph (2); such non-compliance does not interfere with the validity of the instrument under applicable national law (e.g., the law of the place of drawing or of the place of issuance).

"a written instrument"

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

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

Formal requisites of an international bill of exchange

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

Sub-paragraph (a)

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

Sub-paragraph (b)

8. An international bill of exchange must be an "unconditional order" (it must not be payable upon a contingency) to pay a "definite sum of money" (as defined in article 6). The sum is payable to the "payee". Therefore, the Convention does not permit that a bill of exchange is drawn payable to bearer. However, the payee or a special endorsee may make the bill payable to bearer by endorsing it in blank (see article 13 (2) (a)).

9. The wording of sub-paragraph (b) permits a drawer to draw an international bill of exchange on himself or to draw it payable to himself (see also article 10).

10. The words "or to his order" have been added after the words "to the payee" because of a well-established practice in certain common law countries to draw bills of exchange "to the order of" a payee. However, the omission of the words "or to his order" does not prevent the bill of exchange from being a negotiable instrument under this Convention. Therefore, an international bill of exchange may be drawn "pay to X", "pay to the order of X", or "pay to X or to his order".

Sub-paragraph (c)

11. An international bill of exchange must be payable either "on demand" (as defined in article 8 (1)) or "at a definite time" (as defined in article 8 (3)). If an instrument does not state a time of payment, it may nevertheless be a valid instrument under this Convention since it is then deemed to be payable on demand (cf. article 8 (1)(b)).

Sub-paragraph (d)

12. The date of the instrument is relevant in the context of other provisions of this Convention, such as article 51 (f).

Sub-paragraph (e)

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

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

Sub-paragraph (f)

15. The order to pay, contained in the bill of exchange, is an order that can only be given by the drawer. His signature is an indispensable element of the validity of an instrument as a bill of exchange. If the signature of the drawer is lacking, the instrument cannot be made into a bill of exchange by completion (cf. article 11).

16. A bill of exchange may be drawn by two or more drawers (cf. article 9 (1) (b)).

Paragraph (3)

17. The comments in respect of the international bill of exchange apply, mutatis mutandis, to the international promissory note.

Paragraph (4)

18. The security of transactions in connexion with international bills of exchange and international promissory notes depends on a clear and indisputable identification of the legal régime. To this end, paragraphs (2) (a) and (3) (a) require that the bill or note contain in its text the words "international bill of exchange", or "international promissory note", followed by the words "(Convention of ...)". In addition, under paragraphs (2) (e) and (3) (e), an instrument, in order to be subject to this Convention, must show that at least two places, as specified, are situated in different States. The requisite of "internationality" consequently must appear from the statements made on the instrument. These rules are strengthened by the rule of paragraph (4) whereby the applicability of this Convention cannot be placed in doubt by controverting the statements made on the face of the bill or the note in conformity with paragraph (2) (e) or (3) (e).

19. Paragraph (4) has the same effect as a provision that, for the purpose of application of the Convention, the appearance of international elements, required under paragraph (2) (e) or (3) (e), constitutes an irrebuttable presumption. Therefore, an incorrect statement as to the place of drawing or making, etc., so as to bring the instrument under the Convention, does not thereby make the instrument invalid as an international bill of exchange or an international promissory note, and cannot be a defence to be raised against a holder, even if the holder, when taking the instrument, had knowledge of the fact that a statement was incorrect. To provide otherwise would lend grounds for casting doubts on the applicability of the Convention, and would impair the circulation of the international bill of exchange or promissory note.

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

* * *

Article 2

This Convention applies without regard to whether the places indicated on an international bill of exchange or on an international promissory note pursuant to paragraph (2) (e) or (3) (e) of article 1 are situated in Contracting States.

Cross references

Definition of "international bill of exchange": article 1 (2)

Definition of "international promissory note": article 1 (3)

Commentary

1. The sole requirement for the Convention's applicability is that the instrument is an international bill of exchange or an international promissory note, i.e. an instrument which complies with the formal requirements laid down in article 1 (2) or (3). Under this test, the forum of a Contracting State would apply the Convention, and not its domestic law or the negotiable instruments law of a foreign State which, through the application of conflict rules, might otherwise be applicable.

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

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

4. Of course, the obligation to apply the Convention in the circumstances defined in articles 1 and 2 is incumbent on Contracting States only. Consequently, whether the forum of a non-contracting State would apply the Convention to an instrument that complies with the requirements set forth in article 1 (2) or (3) would depend on the conflict of law rules of that forum. Presumably, the forum of a non-contracting State would consider such an instrument to be an international bill of exchange or promissory note subject to the Convention if its conflict rules referred to the law of the country where the instrument was drawn and if that country is a Contracting State. But in other factual settings a non-contracting State may apply the rules of the national law rather than this Convention. In such cases, an instrument, drawn as an international bill or note under the Convention, might not qualify as a bill or note under the applicable law. The Convention seeks to meet that potential problem by laying down, in article 1 (2) and (3), requisites that are in substance similar to those which in the principal legal systems are considered to be the minimum requirements for an instrument to qualify as a bill of exchange or promissory note. Hence, the presence on an instrument of the requisites under article 1 (2) or (3) will, in most cases, also qualify the instrument as a bill of exchange or promissory note under whatever national law may be applicable. Therefore, article 1 (2) or (3) helps to ensure that an instrument drawn pursuant to its provisions will qualify as a negotiable instrument even if the forum of a non-contracting State applies its own law or, by reason of its conflict rules, applies the law of another non-contracting State. However, there may be cases where an instrument that satisfies the requisites of article 1 (2) or (3) will not meet one of the requirements imposed by a national law.

5. Consideration has been given to adding a provision that the Convention would be applicable only if the instrument was drawn, made or issued in a Contracting State. The principal effect of such a rule would be to discourage banking and trade circles from drawing international bills of exchange or making international promissory notes in non-contracting States and thereby reduce the complications that might result from the application of conflict rules by the fora of non-contracting States. Such a rule limiting the applicability of the Convention has not been incorporated in the Convention. Under this Convention a person is given the opportunity to draw, make, accept, endorse or guarantee an international instrument without regard to whether it is drawn in a Contracting State or a non-contracting State, and a court in a Contracting State would give effect to his intent that the rules of the Convention should apply which was expressed on the face of the instrument and by the voluntary use thereof. Of course, the court of a non-contracting State may not give effect to this intent. This possibility, however, can be taken into account by the parties in deciding whether to employ the international instrument in the light of their expectations as to whether litigation would be brought in a Contracting or in a non-contracting State. Furthermore, the rule mentioned above would necessarily make the Convention inapplicable to an instrument drawn as an international bill of exchange in a non-contracting State, even where the drawee is in a Contracting State, or the bill is payable in a Contracting State, and litigation arises in a Contracting State. Such a rule would unduly restrict the scope of application of the Convention.

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

* * *

CHAPTER TWO. INTERPRETATION

Section 1. General provisions

Article 3

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

Commentary

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

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

* * *

Article 4

In this Convention:

- (1) "Bill" means an international bill of exchange governed by this Convention;
- (2) "Note" means an international promissory note governed by this Convention;
- (3) "Instrument" means a bill or a note;
- (4) "Drawee" means the person on whom a bill is drawn but who has not accepted it;
- (5) "Payee" means the person in whose favour the drawer directs payment to be made or to whom the maker promises to pay;
- (6) "Holder" means a person in possession of an instrument in accordance with article 14;
- (7) "Protected holder" means the holder of an instrument which, when he became a holder, was complete and regular on its face, provided that:
 - (a) He was, at that time, without knowledge of a claim to or defence upon the instrument referred to in article 25 or of the fact that it was dishonoured by non-acceptance or non-payment;
 - (b) The time-limit provided by article 51 for presentment of that instrument for payment had not then expired;
- (8) "Party" means any person who has signed an instrument as drawer, maker, acceptor, endorser or guarantor;
- (9) "Maturity" means the date of payment referred to in article 8;
- (10) "Signature" includes a signature by stamp, symbol, facsimile, perforation or other mechanical means* and "forged signature" includes a signature by the wrongful or unauthorized use of such means;
- [11] "Money" or "currency" includes a monetary unit of account which is established by an intergovernmental institution even if intended by it to be transferable only in its records and between it and persons designated by it or between such persons.] **

*

Article (X)

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

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

CommentaryParagraphs (1) and (2): "Bill" and "Note"

1. Article 1 (1) of this Convention provides that the Convention applies to an international bill of exchange and an international promissory note. Article 1 (2) or (3) specifies the formal requisites with which an instrument must comply in order to be an international bill or note. This Convention uses the expression "bill" or "note" to replace the longer expression "international bill of exchange" or "international promissory note".

Paragraph (3): "Instrument"

2. The expression "instrument" denotes an international bill of exchange or an international promissory note and is employed in this Convention whenever a provision is applicable to either a bill or a note.

Paragraph (4): "Drawee"

3. In this Convention, the drawee who has accepted a bill is called the "acceptor". Therefore, in all instances in which the term "drawee" is used, he is not an acceptor and thus not a party to a bill.

Paragraph (5): "Payee"

4. In a bill or a note, the payee is the specified person to whom payment must initially be made. An instrument may be made payable to two or more payees (cf. art. 9 (2)). In a bill, the payee may be the drawer (cf. art. 10 (b)) or the drawee.

Paragraph (6): "Holder"Relevant legislation

BEA - section 2
UCC - section 1-201 (20)
ULB - article 16

Cross references

Holder: article 14
Rights of a holder: articles 24 and 25

5. The rights to and upon an instrument are vested in the holder. He has the right to receive payment at maturity, and payment to him discharges the party paying (article 68). Being a "holder" is a necessary element for qualifying as a protected holder. Under Chapter Five of this Convention, the holder is to present the bill for acceptance and for payment, and, in the event of dishonour, to protest the bill and to give notice of dishonour.

6. Pursuant to article 14, in order to be a holder, a person must be the payee or the endorsee of an instrument and in possession of it, or a person in possession of an instrument on which the last endorsement is in blank. If an instrument shows more than one endorsement, there is the further requirement that the series of endorsements be uninterrupted.

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

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

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

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

7. Under the definition of "holder", a drawer, a maker or guarantor are not holders since they are neither a "payee" nor "endorsee". If the instrument is endorsed to them or if an instrument on which the last endorsement is in blank is delivered to them, they are a holder.

Example E. The acceptor dishonoured the bill. The holder exercised his rights of recourse, and was paid by the drawer. The bill was delivered to the drawer without an endorsement. The drawer (being neither "payee" nor "endorsee") is not the holder of the bill. However, he has rights on the bill against the acceptor in accordance with article 36(2).

8. A payee or endorsee may reacquire an instrument. Even though the instrument is not endorsed to them, in connexion with the reacquisition, the "payee" or "endorsee" comply with the definition of "holder" (article 21).

9. If a holder parts with possession of the instrument he ceases to be the holder. If the lack of possession is caused by the loss of the instrument his rights are determined by the rules on "lost instruments" (articles 74-79).

10. For the purposes of the definition of holder it is irrelevant whether the possession of the instrument is lawful or not. As seen from example D., even a thief may be a holder. Of course, if the possession is unlawful, there may be a defence on or a claim to the instrument pursuant to article 25.

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

Paragraph (7): "Protected holder"

Relevant legislation

BEA - section 29
UCC - sections 3-302 and 3-304
ULB - articles 16 and 17

Cross references

Protected holder: article 26

12. The main advantages of an instrument result from the strong legal position of a protected holder: as a general rule, he takes the instrument free from claims of ownership third parties may have to the instrument and from defences to an action by him on the instrument (article 26).

"was complete and regular on its face"

13. A person does not acquire the status of a protected holder if the instrument, on the face of it, is not complete and regular. For example, a "bill" on which the sum payable is lacking is not complete even though a person may complete it in accordance with article 11. It may be noted that a person, upon so completing an incomplete instrument, may become a holder but cannot become a protected holder. A bill is not regular if, for instance, the name of the first endorser does not correspond to the name of the payee. The expression "on its face" means that the holder need not look beyond the instrument, and refers to both the face and the back of the instrument.

"without knowledge"

14. A holder does not qualify as a protected holder if, when taking the instrument, he knows about the existence of a claim or a defence affecting the instrument or about the fact that it was dishonoured. Such holder takes the instrument at his own risk, and it is not the policy of this Convention to protect him. However, it should be noted that under article 27 (the so-called "shelter-rule") the transfer of an instrument by a protected holder may vest in any subsequent holder the rights of the protected holder, even though the subsequent holder is not a protected holder in his own right as where, for instance, he knew of a claim or a defence.

15. For the definition of the expression "without knowledge", see article 5 and commentary.

"at that time"

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

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

Paragraph (8): "Party"

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

Paragraph (9): "Maturity"

Relevant legislation

BEA - sections 10, 11 and 14
UCC - sections 3-108 and 3-109
ULB - articles 34, 35, 36 and 37

Cross references

Time of payment and maturity: article 8

19. The expression "maturity" appears in several provisions of this Convention (e.g. articles 8 (2), (5), (6) and (7), 47 (d), 51 (e), 66 (1) and 71 (2)).

20. In the case of a fixed-term instrument the maturity date is indicated on the instrument. In the case of a demand instrument the maturity date is the date on which the instrument is presented for payment. In the case of a bill payable at a fixed period after sight the maturity date is to be determined according to the period indicated on the instrument to be calculated as from the date on which the bill is presented for acceptance.

Paragraph (10): "Signature" and "forged signature"

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

22. Article (X) permits a Contracting State whose legislation requires that signatures on negotiable instruments be executed in handwriting to make, at the time of signing, ratifying or acceding to the Convention, a declaration derogating from the provision of paragraph (10) to the effect that a signature placed on an international bill of exchange or an international promissory note in its territory must be handwritten.

23. The term "forged signature" is relevant in the context of article 23, concerning the rights and liabilities of parties to an instrument on which an endorsement is forged, and article 30, concerning the liability of the person whose signature is forged. This paragraph makes articles 23 and 30 applicable where an instrument was signed by an agent without authority or was signed by the wrongful use of any means by which a signature may be made in accordance with the present provision.

Paragraph (11): "Money" or "currency"

24. Amongst the formal requisites with which a written instrument must comply in order to qualify as an international bill of exchange or an international promissory note is the requisite that the instrument must contain "an unconditional order whereby the drawer directs the drawee to pay a definite sum of money to the payee or to his order" (article 1 (2) (b)) or "an unconditional promise whereby the maker undertakes to pay a definite sum of money to the payee or to his order" (article 1 (3) (b)). The definition of "money" or "currency" set forth in paragraph (11) suggests that the Convention, in addition to providing the usual rule that an instrument is payable in a medium of exchange authorized or adopted by a Government as its official currency, should further provide that an instrument:

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

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

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

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

* * *

Article 5

For the purposes of this Convention, a person is considered to have knowledge of a fact if he has actual knowledge of that fact or could not have been unaware of its existence.

Relevant legislation

BEA - sections 29(1), 59(1) and 90
UCC - sections 1-201(19) and (25), and 3-304
ULB - articles 16, 17 and 40

Cross references

Knowledge of a fact: articles 4(7), 11(2)(a), 25(1)(d), 26(1)(c), 41(3), and 68(3)

Commentary

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

* * *

Section 2. Interpretation of formal requirements

Article 6

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

- (a) With interest;
- (b) By instalments at successive dates;
- (c) By instalments at successive dates with the stipulation on the instrument that upon default in payment of any instalment the unpaid balance becomes due;
- (d) According to a rate of exchange indicated on the instrument or to be determined as directed by the instrument; or
- (e) In a currency other than the currency in which the amount of the instrument is expressed.

Relevant legislation

BEA - section 9
UCC - section 3-106
ULB - articles 5 and 33

Cross references

Amount of the instrument: article 7(1) and (2)
Interest: article 7(3) and (4)
Interest to be paid after maturity: articles 66 and 67
Rate of exchange: article 71

Commentary

1. This article provides that if an instrument states that it is to be paid with interest, by instalments at successive dates, according to a certain rate of exchange or in another currency, the sum payable is a definite sum for the purpose of article 1(2)(b) or (3)(b).

Paragraphs (a), (b) and (c)

2. These paragraphs settle a sharp controversy between the principal legal systems. The English and American statutes permit the stipulation of interest on any bill or note and the drawing or making of an instrument with successive maturity dates. In contrast the Geneva Uniform Law permits a stipulation of interest only in the case of a bill or note payable at sight or at a fixed period after sight and denies any effect to a stipulation for interest on bills or notes payable at other maturities. Moreover, the Geneva Uniform Law does not allow instruments to be drawn or made with successive maturity dates. The rules proposed in paragraphs (a), (b) and (c) respond to the majority view expressed by banking and trade circles that it would be desirable for the Convention to permit the drawing or making of instruments containing a stipulation of interest or with successive maturity dates.

3. The sum payable by an instrument is a definite sum only if its amount can be determined ex facie the instrument without reference to evidence or sources extrinsic to it. Therefore, the rate of interest must be specified on the instrument, and a mere stipulation that the instrument carries interest without specifying the rate is without effect (article 7(4)). Similarly, if an instrument is made payable by instalments it must, by virtue of article 1(2)(b) and (c) or (3)(b) and (c), specify the amount of each instalment and the date on which it is payable.

Paragraphs (d) and (e)

4. These paragraphs sanction the common practice of instruments drawn or made in a currency which is not the currency of the place of payment. If no rate of exchange is indicated on the instrument or the instrument contains no directions to that effect, article 71 applies.

5. Paragraph (d) is intended to cover instruments drawn as follows:
"Pay £5.000 in Swiss francs at the rate of exchange of (x) Swiss francs to one pound sterling" or "Pay £5.000 in Swiss francs at the rate of exchange prevailing at maturity".

* * *

Article 7

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

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

(3) If any instrument states that it is to be paid with interest, without specifying the date from which interest is to run, interest runs from the date of the instrument.

(4) A stipulation stating that the sum is to be paid with interest is deemed not to have been written on the instrument unless it indicates the rate at which interest is to be paid.

Relevant legislation

BEA - sections 9(2) and (3), and 72(4)
UCC - section 3-118(c)
ULB - articles 5 and 6

Cross references

Interest: article 6

Commentary

Paragraph (1)

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

Paragraph (2)

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

Paragraph (3)

3. Unless a stipulation of interest specifies the date from which interest is to run, it runs from the date of the instrument. According to article 1(2)(d) and (3)(d) an instrument must be dated.

Paragraph (4)

4. It has not proved feasible to indicate a legal rate of interest applicable in the event that a stipulation of interest does not specify a rate. This paragraph follows article 5 of the Geneva Uniform Law according to which "in default of such specification, the stipulation shall be deemed not to be written".

* * *

Article 8

(1) An instrument is deemed to be payable on demand:

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

(b) If no time for payment is expressed.

(2) An instrument payable at a definite time which is accepted or endorsed or guaranteed after maturity is an instrument payable on demand as regards the acceptor, the endorser or the guarantor.

(3) An instrument is deemed to be payable at a definite time if it states that it is payable:

(a) On a stated date or at a fixed period after a stated date or at a fixed period after the date of the instrument; or

(b) At a fixed period after sight; or

(c) By instalments at successive dates; or

(d) By instalments at successive dates with the stipulation on the instrument that upon default in payment of any instalment the unpaid balance becomes due.

(4) The time of payment of an instrument payable at a fixed period after date is determined by reference to the date of the instrument.

(5) The maturity of a bill payable at a fixed period after sight is determined by the date of the acceptance.

(6) The maturity of an instrument payable on demand is the date on which the instrument is presented for payment.

(7) The maturity of a note payable at a fixed period after sight is determined by the date of the visa signed by the maker on the note or, if signature is refused, from the date of presentment.

(8) Where an instrument is drawn, or made, payable at one or more months after a stated date or after the date of the instrument or after sight, the instrument matures on the corresponding date of the month when payment must be made. If there is no corresponding date, the instrument matures on the last day of that month.

Relevant legislation

BEA - sections 10 and 11
UCC - sections 3-108 and 3-109
ULB - articles 2 and 33 to 37

Cross references

Time of payment: article 1(2)(c) and (3)(c)

Maturity: article 4(9)

Commentary

Instruments payable on demand

1. Paragraph (1)(a) permits a wide latitude in the use of expressions which make an instrument payable on demand. The requirement of one standard expression would not appear to be justified in view of well-established practices in different parts of the world.
2. As to the period of time within which an instrument payable on demand must be presented for payment, see article 51(f).
3. Paragraph (1)(b) restates similar rules found in the principal legal systems.
4. Paragraph (2) provides that where a bill is accepted, or where a bill or note is endorsed or guaranteed, after maturity it is to be deemed payable on demand as regards such acceptor, endorser or guarantor. A similar rule is found in the BEA (section 10).

Instruments payable at a definite time

5. The word "sight" in paragraph (3)(b) refers to presentment for acceptance. "After sight" bills must be presented for acceptance (article 45(2)(b)) in order to determine the date of maturity.
6. Article 6 provides that a sum payable is a "definite sum" if the instrument states that it is to be paid by instalments (i.e. say \$100 on the first of January 1983 \$100 on the first of January 1984 etc.). Article 8(3)(c) and (d) provides a parallel rule as to the date of the bill or note, i.e. that a bill

or note is payable at a definite time if it states that it is payable by instalments at successive dates. It is also provided that an instrument is payable at a definite time if it states that upon default in payment of an instalment the unpaid balance shall **become** due immediately.

7. Paragraph (4) provides that when an instrument is payable at a fixed period after date the time of payment is determined by reference to the date of the instrument. This is so even though the instrument is ante-dated or post-dated. According to article 1(2)(d) and (3)(d) an instrument must be dated.

8. Paragraph (5) deals with the maturity date of a bill of exchange made payable at a fixed period after sight. In respect of such a bill the period begins to run from the date of acceptance. If the acceptor has not dated his acceptance, the holder may insert the date of acceptance (cf. article 38(3)).

9. Paragraph (6) provides that the maturity of a demand instrument is the date on which the instrument is presented for payment. Instruments payable on demand include those expressly stating that they are payable "on demand", "at sight", "on presentment" or "on presentation", and those in which no time of payment is expressed (cf. article 8(1)).

10. Paragraph (7) deals with the unfrequent case of a note made payable at a fixed period after sight. Since a note cannot be accepted, the sole purpose of presentment of an after sight note is to determine the date of maturity. The paragraph follows the provisions of article 78 of the ULB.

11. Paragraph (8) is designed to resolve the ambiguity caused by the **unevenness** in the number of days which make up calendar months. It is based on article 36 of the ULB.

* * *

Article 9

(1) A bill may:

- (a) Be drawn upon two or more drawees;
- (b) Be drawn by two or more drawers;
- (c) Be payable to two or more payees.

(2) A note may:

- (a) Be made by two or more makers;
- (b) Be payable to two or more payees.

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

Relevant legislation

BEA - sections 6(2) and 32(3)
UCC - sections 3-110(1)(d) and 3-116

Cross references

Signature: articles 4(10) and 29
Holder: articles 4(6) and 14

Commentary

Paragraphs (1) and (2)

1. Article 1(2) provides that an international bill of exchange is a written instrument which, inter alia, contains an unconditional order whereby one person (the drawer) directs another person (the drawee) to pay a definite sum of money to a **specified person (the payee)**. Article 1(3) provides that an international promissory note is a written instrument which, inter alia, contains an unconditional promise whereby one person (the maker) undertakes to pay a definite sum of money to another person (the payee).

2. The purpose of paragraphs (1) and (2) of this article is to make clear that a written instrument is also a bill or a note if the direction or undertaking to pay is made by more than one person or if the persons directed to pay or directed or promised to receive payment are several.

3. Although enquiries amongst banking and trade institutions revealed that a plurality of drawees **is** only infrequently found on bills, the majority view amongst those consulted favoured a rule that would permit such practice expressly.

Paragraph (3)

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

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

5. Where an instrument provides that it is payable to A or B, every one of them in possession of the instrument is its holder (see definition of holder in article 14); and every one of them in possession of the instrument may exercise the rights of a holder as provided by this Convention.

6. Where an instrument is drawn or made payable to A and/or B, it is considered to be payable to both A and B, and not any one of them.

* * *

Article 10

A bill may:

- (a) Be drawn by the drawer on himself;
- (b) Be drawn payable to his order.

Relevant legislation

BEA - section 5
UCC - section 3-110
ULB - article 3

Commentary

The drawer of a bill may address the order to pay to himself, and he may draw the bill payable to himself or to his order. Therefore, one person may be both drawer and drawee, or both drawer and payee.

* * *

Section 3. Completion of an incomplete instrument

Article 11

(1) An incomplete instrument which satisfies the requirements set out in subparagraphs (a) and (f) of paragraph (2) or (a) and (f) of paragraph (3) of article 1 but which lacks other elements pertaining to one or more of the requirements set out in paragraph (2) or (3) of article 1 may be completed and the instrument so completed is effective as a bill or a note.

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

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

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

Relevant legislation

BEA - section 20
UCC - sections 3-115 and 3-407
ULB - article 10

Cross references

Holder: articles 4(6) and 14
Knowledge: article 5

Commentary

1. Article 11 deals with the completion of a writing which lacks one or more of the requirements set forth in article 1(2) or (3) of this Convention: a definite sum of money, the name of the payee, the name of the drawee, or one or more of the places referred to in article 1(2)(e) or (3)(e), etc. However, the power conferred by article 11 does not include the power to insert: (a) the signature of the drawer or the maker and (b) the words "international bill of exchange (Convention of ...)" or "international promissory note (Convention of ...)". Therefore, only an instrument on which such designation already appears and which is signed by the drawer or the maker may be completed as a bill or a note by inserting such other elements as are required by article 1(2) or (3). The rationale underlying this rule is that only the drawer or the maker decides whether the instrument he issues is to be governed by the Convention. It may be noted that a writing which lacks the words "international bill of exchange (Convention of ...)" or "international promissory note (Convention of ...)" may be completed under the applicable national law but would, if completed, not be governed by the Convention.

2. If a writing lacks elements pertaining to one or more of the requirements set out in article 1(2) or (3) it is not a bill or a note under this Convention and cannot be enforced as a bill or a note until completed. When the lacking elements have been inserted the writing becomes a bill or a note within the meaning of article 1 and the Convention is applicable.

3. Article 11 deals with the completion of an instrument which lacks elements that are required for purposes of validity under the Convention. The article does not apply to the alteration or correction of elements that appear on an incomplete or complete instrument. In the latter case article 31 concerning material alterations applies.

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

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

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

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

CHAPTER THREE. TRANSFER

Article 12

An instrument is transferred:

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

(b) By mere delivery of the instrument if the last endorsement is in blank.

Relevant legislation

BEA - sections 22(2) and 31
UCC - section 3-202(1)
ULB - article 11

Cross references

Endorsement: article 13

Commentary

1. A negotiable instrument, by its nature, is transferable although parties may exclude or limit its transferability (see article 16). The transfer of an instrument is in some legal systems known as "negotiation".
2. Article 12 sets forth the ways in which an instrument may be transferred. It follows in substance the relevant provisions of the existing legal systems. An instrument is transferred when the holder endorses it, either specially or in blank, and delivers it to the endorsee (paragraph (a)) or, if the last endorsement is in blank, when the holder delivers the instrument (paragraph (b)).
3. When an instrument is transferred under this article, the transferee becomes a holder (cf. arts. 4(6) and 14(1)(b)) and thus acquires the rights, and is subject to all the duties, of a holder. The result obtains irrespective of whether the transfer takes place before, at or after maturity.

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

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

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

4. It should be noted that article 12 deals only with the transfer of an instrument by endorsement and delivery or, if the last endorsement is in blank, by mere delivery. The article does not deal with other ways by which a person may acquire the rights to and upon an instrument, as where a person is the heir of the holder or where the holder assigns his rights on the instrument to another person. These questions are left to the applicable national law.

Article 13

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

(2) An endorsement may be:

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

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

Relevant legislation

BEA - sections 2 and 32
UCC - section 202(2)
ULB - article 13

Cross references

Signature: article 4(10)

Commentary

1. An endorsement serves two functions. It is a necessary element in the transfer of an order instrument (article 12(a)), and it renders the endorser liable on the instrument as a party (article 40(1)). In most cases, the endorsement is intended to serve both functions. However, the endorser may exclude or limit the liability function of the endorsement by an express stipulation on the instrument as provided in article 40(2), e.g. by inserting the words "without recourse". Also the endorser can exclude or limit the transfer function as regards any possible transfer from his endorsee to others. For example, he may exclude the possibility that a person other than his endorsee becomes a holder except for purposes of collection. He would achieve this by inserting in his endorsement the words "not transferable", "pay (X) only" or words of similar import (article 16).

2. Article 13 explains what is meant by endorsement and how it is effected. An endorsement is effected by the signature of the person endorsing the instrument.

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

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

4. It should be noted that a signature alone on the instrument is not necessarily a blank endorsement; it may be an acceptance (cf. art. 37) or a guarantee (cf. art. 42).

5. It may be recalled that the Convention does not permit an instrument to be drawn payable to bearer (see commentary to art. 1, para. 8); but an order instrument may be made payable to bearer by a blank endorsement by the payee or a special endorsee.

* * *

Article 14

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

(a) The payee in possession of the instrument; or

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

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

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

Relevant legislation

BEA - section 2
UCC - sections 1-201(20) and 3-202(1)
ULB - article 16

Cross references

Holder: article 4(6)
Payee: article 4(5)
Instrument: article 4(3)
Endorsement: article 13

Commentary

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

(a) being a holder is a necessary element of the status of a protected holder (cf. art. 5(7));

(b) the holder may exercise all rights on the instrument against the parties to it (cf. art. 24);

(c) a party to an instrument is discharged when he pays the holder (cf. art. 68).

2. Pursuant to article 14 a person in order to be a holder

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

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

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

Example B. The payee lost the instrument. Not being in possession of the instrument he is not a holder (as to lost instruments see articles 74-79).

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

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

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

Example F. The payee endorses the instrument in blank. It is stolen by T. T is a holder.

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

Example G. The acceptor of a bill dishonours it by non-payment. The holder is paid by the drawer and delivers the bill to him without an endorsement. The drawer, though in possession of the bill, is not a holder. Nevertheless, by virtue of article 36(2) the drawer has rights on the bill against the acceptor.

4. A payee or an endorsee may reacquire the instrument by payment or otherwise. By virtue of article 21 such a payee or endorsee, even though the instrument is not endorsed to him, is a holder.

5. For the purposes of holder status it is irrelevant whether the possession of the instrument is lawful or not. As seen from example F. above even a thief may be a holder. However, if the possession is unlawful the owner of the instrument has a valid claim to the instrument and such claim may be set up as a defence against liability (cf. art. 25).

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

"Uninterrupted series of endorsements"

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

Example H. The instrument is stolen from the payee. T, the thief, forges the signature of the payee and endorses the instrument to A. A is a holder. However, the drawer may raise the defence of forgery against A (cf. art. 25). Such a defence would not prevail if A is a protected holder (cf. art. 26). The payee may claim the instrument from A (cf. art. 25(2)) unless A is a protected holder.

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

Paragraph (2)

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

Example J. The payee endorses the instrument to A and delivers it to him. A endorses the instrument in blank and delivers it to B. B endorses the instrument specially to C or in blank and delivers it to C. Under article 14(2), B is deemed to be the endorsee of A by his endorsement in blank. It follows that C is a holder since he received the instrument under an uninterrupted series of endorsements.

Paragraph (3)

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

10. This paragraph does not deal with the question of liability upon an instrument of the party transferring it, nor does it deal with the rights of a person to the instrument. The party transferring the instrument may assert any defence or any claim available to him under articles 25 and 26 of this Convention.

11. Paragraph (3) does not impose any liability on a party who signed the instrument under the circumstances mentioned in the paragraph. The question whether such party may raise the defence of ius tertii is governed by article 25(3).

Example K. A induces the payee by way of fraud to endorse to him a note owned by the payee. Pursuant to article 14 A is a holder of the note. The consequences are shown by the following examples.

Example L. The same facts as in example K. A brings an action against the payee (P). Nothing in this article makes the payee (P) liable to A in spite of the fraud practised by A on P. Pursuant to article 25 the payee has a valid defence to A's action.

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

Example N. The same facts as in example K. A brings an action against the maker. This question is not solved by article 14. The answer to this question is to be found in article 25.

Example O. By fraud A induces the payee (P) to transfer to him a bill owned by P. A transfers the bill to B, who takes it as a protected holder. P brings an action against B for conversion of the bill. P's action fails. According to article 14 A is a holder, and the bill was transferred to B in circumstances that make B a protected holder. According to article 26 P's claim fails against a protected holder.

Example P. The same facts as in example O. B brings an action against the drawer and the payee (P). According to article 26 the defences of the drawer and the payee are not available against B, a protected holder.

* * *

Article 15

The holder of an instrument on which the last endorsement is in blank may:

- (a) Further endorse the instrument either in blank or to a specified person; or
- (b) Convert the blank endorsement into a special endorsement by indicating therein that the instrument is payable to himself or to some other specified person; or
- (c) Transfer the instrument in accordance with paragraph (b) of article 12.

Relevant legislation

BEA - section 34(4)
UCC - section 3-204
ULB - article 14

Cross references

Holder: article 14
Endorsement: article 13
Transfer: article 12

Commentary

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

Example A. The holder A delivers the instrument to B. This is a proper transfer (cf. art. 12(b)) and B is a holder under article 14(1)(b). A is not liable on the instrument because he has not signed it (cf. art. 29). However, he may be liable off the instrument under article 41. The instrument remains an instrument payable to bearer.

Example B. A, the holder, delivers the instrument to B after endorsing it in blank. This is a proper transfer under article 12(b) and B is a holder. A is liable on his signature as an endorser. It may be noted that A's signature

is not required for the purpose of transferring the instrument to B (the instrument is a bearer instrument by reason of the blank endorsement). The effect of A's blank endorsement is to render A liable on the instrument and this may be commercially expedient.

Example C. A, the holder, delivers the instrument to B after having converted the blank endorsement into a special endorsement (by indicating in that endorsement that the instrument is payable to B). This is a proper transfer under article 12(a) and B is a holder. A is not liable on the instrument because he has not signed it (cf. art. 29). The conversion of a blank endorsement into a special endorsement is authorized under article 15(b) and is therefore not a material alteration under article 31.

* * *

Article 16

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

Relevant legislation

BEA - sections 8(1) and 35
UCC - sections 3-205, 3-206 and 3-805
ULB - articles 11 and 15

Cross references

Holder: article 14
Endorsement: article 13
Transfer: article 12
Collection: article 20

Commentary

1. Under article 16 the transfer of an instrument in accordance with article 12 may be excluded or limited by the drawer, the maker or an endorser by using such words as "not negotiable", "not transferable" or words of similar import. The drawer or maker must insert these words in the instrument, and the endorser would have to insert them in his endorsement.
2. The purpose of such insertion is to ensure that payment of the instrument may only be claimed by the payee or the endorsee or the agent for collection, as the case may be. This insertion does not affect the character of the instrument as a bill or note but the endorsee does not become a holder except for purposes of collection. He may not further transfer the instrument, not even for purposes of collection; he would have this latter power only if the endorsement to him would have been made expressly for purposes of collection (cf. art. 20).
3. Under article 1(2) and (3) of this Convention an instrument need not be made payable to "the order" of the payee. Therefore, a mere omission of the words "to order" does not prevent further transfer, and where an instrument lacking that expression is transferred by the payee in accordance with article 12 the transferee is a holder and may in turn further transfer the instrument.

* * *

Article 17

(1) An endorsement must be unconditional.

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

Relevant legislation

BEA - section 33
UCC - section 3-202
ULB - article 12

Cross references

Transfer: article 12
Endorsement: article 13

Commentary

1. Article 17 expresses the fundamental policy of the Convention that an endorsement may not be made subject to a condition (paragraph (1)).
2. If an endorsement contains a condition the endorsement is a valid endorsement for purposes of transferring the instrument and the transferee is a holder whether or not the condition has been fulfilled. Furthermore the condition to the extent that it affects the liability of the endorser is to be disregarded. However, the fact that a condition was not fulfilled is not necessarily irrelevant. It may, for example, form the basis of a claim or defence under article 25 if the condition relates to the underlying transaction. For that reason, the same result would obtain if the condition had not been included in the endorsement but was only expressed in the agreement of the underlying transaction.
3. It should be noted that article 17 deals only with conditions in the proper sense of the term, i.e. making the liability of the endorser dependent upon the occurrence or non-occurrence of an uncertain future event. Thus, the article does not cover other ways of excluding or limiting the liability as, for example, where an instrument is endorsed partially (article 18) or without recourse (article 40(2)).

* * *

Article 18

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

Relevant legislation

BEA - section 32(2)
UCC - section 3-202(3)
ULB - article 12

Cross references

Endorsement: article 13
Sum payable: article 6

Commentary

1. This article provides that an endorsement must be of the entire instrument; therefore, a partial endorsement is not effective as an endorsement. An endorsement is partial if, for example, it states "Pay one half of the sum due to A" or "Pay half of the sum due to A and half to B". However, an endorsement is not partial if, for example, it states "Pay A and B" or "Pay A or B" since the full sum due is then payable to the person(s) indicated. A special problem arises when an instrument has been paid in part. If in such a case an endorsement is limited to the part unpaid, it is "partial" in the sense of article 18 and therefore ineffective. If however the endorsement is not so qualified, it is a valid endorsement although in fact it is only for part of the sum, namely for the amount unpaid.

2. The "transferee" of an instrument endorsed as to part of the sum payable does not qualify as a holder since the endorsement is ineffective. However, article 18 does not prevent such person from acquiring rights under the partial endorsement under the applicable domestic law (e.g. by "partial" assignment).

* * *

Article 19

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

Relevant legislation

BEA - section 32(5)

UCC - section 3-414(2)

Cross references

Endorsement: article 13

Commentary

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

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

* * *

Article 20

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

- (a) May only endorse the instrument for purposes of collection;
- (b) May exercise all the rights arising out of the instrument;
- (c) Is subject to all claims and defences which may be set up against the endorser.

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

Relevant legislation

BEA - section 35
UCC - sections 3-205 and 3-206
ULB - article 18

Cross references

Endorsement: article 13
Claims and defences: article 25

Commentary

1. A holder, in order to obtain payment, would normally present the instrument himself to the person liable. However, particularly in the international context, he will engage an agent (usually a bank) to do so on his behalf.
2. For that purpose, he may, for example, use the means of a regular endorsement, whether blank or special, accompanied by collecting instructions outside the instrument. He may, however, prefer an endorsement for collection as provided for in article 20 which would avoid certain risks inherent in the first approach. These risks arise from the fact that the agent for collection may disregard his instructions and further endorse the instrument to a person who may not know about the collection instructions and may thus qualify as a protected holder and exercise rights of a protected holder against the endorser whose endorsement was intended only for collection purposes. These risks cannot materialize where an endorsement for collection is made in accordance with article 20.

Example A. The payee endorses the bill "for collection" to A. Fraudulently and without the permission of the payee the bill is sold (and endorsed in blank) by A to B. The acceptor refuses payment, and B brings an action against the payee. By virtue of paragraph (2) the payee is not liable to B. In that respect an endorsement for collection resembles an endorsement "without recourse" (see article 40(2)).

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

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

4. However, the legal position of a holder under an endorsement for collection differs from that of a "normal" holder since the endorsee for collection acts as an agent of the endorser. The difference manifests itself in the following rules expressed in article 20:

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

(b) The endorsee for collection may exercise rights against any party who is liable to the endorser for collection, including the right to bring an action on the instrument. The endorsee for collection has no rights on the instrument against the endorser for collection since the purpose of the endorsement is to collect the instrument for the endorser and not from him. In this respect, an endorsement for collection is an endorsement that excludes the liability of the endorser and is thus similar to an express stipulation provided for in article 40(2).

(c) The endorsee for collection cannot be a protected holder in his own right. However, if the endorser for collection is a protected holder, the transfer of the instrument to the agent for collection vests in him the rights on and to the instrument which the protected holder had (article 27). It follows that the endorsee for collection is subject only to those claims and defences which may be set up against the endorser.

5. It should be noted that the Convention does not deal with the legal relations between endorser and endorsee for collection outside the instrument, e.g. the circumstances under which the underlying agency relationship is terminated. However, such termination may form the basis of a claim by the endorser for collection which, if asserted, may be set up as a defence against the holder (i.e. the ex-agent, see art. 25(3)) or may lead to the result that payment to the holder does not discharge the payer (cf. art. 68(3)).

* * *

Article 21

The holder of an instrument may transfer it to a prior party or the drawee in accordance with article 12; nevertheless, in the case where the transferee was a prior holder of the instrument, no endorsement is required and any endorsement which would prevent him from qualifying as a holder may be struck out.

Relevant legislation

BEA - sections 37 and 59(2)(b)
UCC - section 3-208
ULB - article 50

Cross references

Transfer: article 12
Holder: articles 4(6) and 14

Commentary

1. An instrument may be transferred to a prior party (an endorser, the drawer, the acceptor or the maker) or to the drawee. If the prior party was a holder no endorsement is necessary. Therefore, transfer of the instrument to the drawer (i.e. transfer within the meaning of article 12) requires an endorsement unless the last endorsement is in blank. A prior party who is a holder may further transfer the instrument.

2. Article 21 also provides that a prior holder who acquires the instrument without an endorsement may strike out any endorsement which would prevent him from being a holder. Such striking out is not a material alteration.

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

* * *

Article 22

An instrument may be transferred in accordance with article 12 after maturity, except by the drawee, the acceptor or the maker.

Relevant legislation

BEA - section 36
UCC - section 3-304(3)
ULB - article 20

Cross references

Transfer: article 12

Commentary

An instrument may be transferred before, at or after maturity, whether or not the instrument was dishonoured or protest made. However, if the instrument was transferred to the drawee, the acceptor or the maker it cannot be transferred by either of them after maturity.

Example. The drawee pays a bill on which the last endorsement is in blank. After maturity he delivers the bill to A. This is not a transfer under article 12 and A is not a holder.

* * *

Article 23

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

(2) The liability of a party or of the drawee who pays, or of an endorsee for collection who collects, an instrument on which there is a forged endorsement is not regulated by this Convention.

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

Relevant legislation

BEA - sections 24 and 59
UCC - sections 3-404, 3-405 and 3-603
ULB - articles 16 and 40

Cross references

Forged signature: article 4(10)
Transfer: article 12
Endorsement for collection: article 20
Endorsement by a person in a representative capacity: article 32

Commentary

1. Where an endorsement on a bill of exchange or promissory note has been forged, one of the parties must bear the risk of loss. The problem of who should bear that risk is solved in a fundamentally different way in the common and civil law systems. The reasons for this divergence in approach are based on a different appreciation of what is commercially expedient and what policy considerations should prevail, even though the rationalization of certain aspects of the rule may have occurred after its formulation. While there are other issues of negotiable instruments law where the two systems are in sharp contrast, the rule on forged endorsements can be said to present the most striking conflict between them.

2. The BEA, the UCC and the ULB all recognize the basic principle that a person whose signature is forged on an instrument is not liable thereon (BEA section 24; UCC section 3-404(1); ULB article 7) and that the person who forges the signature of another person is liable on the instrument as if he had signed his own name. The basic point on which the two systems differ is the effect of the transfer of an instrument bearing a forged endorsement. Who is the owner of the instrument? What are the rights and liabilities of the various parties to the instrument and of the drawee who pays on a forged endorsement and the person whose endorsement was forged?

The existing legal systemsAnglo-American Law

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

4. The effects of this basic rule are several. Since an order instrument is negotiated by delivery with any necessary endorsement and a forged signature is inoperative as an endorsement, without such negotiation the transferee does not become a holder. The same is true for any subsequent transferee, whether or not he acts in good faith. Because the endorsement is inoperative, it cannot make the instrument payable to bearer either. Possession of the instrument does not confer title to it nor the right to enforce it against parties who signed it prior to the forged endorsement. In respect of persons transferring the instrument subsequent to the forged endorsement, the UCC provides that such transferor, who receives consideration, "warrants to his transferee and if the transfer is by indorsement to any subsequent holder who takes the instrument in good faith that (a) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and (b) all signatures are genuine or authorized" (section 3-417(2)(a) and (b)). A warranty of title runs also to a good faith payer or acceptor (section 3-417(1)(a)). The BEA provides in this respect that an endorser is estopped from raising against subsequent transferees the fact that an endorsement was forged (section 55(2)(c)). In the case of a bearer bill or note any person who negotiates it warrants to his immediate transferee for value that there are no prior forged endorsements (section 58(3)).

5. Payment on a forged endorsement does not discharge the drawee's debt to the drawer since payment is not to the holder. According to the BEA such payment does not qualify as payment in due course to the holder. As a result the drawer is entitled to demand that the drawee reverse the charge by recrediting his account. An exception to this rule is found in section 60 of the BEA in respect of bills drawn on a banker and payable to order on demand. If a banker pays such a bill in good faith and in the ordinary course of business it is not incumbent on him to show that any endorsement on the instrument was made by or under the authority of the person whose endorsement it purports to be; and he is deemed to have paid the bill in due course although the endorsement has been forged or made without authority. Under the UCC an instrument bearing a forged endorsement is not "properly payable" (section 4-401(1)) and since the payee or the endorsee whose endorsement was forged has not signed, the drawee who pays does so without instructions and in violation of the drawer's order.

6. The payee or the endorsee whose signature is forged retains title to the instrument and the instrument remains payable to him. He may exercise his rights to it by an action for conversion outside the instrument or by an action on the instrument under the provisions of lost instruments. Thus if the drawee pays to someone else and receives the instrument he is liable for conversion to such payee or endorsee on an action in tort outside the instrument and the drawer may still be liable on the instrument to such payee or endorsee.

7. The drawee who paid the instrument in good faith may recover from the person paid. Under English common law, he may claim on the ground that money paid through a mistake of fact is recoverable. Under the UCC he may shift the loss to the person who received payment by a claim for breach of warranty of title (section 3-417(1)(a)).

The Geneva Uniform Law

8. The approach of the ULB is fundamentally different from that of the common law. According to article 16 of that Law the person who is in possession of an instrument and establishes his title to it through an uninterrupted series of endorsements is considered to be the lawful holder (porteur légitime). These two conditions establish what is often referred to by civil law authors as légitimation formelle, a term for which there is no correct equivalent in the English language. They establish a presumption that the possessor of an instrument on which there appears an uninterrupted chain of endorsements has title to it and, as such, is entitled to exercise all rights derived therefrom. The presumption is rebuttable: the true owner may claim the instrument but will succeed only if he proves that the holder, though the conditions set forth in article 16 of the ULB may be met, acquired it in bad faith or in acquiring it has been guilty of gross negligence. In the context of forged endorsements this means that the status of lawful holder which article 16 bestows upon the possessor is not available if the possessor was aware or should have been aware that the endorser was not the true owner of the instrument and that the endorsement was forged or made by an agent without authority.

9. Therefore, under the ULB a forged endorsement is, with respect to the rights of the taker from the forger, a valid endorsement provided that the taker meets the conditions set forth in article 16. It is also a valid endorsement with respect to the rights of subsequent endorsees even if they knew about the earlier forgery. The dispossessed owner may claim the instrument from the person who took it from the forger, but if such person is a lawful holder the dispossessed owner will succeed only if he proves bad faith or gross negligence. Since a lawful holder, in the absence of bad faith or gross negligence, is not bound to give up the instrument he may exercise the rights on the instrument. Parties to the instrument, whether they signed before or after the forgery, are liable to the lawful holder.

10. The presumption which article 16 establishes is also relevant in the context of discharge of the debtor who pays an instrument: he may act in reliance on the apparent title. According to article 40 of the ULB, payment to the possessor of an instrument who qualifies as a lawful holder under article 16 discharges the payer. The drawee need not investigate whether the person presenting the instrument for payment is the true owner and whether the signatures of the endorsers appearing on it are genuine. But there are some important exceptions to the rule. It does not apply if the drawee pays before maturity, in which case he pays at his own risk and peril (ULB article 40). Thus, the drawee cannot debit the account of the drawer if he paid before maturity to a holder who, although there is formal légitimation under article 16, is not the true owner even if there was absence of bad faith and gross negligence on the part of the holder when acquiring the instrument. He would be liable to pay a second time. Nor can the drawee debit the account of the drawer if, though paying at maturity, he has been guilty of "fraud or gross negligence". It is to be noted that the language of article 40 differs from that of article 16, where the status of lawful holder is denied to the possessor if he acquired the instrument in "bad faith" or with "gross negligence".

Who bears the risk of a forged endorsement?

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

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

Under the ULB, the payment by the drawee operates as a discharge of his debt to the drawer, and the drawee is entitled to debit the drawer's account (i.e. the risk is not upon the drawee). As the bill is paid to the person entitled to payment, the drawer discharges his obligation to the payee (i.e., the risk is not upon the drawer). The risk of forgery rests, therefore, according to the ULB, on the payee, the last owner before the forgery, who lost possession of the bill.

Under the BEA and UCC, payment by the drawee does not discharge his debt to the drawer. When the forgery is discovered, the drawee who paid must credit the account of the drawer. (As a result, the risk does not remain upon the drawer; on the other hand the drawer does not gain from the forgery since he is still liable on the bill to the payee.) The drawee is entitled to recoup his loss, by shifting it to B, who in turn will shift it to A (i.e., the risk is not upon the drawee or the person paid by him). A cannot shift the risk back. He will bear it. Consequently, under the BEA and UCC the risk falls on the person who took the bill from the forger.

Example B. The drawer sends a bill by post to the payee (P). Before the bill reaches the payee, T steals it from the post. T forges P's signature and "endorses" the bill to A who takes it without knowledge of the theft or forgery. A endorses it to B who takes it without knowledge. B receives payment from the drawee; the drawee's payment is without knowledge. The drawee debits the drawer's account.

Under the ULB, the drawee is discharged (i.e., the risk is not upon the drawee). The drawee is thus entitled to debit the drawer's account. The drawer has not paid the payee since the bill has not reached the payee. It follows that the risk of the forgery is on the drawer, the owner of the bill from whom it was stolen, and whose account was debited.

Under the BEA and UCC the drawee is not discharged. He is not entitled to debit the drawer's account with him, and he must reverse it (i.e., the risk is not upon the drawer; the drawer has not gained since he is still liable to the payee under the obligation for which the bill was drawn). The drawee is entitled to recoup his loss by shifting it to B who in turn will shift it to A (i.e., the risk is not upon the drawee or the person paid). A suffers the loss since he presumably gave goods or services to the forger without receiving payment. Thus the loss ultimately falls on the person who took the bill from the forger.

The advantages and disadvantages of the two approaches to forgery

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

(a) The ULB promotes circulation and consequently easy financing of transactions by bills or notes, since any possessor without knowledge is assured that a previous forged endorsement has no effect on his rights to and upon the bill or note. Under the BEA and UCC, on the other hand, a person without knowledge may be hesitant in taking a bill or note since he may have no right to or upon the bill or the note if there is a previous forged endorsement.

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

(c) The ULB rule provides economy of remedies. Pursuant to the ULB, when the drawee pays and debits the drawer's account, the risk of the forgery is automatically imposed on the party who should, under the ULB, bear the risk (i.e., the last owner before the forgery). There is no need for any action or litigation in order to impose the risk on such party. On the other hand, according to the BEA and UCC, a series of actions or remedies may be necessary to transfer the loss to the one ultimately responsible (i.e., the person who took from the forger). One may envisage several actions (and therefore possible disputes) before the risk rests on the taker from the forger. The first is the recrediting of the drawer's account; the second is the recouping by the drawee of the money paid; the third is the claim by the person paid against previous endorsers; the fourth is the action between the true owner and the drawer; the fifth is the action between the true owner and the drawee or subsequent endorser. Not all of those actions will actually take place and some of them are in the alternative, but there is an inherent risk of multiplicity of actions and remedies.

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

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

(b) The BEA-UCC approach puts the risk of forgery on the person who dealt with the forger. That party ought to bear the risk since he can most easily prevent it. The endorsee should know his endorser. He should not take the bill or the note from a stranger. The ULB, on the other hand, imposes the risk of forgery on the owner of the bill or the note, who under normal and efficient procedures for handling bills or notes (including the use of mail) cannot prevent theft and forgery of the bill.

14. It is to be noted that the above-mentioned advantages that are said to be inherent in one or the other system do not appear, in actual practice, to be absolute. For instance, the principal reason advanced during the 1930 international conference in favour of articles 16 and 40 of the ULB was that only by protecting the possessor of a bill who took it in good faith would the bill be susceptible of easy circulation and that circulation would be impeded if one would

oblige the endorsee or the drawee to verify the signature of all preceding endorsers who would be mostly unknown to him. However there is no proof that the common law rule has in any way impeded circulation or that bills subject to the rules of common law jurisdictions are in practice less negotiable. Nor, it would appear, has the alleged disadvantage of the ULB rule—that it discourages the use of a bill by the drawer because he bears the risk of the forgery of an endorsement—led to a decrease in the issuance of bills in countries operating under the ULB system. If bills are used to a lesser degree, the cause is probably that other methods of credit and payment have come to be preferred. The other objection that the ULB rule encourages laxity in bill transactions because there is little risk in buying a bill from a stranger, while the common law rule prevents this by imposing the risk on the purchaser, appears to be refuted by the near-absence of forged endorsements on bills in civil law countries.

15. There are other rationalizations of the rules on forged endorsements that concern their procedural effects. It is certainly true that the ULB achieves finality of payment in that, once the bill is paid by the drawee under the conditions laid down by article 40 of that Law, the drawee may debit the account of the drawer and his relations with the drawer are settled. But it is at least arguable whether this is the most appropriate solution and whether it is not preferable to protect the interests of the drawer by accepting the inconvenience of reopening the transactions.

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

Article 23 of the Convention

17. Article 23 attempts to bridge the basic differences between the common law rules and those of the ULB. The legal effects of this article and of article 14 are the following:

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

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

18. As a result:

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

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

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

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

Example D. The drawer sends a bill by post to the payee (P). Before the bill reaches P it is stolen from the post. The thief forges P's signature and "endorses" the bill to A who takes it without knowledge of the forgery. A endorses the bill to B who takes it without knowledge of the forgery. B receives payment from the drawee. The drawee debits the drawer's account. Who bears the risk?

According to article 23 payment by the drawee entitles him to debit the drawer's account. The drawer - who still is liable on his underlying obligation to the payee - has lost ownership of the bill but has a right for compensation against T and A. If T cannot be found or is insolvent A cannot shift the risk to anyone else. Therefore, the risk of the forgery rests on A as the person who took the bill from the forger.

Rationale

19. As pointed out above, each solution to the "forged endorsement" problem, whether under the BEA, the UCC or the ULB, has its advantages and disadvantages. Theoretically, the best solution would be one which embodies all the advantages of these systems, without being subject to their disadvantages. This cannot be done since any "positive" aspect of an optimum solution is of necessity accompanied by a "negative" aspect. As has been noted, the elements of an optimum solution include: (a) finality of payment; (b) economy of remedies; (c) allocation of the risk of forgery to the person best able to guard against the risk; (d) encouragement of the use of bills and notes as payment, credit or security instruments. Article 23 offers a compromise solution; it attempts to embody the principal advantages of the existing legal systems, whilst avoiding or minimizing their main disadvantages.

20. Finality of payment. Under article 23 that advantage is substantially achieved; payment by the drawee is final. The legal relations between the drawee and the drawer, the payee and the drawer, the endorsees between themselves, the drawee and the person receiving payment are settled in a final way. The only "non-final" element is the rule that enables the person from whom the instrument was stolen to recover damages from the person who acquired the instrument from the forger.

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

22. The risk of forgery should be borne by the person who is best able to prevent the forgery. It is the person who acquired the instrument from the forger who can best prevent the circulation of the instrument containing the forged endorsement. The endorsee should know his endorser. He should not take the instrument from a stranger. Article 23 encourages this by giving the owner a right of action against the person who took from the forger.

Paragraph (1)

23. The basic rule that a person to whom an instrument is transferred through an uninterrupted series of endorsements is a holder, even if any of the endorsements was forged or was signed by an agent without authority, follows from article 14(1)(b). This rule underlies the provision of paragraph (1). Consequently paragraph (1) does not apply to the case of a stolen bearer instrument.

24. Nothing in article 23 affects the rule that a forged signature does not impose any liability on the person whose signature was forged (cf. art. 30). However there are cases in which such a person will nevertheless be liable (cf. art. 30). In such cases paragraph (1) does not apply by reason of the fact that the person whose signature was forged is considered to be bound by it.

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

26. Article 23 confers a right for compensation on any party who suffered damages because of the forgery. That right is therefore not limited to the person whose endorsement was forged. Thus the drawer of a bill which was stolen from the post on its way to the payee may exercise the right if he suffered damages because of the forgery of the payee's signature.

27. The right to recover compensation may be exercised only against the forger and the immediate transferee of the forger. Thus if T forges the signature of the payee, transfers the instrument to A and A transfers to B, the payee who suffered damages because of his forged endorsement may not recover damages under article 23(1) from B, even if B knew about the forgery.

Paragraph (2)

28. Under article 23, the right to recover compensation for damages suffered because of a forged endorsement is given against the forger and against the "person to whom the instrument was directly transferred by the forger". The rationale for the rule that the right to recover compensation may be exercised against the person to whom the instrument was directly transferred by the forger, by endorsement and delivery or by delivery alone if the last endorsement was in blank, is that the transferee should know the person who so transfers the instrument to him. Therefore, such transferee is liable for damages that any party may suffer because of a forged endorsement. Paragraph (2) makes clear that the Convention makes no rule in respect of the liability of a party or the drawee to whom the instrument is transferred consequent upon payment of it by him.

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

Paragraph (3)

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

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CHAPTER FOUR. RIGHTS AND LIABILITIES

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

Article 24

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

(2) The holder is entitled to transfer the instrument in accordance with article 12.

Relevant legislation

BEA - section 38

UCC - sections 3-301 and 3-306

ULB - articles 16 and 17

Cross references

Holder: articles 4(6) and 14

Party: article 4(8)

Transfer: article 12

Commentary

1. Article 24 is the introductory article to the articles governing the rights of a holder and of a protected holder. In order to exercise the rights on an instrument under this Convention a person must, as a general rule, be a holder. Special rules obtain if a holder is not in possession of the instrument because it is lost (see articles 74 to 79). As to the duties of a holder see Chapter Five of this Convention.

2. An instrument may be transferred only by a holder. If the transfer is in accordance with the provisions of article 12 the transferee is a holder.

* * *

Article 25

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

(a) Any defence available under this Convention;

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

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

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

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

(3) A party may not raise as a defence against a holder who is not a protected holder the fact that a third person has a claim to the instrument unless:

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

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

Relevant legislation

BEA - sections 36(2) and (6), and 38(2)
UCC - section 3-306
ULB - articles 7, 16 and 17

Cross references

Holder - articles 4(6) and 14
Protected holder: articles 4(7) and 26

Commentary

1. A person who signs an instrument (a "party") is liable to the holder of it. The Convention makes a distinction between a "holder" and a "protected holder". Article 25 deals with the rights of a holder who is not a protected holder.

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

Paragraph (1)(a)

3. The Convention sets forth various defences which a party may raise against the holder. Some of them may also be raised against a protected holder (see article 26(1)(a) and commentary).

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

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

Example B. The drawer stipulates on the bill that it be presented for acceptance. The bill is not presented for acceptance and the holder, upon dishonour by non-payment, demands payment from the drawer. Under article 49 the drawer may raise as a defence the fact that his liability was conditional upon due presentment for acceptance.

Example C. The payee of a note payable on demand presents it for payment to the maker. The maker pays the note but does not request that it be handed over to him. Subsequently, the payee endorses the note to A who is not a protected holder. The maker may set up against A the defence of discharge because of payment (cf. art. 68).

Paragraph (1)(b)

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

Example D. Pursuant to a contract of sale the buyer (drawer) issues a bill made payable to the seller (payee). The seller fails to deliver the goods under the sales contract and endorses the bill to A who is not a protected holder (for instance because A when taking the bill had knowledge of seller's failure to deliver and, consequently, of buyer's defence on the bill against seller; cf. art. 4(7)(a)). The drawer may set up the defence of non-delivery in an action on the bill by A, even though A is a person with whom the drawer has not dealt.

Example E. The payee by fraud induces the maker to make a note payable to the payee. The payee endorses the note to A who is not a protected holder. A brings an action on the note against the maker. The maker may raise against A the defence based on fraud as a result of which the maker became a party.

Paragraph (1)(c)

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

Example F. A to whom the payee transferred the instrument brings an action on it against the payee. The payee may set up as a defence the fact that A has not delivered goods under a sales contract between himself and A.

Paragraph (1)(d)

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

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

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

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

Paragraph (2)

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

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

Paragraph (3)

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

Example I. The drawer issues a bill made payable to the payee. By fraud A induces the payee to transfer the bill to him. A brings an action on the bill against the drawer. Pursuant to paragraph (3) only the drawer may raise the defence based on the fraud A practised on the payee if the payee asserts his claim to the bill.

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

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

(a) the rule protects a party liable on the instrument since his liability will be discharged by his payment to the holder even if the party has knowledge of the claim of another person (cf. art. 68(3)).

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

Thus, under article 68(3), a party is not discharged of liability if, though knowing that a third person has asserted a valid claim to the instrument, he nevertheless pays it.

Article 26

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

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

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

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

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

Relevant legislation

BEA - section 38
UCC - sections 3-305 and 3-602
ULB - articles 7, 16 and 17

Cross references

Protected holder: article 4(7)

Commentary

1. As noted under article 4(7), the main advantages of a negotiable instrument result from the strong legal position of a protected holder. He receives the instrument free from any defences of prior parties and free from claims to it by any person.

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

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

Example C. The payee of a note payable on demand presents the note for payment to the maker. The maker pays the note but does not request that it be handed over to him. The payee subsequently endorses the note to A, a protected holder. The maker may not set up as a defence against A the fact that he is discharged of liability because of his having paid the note.

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

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

2. The principal rule embodied in article 26, namely that the protected holder takes the instrument free from all defences and claims of any party, is subject to a number of important exceptions as provided in paragraph (1)(a), (b) and (c).

Paragraph (1)(a)

3. The protected holder does not take the instrument free from defences that are based on the provisions of the Convention listed in paragraph (1)(a). The defences are those based on the fact that the person from whom the protected holder demands payment has not signed the instrument (art. 29(1)); that that person's signature on the instrument was forged (art. 30); that he signed the instrument before a material alteration of the instrument (art. 31(1)); that his signature was placed on the instrument in the conditions specified in article 32(3); that the instrument which should have been presented for acceptance was not so presented (art. 49); that the instrument was not duly presented for payment (art. 53); and that a right of action on the instrument is prescribed under article 80.

Example F. The drawer draws a bill for Swiss francs 1.000 payable to the payee P. P fraudulently increases the amount of the bill to Swiss francs 2.000 and transfers it to A who is a protected holder. Upon dishonour of the bill by non-payment A brings an action on the bill against the drawer for the amount of the bill. The drawer may set up as a defence against A the fact that he signed the bill before the material alteration and is liable only for Swiss francs 1.000 (article 31(1)).

Paragraph (1)(b)

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

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

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

Paragraph (1)(c)

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

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

Limitation or exclusion of liability

7. The rights of a protected holder on an instrument are determined by what is apparent ex facie the instrument. Therefore if a party has limited or excluded by a stipulation on the instrument the rights of a subsequent party or subsequent parties against him, as where an endorser has endorsed "without recourse" or has endorsed for collection or where a guarantor has guaranteed payment of only part of the sum payable, the protected holder cannot overcome such stipulation. Similarly where a party has paid part of the sum payable by the instrument - the instrument is then dishonoured by non-payment as to the amount unpaid (art. 69(3)(b)) - **and such partial payment is stated on the instrument** (art. 69(5)), the party who paid partially can successfully raise against a protected holder the fact that he is discharged of his liability on the instrument to the extent of the amount he paid.

Paragraph (2)

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

* * *

Article 27

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

(2) If a party pays the instrument in accordance with article 66 and the instrument is transferred to him, such transfer does not vest in that party the rights to and upon the instrument which any previous protected holder had.

Relevant legislation

BEA - section 29(3)
UCC - section 3-201

Cross references

Transfer: article 12
Holder: articles 4(6) and 14
Protected holder: article 4(7)

Commentary

Paragraph (1)

1. According to article 27 a holder who is not a protected holder may nevertheless obtain the rights of a protected holder if the instrument is transferred to him by a protected holder. The purpose of this so-called "shelter rule" is to enable the protected holder to receive the full benefit of his protected status by being able freely to transfer the instrument. However, this rule is not intended, and should not be used, to permit any person who "participated in a transaction which gives rise to a claim to, or defence upon, the instrument" to wash the instrument clean by passing it into the hands of a protected holder. Consequently, under this paragraph, such a person is denied the benefit of the "shelter rule".

Example A. The payee by fraud induces the drawer to draw a bill payable to the payee (P). P endorses it to A who is a protected holder. A transfers the bill to B who knows that the bill was dishonoured. B brings an action against the drawer. Under article 27, the drawer is liable to B; the drawer has no defence against A since A is a protected holder. In the above facts the rights of A were transferred to B; therefore the drawer has no defence against B.

Example B. P and B by fraud induce the drawer to draw a bill payable to P. P endorses the bill to A who is a protected holder. A transfers the bill to B. B brings an action against the drawer. The drawer has a good defence. Though generally B acquires the same rights as A and A as a protected holder has a valid right against the drawer, article 27(1) provides that this rule does not apply when the transferee was himself a party to the fraud.

However, it should be noted that the exception in article 27(1) only applies where a person participated in the specified transaction and that mere knowledge is not sufficient. Thus if, in example B., B had not participated in the fraud, but only known about it, he would have had the rights of a protected holder.

Example C. In the fact situation described in example B., B transfers the bill to C who is not a protected holder in his own right because he knew about the participation of B in the fraud. Under article 27(1) C acquires the same rights as A had and, thus, obtains the rights of a protected holder.

Paragraph (2)

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

Example D. The payee P induces by fraud the drawer to draw a bill to P, which P transfers to A who knows about the fraud. A transfers to B who is a protected holder. B transfers to C and C to A. A acquires the rights of a protected holder according to article 27(1) although as a previous party he was a holder against whom the drawer could have raised the defence of fraud.

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

* * *

Article 28

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

Relevant legislation

BEA - section 30
UCC - section 3-307(3)
ULB - article 16

Cross references

Protected holder : article 4(7)

Commentary

If a person is the holder of an instrument it is presumed that he is a protected holder. Therefore, if, in an action by the holder on the instrument against a party liable to him, such party brings a claim to the instrument or raises a defence against his liability, it is for the party bringing the claim or raising the defence to prove that the holder is not a protected holder.

* * *

Section 2. The liability of the parties

A. General provisions

Article 29

(1) Subject to the provisions of articles 30 and 32, a person is not liable on an instrument unless he signs it.

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

Relevant legislation

BEA - section 23
UCC - section 3-401

Cross references

Signature: article 4(10)

Commentary

1. Article 29 embodies one of the basic principles of negotiable instruments law, namely that a person is liable on an instrument only if he signed it. Therefore, for example, the drawee is not liable on the instrument until he accepts it. Articles 30 to 32 set forth certain exceptions to this rule.

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

* * *

Article 30

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

Relevant legislation

BEA - section 24

UCC - sections 3-404 and 3-406

Cross references

Signature, forged signature: article 4(10)

Commentary

1. In conformity with the generally prevailing rule that a person is not liable on an instrument unless he signs it (cf. art. 29), article 30 provides that a forged signature (as defined in article 4(10)) on an instrument does not impose liability on the person whose signature was forged, not even against a protected holder (cf. art. 26(1)(a)). However, article 30 sets forth two exceptions to this rule. Such person is liable if he accepts or adopts the forged signature as his own or if he represents, in writing or orally or by other conduct, that the forged signature is his own.

Example. The payee intends to endorse a bill to A. Before A takes the bill, he asks the drawer whether the signature on the bill is his. The drawer mistakenly answers in the affirmative. It turns out that the drawer's signature was forged. Under article 30, the drawer is liable on the bill since he represented to A that the signature was his own.

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

3. It should be noted that the liability of persons other than the person whose signature was forged is not dealt with in article 30 but in other provisions (articles 23, 29).

* * *

Article 31

(1) If an instrument has been materially altered:

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

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

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

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

Relevant legislation

BEA - sections 55(2)(c) and 64
UCC - sections 3-406 and 3-407
ULB - article 69

Cross references

Signature: article 4(10)

Commentary

Paragraph (1)

1. Article 31 deals with the material alteration of an instrument and not with forgery of the signature of a party, which is dealt with in article 30. It is irrelevant whether the material alteration is made by a party or a stranger.

2. The alteration does not discharge parties to the instrument of their liability. However, as to the extent of their liability it is relevant whether they signed before or after the alteration. A party who signs after the alteration is liable according to the terms of the altered text (sub-paragraph (a)). A party who signed before the alteration is liable according to the terms of the original text. The only exception to this rule is that such party is liable according to the terms of the altered text if he himself made, authorized, or assented to the alteration (sub-paragraph (b)).

Example. A bill which states the sum payable as X is accepted. The payee then raises the sum to Y and endorses the bill to A. A endorses the bill to B. By virtue of article 31, the acceptor is liable to B for X. If he dishonours the bill the drawer is liable to B for X. Pursuant to paragraph (1)(a) the payee and A are liable to B for Y.

3. The application of the above rules based on the time of the signature does not depend on whether the person claiming payment is with or without knowledge of the alteration or whether or not he is a protected holder. Thus, a party signing before the alteration is liable according to the original terms even if the holder had no knowledge of the alteration and even if he was a protected holder (cf. art. 26(1)(a)). Conversely, a party signing after the alteration is liable according to the altered terms even if the holder had knowledge of the alteration.

4. The rule in paragraph (1) places the risk of a material alteration on the person making the alteration and on the party who takes the instrument from that person. The same policy of risk allocation is adopted in the case of a forged endorsement (cf. art. 23). In certain circumstances, this risk allocation may lead to the liability of an innocent person. Such potential hardship is unavoidable and seems justified by the fundamental principle "know your endorser".

5. It should be noted that the rule on material alteration laid down in article 31 deals only with the liability on the instrument. It does not prevent a person who suffered loss because of the alteration to claim damages under national law, for example from a drawer who facilitated the alteration by leaving open a space which enabled the payee to alter the figure and wording of the sum without it being apparent.

Paragraph (2)

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

Paragraph (3)

7. Paragraph (3) defines what constitutes material alteration. The test is whether there was any change in the "written undertaking on the instrument". For example, there is such a change and, consequently, a material alteration where the date of payment is altered or the sum payable is changed (whether increased or decreased). There is no such change if, for example, the sum is given in figures only and the corresponding amount is added in words, or if on a bill without a date of payment the words "on demand" are added.

8. A change in the "written undertaking on the instrument" is possible only where there was already an instrument. According to article 1(2) and (3) a writing must comply with certain formal requisites in order to qualify as an instrument. Therefore, if one or more of the essential requisites are missing article 31 does not apply. If missing elements are added, this would be a case of completion of an instrument dealt with in article 11. However, if a writing is an instrument an alteration on it may pertain to an essential or to a non-essential requirement. The only question is whether it changes the "written undertaking on the instrument of any party".

9. There is one exception to this test: an alteration is not material if it is authorized by this Convention. For example, article 31 does not apply in the cases envisaged under article 15(b) (conversion of blank endorsement into special endorsement) or article 21 (striking out of previous endorsements).

Article 32

(1) An instrument may be signed by an agent.

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

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

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

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

Relevant legislation

BEA - sections 25 and 26

UCC - section 3-403

ULB - article 8

Cross references

Signature: article 4(10)

Commentary

Paragraph (1)

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

Paragraph (2)

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

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

Paragraph (3)

4. Paragraph (3) sets forth the cases in which not the principal but the agent himself is liable on the instrument. One case is where an agent signs without, or exceeding his, authority irrespective of whether the instrument shows that he is acting in a representative capacity. If he would simply use his principal's signature without authority, this would be a case of forgery and he would be liable under article 29(2). The second case is where an agent signs the instrument with authority but without showing that he signs in a representative capacity for a named person. Unlike in the first case, A signs with authority and he is liable only because he does not specify on the instrument that he signs on behalf of his principal as, for example, where A signs his own name. The third case is where an agent signs with authority indicating that he signs in a representative capacity but does not name the principal as, for example, where he simply signs "A, as agent".

Paragraph (4)

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

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

6. Since the only relevant factor is what appears ex facie the instrument, it is immaterial whether or not the holder had knowledge of the agent's authority or of his acting as agent. Furthermore, the above rules apply even if the holder is a protected holder (cf. art. 26(1)(a)).

Paragraph (5)

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

* * *

Article 33

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

Relevant legislation

BEA - section 53
UCC - section 3-409
ULB - article 16 of annex II to the Geneva Convention of 1930

Commentary

Article 33 provides that the drawing of a bill does not of itself operate as an assignment to the payee of any funds made available for payment by the drawer with the drawee. Therefore the payee has no rights against the drawee (unless the drawee has accepted). However, nothing in this article prevents a drawer from assigning such funds to the payee by agreement. The effect of such an agreement would be governed by national law.

* * *

B. The drawer

Article 34

(1) The drawer engages that upon dishonour of the bill by non-acceptance or non-payment, and upon any necessary protest, he will pay to the holder, or to any subsequent party who pays the bill in accordance with article 66, the amount of the bill, and any interest and expenses which may be recovered under article 66 or 67.

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

Relevant legislation

BEA - section 55 (1)(a)
UCC - sections 3-413(2) and 3-502
ULB - article 9

Cross references

Dishonour by non-acceptance: article 50
Dishonour by non-payment: article 54
Necessary protest: article 55

CommentaryParagraph (1)

1. The drawer's liability is "secondary" to that of the acceptor. Only if the bill is dishonoured (by non-acceptance or non-payment) by the drawee or acceptor will the drawer be liable. The drawer's liability (unlike that of the acceptor and maker) is "conditional": it is subject to any necessary presentment and protest. If the bill is not dishonoured, or if the bill is dishonoured but a necessary protest is not effected, the liability of the drawer has not crystallized. A distinction should be made between the absence of liability and discharge. The drawer is discharged of liability by payment or other occurrences provided in Chapter Six. Discharge assumes the existence of liability.

2. The engagement of the drawer is to pay the bill, upon dishonour and any necessary protest, to the holder or to any party subsequent to the holder who pays the bill in a recourse action. Thus, if the bill is paid by an endorser to the holder, and the bill is transferred to such endorser (with or without endorsement, cf. art. 21) by the holder, the liability of the drawer is to pay the bill to such endorser.

3. It may be noted that the liability of the drawer is not subject to any notice of dishonour. This is in conformity with the policy of this Convention that notice of dishonour is not necessary in order to render a party liable on the instrument. Under article 6⁴ failure to give due notice of dishonour renders a person who is required to give notice liable to the drawer for any damages that he may suffer from such failure.

4. Article 34 deals with the liability of the drawer. The rights of the drawer against the acceptor are dealt with in article 36(2).

Paragraph (2)

5. Paragraph (2) allows the drawer to exclude or limit his own liability by an express stipulation on the bill. Under the Convention, such power is also given to the endorser (art. 40(2)) but not to the maker (art. 35(2)).

6. The words "his own liability" make it clear that only the drawer himself benefits from such an exclusion or limitation and not any other party from whom payment is claimed. The exclusion or limitation may be invoked by the drawer even against a remote protected holder.

7. Paragraph (2) deals only with a stipulation made expressly on the bill. It does not prevent a drawer from excluding or limiting his liability by an agreement outside the bill; in such a case he may invoke the exclusion or limitation as a defence against a holder in accordance with article 25(1) unless that holder is a protected holder (cf. art. 26(1)(a)).

8. Paragraph (2) does not specify the wording that must be used to exclude or limit the liability. While the expression commonly used is "without recourse", the drawer may use other words for that purpose.

* * *

C. The maker

Article 35

(1) The maker engages that he will pay to the holder, or to any party who pays the note in accordance with article 66, the amount of the note in accordance with the terms of that note, and any interest and expenses which may be recovered under article 66 or 67.

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

Relevant legislation

BEA - section 88
UCC - section 3-413(1)
ULB - article 78

Commentary

Paragraph (1)

1. Article 35 states the basic rules on the liability of the maker of a note. The maker's liability, like that of the acceptor, is a primary liability in that his liability is not subject to presentment for payment or to any protest of dishonour for non-payment. According to paragraph (1), the maker engages to pay the amount of the note to the holder or to any party who pays the note in accordance with article 66.

2. The engagement of the maker is to pay the note to the holder or to any party who pays the note in a recourse action. Thus, if the note is paid by an endorser to the holder, and the note is transferred to such endorser (with or without endorsement, cf. art. 21) by the holder, the liability of the maker is to pay the note to such endorser.

Paragraph (2)

3. The maker, since his liability is primary, may not exclude or limit his liability by a stipulation on the note. If, nevertheless, such a stipulation is made, it does not affect the validity of the note and is without effect.

4. However, nothing in this article prevents the maker from excluding or limiting his liability by a stipulation outside the note. If he does so, he may raise this as a defence against a holder in accordance with article 25(1) but not against a protected holder (cf. art. 26(1)(a)).

* * *

D. The drawee and the acceptor

Article 36

(1) The drawee is not liable on a bill until he accepts it.

(2) The acceptor engages that he will pay to the holder, or to any party who pays the bill in accordance with article 66, the amount of the bill in accordance with the terms of his acceptance, and any interest and expenses which may be recovered under article 66 or 67.

Relevant legislation

BEA - sections 23 and 54
UCC - sections 3-401, 3-409, 3-410, and 3-413(1) and (3)
ULB - article 28

Cross references

Form of acceptance: article 37
Holder: articles 4(6) and 14

Commentary

Paragraph (1)

1. The rule expressed in this paragraph is common to all legal systems. Article 29(1) provides that no person is liable on an instrument unless he signs it.

Paragraph (2)

2. The liability of the acceptor is a primary liability: it is not conditional upon presentment for payment (cf. art. 53(3)) and the making of a protest in the event of dishonour of the bill by him (cf. art. 59(3)).

3. The liability of the acceptor is to pay the bill at maturity to the holder. If the bill was paid to the holder by a party secondarily liable the acceptor must pay to that party.

* * *

Article 37

An acceptance must be written on the bill and may be effected:

(a) By the signature of the drawee accompanied by the word "accepted" or by words of similar import; or

(b) By the signature alone of the drawee.

Relevant legislation

BEA - section 17(2)(a)
UCC - section 3-410
ULB - article 25

Cross references

Signature - article 4(10)

Commentary

The acceptance in order to be enforceable on the instrument must be in writing and must be signed by the drawee. The acceptance may be expressed by the word "accepted" or by words of similar import. However, the signature alone of the drawee, whether on the face or on the back of the bill, constitutes an acceptance.

* * *

Article 38

(1) An incomplete instrument which satisfies the requirements set out in article 1(2)(a) may be accepted by the drawee before it has been signed by the drawer, or while otherwise incomplete.

(2) A bill may be accepted before, at or after maturity, or after it has been dishonoured by non-acceptance or non-payment.

(3) When a bill drawn payable at a fixed period after sight, or a bill which must be presented for acceptance before a specified date, is accepted, the acceptor must indicate the date of his acceptance; failing such indication by the acceptor, the drawer or the holder may insert the date of acceptance.

(4) If a bill drawn payable at a fixed period after sight is dishonoured by non-acceptance and the drawee subsequently accepts it, the holder is entitled to have the acceptance dated as of the date on which the bill was dishonoured.

Relevant legislation

BEA - section 18
UCC - section 3-410(2) and (3)
ULB - article 25

Cross references

Incomplete instrument: article 11
Maturity: article 4(9)
Dishonour by non-acceptance: article 50
Dishonour by non-payment: article 54

Commentary

Paragraph (1)

1. A bill may be accepted before it is issued by the drawer or even before it is signed by him or is incomplete in other respects. If an incomplete bill is signed by the drawee he will be liable on it under this Convention only when the writing he signs satisfies the requirements set out in article 1(2)(a) and when the writing is completed in accordance with article 11. Therefore a signature of a purported drawee on a blank piece of paper can never be or become an acceptance under this Convention.

Paragraph (2)

2. A bill may be accepted also at or after maturity or after it has been dishonoured by non-acceptance or non-payment.

Paragraph (3)

3. A bill drawn payable at a fixed period after sight (i.e., at a fixed period after presentment for acceptance) must be presented for acceptance in order to determine the date of payment (article 45(2)(b)). It may happen that when such a bill is presented and accepted the acceptor omits to indicate the date of his acceptance. In such a case, the date of payment cannot be ascertained from the face of the bill, and the bill is incomplete. Paragraph (3) provides that in

such a case, the drawer or the holder may insert the date of acceptance. This Convention, by giving the drawer or holder the right to insert the missing date, uses the approach that is applicable to any other completion of an incomplete instrument (cf. art. 11).

4. Similarly when the drawer has stipulated on the bill that it is to be presented for acceptance before a specified date and the acceptor does not indicate the date of his acceptance the drawer or the holder may insert the date of acceptance.

Paragraph (4)

5. It occurs in practice that the drawee is prepared to accept an "after sight" bill which he had previously dishonoured by non-acceptance. In such a case the date of acceptance is important in order to determine the date of payment. Paragraph (4) provides that the holder is entitled to have the bill accepted not as from the date of the acceptance, but as from the date of the dishonour by non-acceptance. If the acceptor refuses to write the correct date, this would be a "qualified acceptance" dealt with in article 39 and the holder may refuse to take the "qualified" acceptance, and may treat the bill as dishonoured by non-acceptance.

* * *

Article 39

(1) An acceptance must be unqualified. An acceptance is qualified if it is conditional or varies the terms of the bill.

(2) If the drawee stipulates on the bill that his acceptance is subject to qualification:

(a) He is nevertheless bound according to the terms of his qualified acceptance;

(b) The bill is dishonoured by non-acceptance.

(3) An acceptance relating to only a part of the amount of the bill is a qualified acceptance. If the holder takes such an acceptance, the bill is dishonoured by non-acceptance only as to the remaining part.

(4) An acceptance indicating that payment will be made at a particular address or by a particular agent is not a qualified acceptance, provided that:

(a) The place in which payment is to be made is not changed;

(b) The bill is not drawn payable by another agent.

Relevant legislation

BEA - sections 19 and 44

UCC - section 3-412

ULB - article 26

Cross references

Dishonour by non-acceptance: article 50

Commentary

1. The holder of a bill is entitled to an unqualified acceptance, i.e. the undertaking by the drawee to pay the bill according to its terms. Thus, any acceptance which is conditional (making payment dependent upon the fulfillment of a condition) or which varies the terms of the bill (e.g. partial as to the amount or qualified as to place or time) would not be an unqualified acceptance and the holder is not obliged to take it.

2. If the drawee signs an acceptance which is qualified he dishonours the bill by non-acceptance but is bound by the terms of his qualified acceptance (cf. art. 50(1)(a)). In such a case the holder may exercise an immediate right of recourse upon due protest. If the holder takes the qualified acceptance and does not protest the dishonour he has rights against the acceptor under the qualified acceptance but parties secondarily liable to the holder are not liable.

3. Paragraphs (3) and (4) set forth two exceptions to the above general rule. If the acceptance is qualified because the acceptance relates to only a part of the amount of the bill, the bill is considered to be dishonoured by non-acceptance only as to the part of the amount not accepted. If the acceptance indicates that payment will be made at a particular address or by a particular agent, the acceptance is an unqualified acceptance if it does not change the terms of the bill as to the place of payment and does not substitute another agent for the agent indicated by the drawer as the payer.

* * *

E. The endorser

Article 40

(1) The endorser engages that upon dishonour of the instrument by non-acceptance or non-payment, and upon any necessary protest, he will pay to the holder, or to any subsequent party who pays the instrument in accordance with article 66, the amount of the instrument, and any interest and expenses which may be recovered under article 66 or 67.

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

Relevant legislation

BEA - section 55(2)(a)
UCC - section 3-414(1)
ULB - article 15

Cross references

Dishonour by non-acceptance: article 50
Dishonour by non-payment: article 54
Necessary protest: article 55

Commentary

1. The endorsement may be a necessary element in the transfer of an instrument (cf. art. 12(a)) and serves the function of rendering the endorser liable on the instrument. This latter function is dealt with in article 40.
2. The endorser's liability is "secondary" to that of the acceptor or maker. Only if the bill is dishonoured (by non-acceptance or non-payment) by the drawee or acceptor or if the note is dishonoured (by non-payment) by the maker, will the endorser be liable. The endorser's liability is "conditional": it is subject to any necessary presentment and protest.

Paragraph (1)

3. According to paragraph (1), the engagement of the endorser is to pay the instrument, upon dishonour and any necessary protest, to the holder or to any subsequent party who pays the instrument in a recourse action. Thus, if an instrument endorsed by the payee to A and by A to B is paid by A to B, the payee's liability is to pay A. The liability of the endorser on the instrument is, thus, similar to the drawer's liability on the bill (see commentary to art. 34, paras. 1-4).

Paragraph (2)

4. The endorser - like the drawer (art. 34(2)) but unlike the maker (art. 35(2)) - may exclude or limit his own liability by an express stipulation on the instrument. It should be noted that in the case of an endorsement for collection the exclusion of liability follows from the rule laid down in article 20(2).
5. The words "his own liability" make it clear that only the endorser himself benefits from such an exclusion or limitation and not any other party from whom payment is claimed. The exclusion or limitation being *ex facie* the instrument may be invoked by the endorser even against a remote protected holder.
6. Paragraph (2) deals only with a stipulation made expressly on the instrument. It does not prevent an endorser from excluding or limiting his liability by an agreement outside the instrument; in such a case he may invoke the exclusion or limitation as a defence against a holder in accordance with article 25(1) unless that holder is a protected holder (cf. art. 26(1)(a)).
7. Paragraph (2) does not specify the wording that must be used to exclude or limit the liability. While the expression commonly used is "without recourse", the endorser may use other words for that purpose.

* * *

Article 41

(1) Any person who transfers an instrument 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 instrument was forged or unauthorized; or
- (b) The instrument was materially altered; or
- (c) A party has a valid claim or defence against him; or
- (d) The bill was dishonoured by non-acceptance or non-payment or the note was dishonoured by non-payment.

(2) The damages recoverable under paragraph (1) may not exceed the amount referred to in article 66 or 67.

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

Relevant legislation

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

Cross references

Transfer: article 12
Forged signature: articles 4(10), 30
Unauthorized signature: article 32(3)
Material alteration: article 31
Dishonour by non-acceptance: article 50
Dishonour by non-payment: article 54
Knowledge: article 5

Commentary

Paragraph (1)

1. A person who transfers an instrument by mere delivery (cf. art. 12(b)) is not liable on the instrument since he has not signed it. However, such person may incur liability under article 41. Under this article, he is liable for any damages that a subsequent holder may suffer as a consequence of any of the circumstances referred to in sub-paragraphs (a) to (d) of paragraph (1).

2. The fact that the transferor did not know of any such circumstance, whether negligently or not, does not affect his liability under the article. Such liability benefits any subsequent holder who, when taking the instrument, has no knowledge of the deficiency. The liability under article 41 is off the instrument and, thus, presentment and protest are not conditions precedent to such liability. It materializes the moment the instrument is transferred, regardless of its date of maturity.

Example A. The maker issues a note to the payee (P) for the sum of 1,000 Swiss francs. P endorses the note in blank and delivers it to C who alters the sum payable to 11,000 Swiss francs. C delivers the note to D who does not know about the alteration, and D delivers it to E who does not know about the alteration. E may claim from the maker and from P 1,000 Swiss francs under article 31(1)(b). E has no right on the instrument against C or D since they have not endorsed it. However, E may recover from C or D, under article 41, 10,000 Swiss francs as compensation for the damages suffered by him.

3. A person who transfers an instrument by mere delivery and who has no knowledge of any circumstances giving rise to liability under article 41 may exclude or limit his liability by agreement off the instrument or by an express stipulation on the instrument. Although this faculty is not stated in article 41, it follows from the fact that it is liability off the instrument and for damages.

4. Under article 41 the holder may recover only those damages which he has suffered "on account of" any factor enumerated in paragraph (1). Consequently, insolvency of the drawer would not confer a right of action under article 41 on the transferee by mere delivery, since the transferor is not deemed, under the article, to have warranted the solvency of a secondary obligor.

5. The holder may recover only if, on account of the factors enumerated, he has in fact suffered damages. This is not the case where he has been paid the amount due, for example, by a person whose signature had been forged but who accepted it or represented it to be his own (cf. art. 30). Another example is where an instrument which was dishonoured by non-payment was nevertheless paid.

Sub-paragraph (a)

6. According to article 30 a person whose signature has been forged is not liable on the instrument. A holder who takes the instrument without knowledge of the forgery may therefore suffer loss by relying on the liability of that person. Sub-paragraph (a) is intended to protect him against such risk. The same is true with regard to an unauthorized signature.

Example B. The maker issues a note which shows on it that he signs as agent, though he had no authority to sign. The payee endorses the note in blank to B who transfers it by delivery to C. Upon dishonour by non-payment, C has an action against B under article 41(1)(a).

Sub-paragraph (b)

7. According to article 31(1)(b) parties who have signed the instrument before a material alteration are liable according to the terms of the original text. This may cause loss to a holder who receives an instrument without knowledge of the alteration (cf. above example A., para. 2). Sub-paragraph (b) is intended to protect him.

Sub-paragraph (c)

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

Example C. The maker issues a note to the payee (P). The note is stolen and P's signature is forged by A who delivers the note to B. B endorses it in blank to C. C transfers it by mere delivery to D who is not a protected holder. D is subject to a valid claim to the instrument by P and may recover any ensuing damages from C under article 41(1)(c).

Example D. The maker issues a note to the payee (P) who endorses it in blank. The note is stolen from P by T who transfers it to A who is not a protected holder. A transfers the note to B who is not a protected holder. The payee has a claim to the note against B and B may recover any damages from A (article 41(1)(c)).

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

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

Sub-paragraph (d)

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

Paragraph (2)

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

Paragraph (3)

12. Following the rationale of the liability rule in paragraph (1), i.e. to protect the innocent transferee, paragraph (3) specifies that only those transferees may recover who are without knowledge of the defect which causes the loss (as to the definition of "knowledge", see article 5).

* * *

F. The guarantor

Article 42

(1) Payment of an instrument, whether or not it has been accepted, may be guaranteed, as to the whole or part of its amount, for the account of a party or the drawee. A guarantee may be given by any person who may or may not already be a party.

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

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

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

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

(b) The signature alone of the drawee on the front of the instrument is an acceptance; and

(c) A signature alone on the back of the instrument other than that of the drawee is an endorsement.

(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 acceptor or the drawee in the case of a bill, and the maker in the case of a note.

Relevant legislation

BEA - no relevant provision and see section 56

UCC - no relevant provision and see sections 3-402, 3-415 and 3-416

ULB - articles 30 and 31

Cross references

Party: article 4(8)

Commentary

1. In addition to the liability incurred by the drawer, acceptor and endorser of a bill and the maker and endorser of a note the Convention recognizes the special liability of a person who signs an instrument as a "guarantor". The liability is a guarantee of payment of the whole or part of the amount of the instrument for the account of a party or the drawee. Such a guarantee may be given by a stranger or by someone who is already a party. The guarantee is "transferable" in nature in that it runs with the instrument.
2. The provisions of the Convention in respect of this liability of a guarantor follow in substance the provisions of the Geneva Uniform Law in respect of the giver of an aval.
3. The guarantee is given on the instrument itself, or on an allonge or slip affixed to the instrument, by a signature accompanied by the words "guaranteed", "payment guaranteed", "aval", "good as aval" or by words of similar import. However, if the guarantee is given on the face of the instrument a signature alone is sufficient to express the guarantee provided the signature is not that of the drawee (in which case it is an acceptance) or the drawer. A signature alone on the back of the instrument is an endorsement.
4. The person signing as guarantor may, but need not, indicate on the instrument for whose account he effects the guarantee. In the absence of such indication the guarantee is given for the acceptor or the drawee in the case of a bill and for the maker in the case of a note. This rule is justified by the fact that it is from the drawee, acceptor or maker that payment must initially be demanded.
5. Under the Convention a person may become a guarantor for the drawee and, indeed, if the guarantor has not specified the person for whom he has become a guarantor, the irrebuttable presumption is that he is the guarantor of the drawee (and if the drawee has accepted the bill, of the acceptor). In other words the essential liability of the guarantor of the drawee or the acceptor is to pay the bill when due: failure to present the bill for payment does not discharge him of liability (cf. art. 53(3)) nor does failure to protest dishonour (cf. art. 59(3)).

Article 43

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

(2) If the person for whom he has become guarantor is the drawee, the guarantor undertakes to pay the bill at maturity.

Relevant legislation

ULB - article 32

Cross references

Maturity - article 4(9)

Commentary

1. Subject to the exception stated in paragraph (2) of this article the liability of a guarantor is of an accessory nature: if the liability of the party for whom the guarantee is given is a primary liability (as where that party is the maker or the acceptor) the liability of the guarantor is also primary. In such a case failure to present the instrument for payment does not discharge the guarantor (cf. art. 53(3)), nor does failure to protest dishonour (cf. art. 59(3)). Likewise if the liability of the party is secondary, the liability of the guarantor is also secondary and due presentment for acceptance (where necessary) and due protest are, unless dispensed with, conditions precedent to his liability.

2. A further corollary of the rule stated in paragraph (1) is that the guarantor may base defences against his liability on the instrument on the defences which the party for whom he became guarantor may invoke. In addition the guarantor may set up defences which are personal to himself. On the other hand the guarantor is not entitled to the benefit of excussion: the holder or a party who has taken up and paid the instrument is not obliged to demand payment first from the person in favour of whom the guarantee was given. Therefore, the liability of the guarantor is not dependent on the refusal to pay by the person for whom he became guarantor. However the guarantor, other than the guarantor for the drawee, cannot be sued under the guarantee until the liability of the person for whom he became guarantor has materialized.

3. Under paragraph (1) the guarantor may "stipulate otherwise", i.e. the liability under a guarantee may be extended or restricted by the giver thereof. Such stipulation may relate to any possible element of the guarantor's liability in any possible way, including different time or place of payment and reduction or increase of the amount. For example, the guarantor may stipulate that the guarantee is given for part of the sum due or, where he is the guarantor of the drawee, that his liability is subject to due presentment and due protest, or that the guarantee is given for a limited time.

4. The rule in paragraph (1) that the liability of a guarantor is co-existent with the liability of the party for whom he has become guarantor does, for obvious reasons, not apply in the case where the guarantee is given for the drawee. The liability of the guarantor of the drawee is to pay the bill at maturity. Presentment of the bill for payment to the drawee is not necessary to make such guarantor liable on the bill.

Article 44

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

Relevant legislation

ULB - article 32

Cross references

Party: article 4(8)

Commentary

The guarantor upon payment of the instrument by him acquires rights on it against the party for whom he became guarantor and against those parties who are liable to that party. The rights of the drawee's guarantor who pays the bill are not dealt with in this Convention. Any action by such guarantor against the drawee would be outside the bill. It may be noted that the guarantor has rights on the instrument against parties who are liable on it to the party for whom he became guarantor even if he is not a holder (as where the instrument was not transferred to him under article 12). A guarantor who is not a holder may not transfer the instrument.

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

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

Article 45

- (1) A bill may be presented for acceptance.
- (2) A bill must be presented for acceptance:
 - (a) When the drawer has stipulated on the bill that it must be presented for acceptance;
 - (b) When the bill is drawn payable at a fixed period after sight; or
 - (c) When the bill is drawn payable elsewhere than at the residence or place of business of the drawee, except where such a bill is payable on demand.

Relevant legislation

BEA - section 39
UCC - section 3-501
ULB - articles 21 and 22

Cross references

Acceptance: article 37

Commentary

1. The general rule embodied in this article is that presentment for acceptance is optional except in the cases stated in paragraph (2). The provisions of the Convention pertaining to presentment for acceptance apply only to bills of exchange, not to promissory notes. By accepting the bill the drawee becomes liable on it (articles 29(1) and 36). Except in the case referred to in article 46(1) refusal by the drawee of a bill to accept it gives rise to dishonour and entitles the holder, upon due protest (article 55), to exercise an immediate right of recourse against the drawer and any endorser and guarantor (article 50(2)).

Paragraph (2)

2. In the three cases stated in paragraph (2) presentment for acceptance is a condition precedent to any right of action against the drawer, any endorser and guarantor. As to when presentment for acceptance is dispensed with, see article 48.

Sub-paragraph (a)

3. An express stipulation on a bill that it must be presented for acceptance may be made only by the drawer and benefits any subsequent party.

4. The drawer may stipulate that the bill must be presented before a specified date (cf. arts. 38(3) and 47(f)).

Sub-paragraph (b)

5. If a bill is drawn payable at a fixed period after sight (cf. art. 8(3)(b)) presentment for acceptance is necessary in order to determine the date of the instrument. If the acceptor of such a bill omits to indicate the date of his acceptance the holder may insert that date (cf. art. 38(3)).

Sub-paragraph (c)

6. The rationale of the requirement that a bill drawn payable elsewhere than at the residence or place of business of the drawee (a "domiciled" bill) must be presented for acceptance is founded upon the need to advise the drawee that a bill has been drawn upon him payable at a place other than his residence or place of business so as to enable him to provide his agent (usually a bank) with the necessary funds. However, the requirement of presentment for acceptance does not obtain in the case of a demand bill. The holder of such a bill is entitled to immediate payment and should not be required to present the bill first for acceptance.

* * *

Article 46

(1) Notwithstanding the provisions of article 45 the drawer may stipulate on the bill that it must not be presented for acceptance or that it must not be so presented before a specified date or before the occurrence of a specified event.

(2) If a bill is presented for acceptance notwithstanding a stipulation permitted under paragraph (1) and acceptance is refused, the bill is not thereby dishonoured.

(3) If the drawee accepts a bill notwithstanding a stipulation that it must not be presented for acceptance, the acceptance is effective.

Relevant legislation

ULB - article 22

Cross references

Dishonour by non-acceptance: article 50

Commentary

1. This article deals with the express stipulation on a bill that it shall not be presented for acceptance. The legal effect of such a stipulation is that the holder may not exercise an immediate right of recourse for dishonour by non-acceptance. The drawer only may write such stipulation on the bill and the stipulation benefits any subsequent party.

Paragraph (1)

2. This paragraph permits a stipulation to the effect that the bill must not be presented for acceptance or that it must not be so presented before a date specified in the stipulation or before the occurrence of a specified event. Inquiries amongst banking and trade institutions have shown that stipulations requesting the holder not to present the bill before the occurrence of a specified event occur not infrequently. In some countries, particularly Latin American, it appears to be normal practice to delay presentment until the merchandise has arrived or (in some African countries) until after customs clearance. In some countries, drawees often refuse to accept documentary bills on the ground that the carrying vessel has not yet reached its destination point, and a bill may therefore direct a holder not to present it for acceptance until the vessel has arrived.

3. Such stipulation, if made on a bill drawn payable at a fixed period after sight, does not affect the validity of the instrument as an international bill of exchange on the ground that the instrument would no longer be payable at a definite time or would be "conditional". If the specified event did not occur, for instance the vessel suffered shipwreck before reaching its destination, presentment for acceptance as directed by the stipulation is obviously impossible and would be dispensed with under article 48(b). In that case, the holder would acquire an immediate right of recourse (by virtue of article 50(1)(b)).

The bill is not made "conditional" by such a stipulation because the order to pay is not conditional.

Paragraph (2)

4. The purpose of this rule is to lay down that if a bill on which it is stipulated that it must not be presented for acceptance is nevertheless so presented and acceptance is refused, the refusal does not amount to a dishonour by non-acceptance. Consequently, a refusal to accept such a bill does not entitle the holder to an immediate right of recourse against prior parties and they can become liable only if the bill is dishonoured by non-payment.

Paragraph (3)

5. An acceptance is an engagement by the drawee that he will pay the bill to the holder or to any party who pays the bill in accordance with article 66. Accordingly, an acceptance even if made in the context of a stipulation under paragraph (1) binds the drawee and benefits all parties.

* * *

Article 47

A bill is duly presented for acceptance if it is presented in accordance with the following rules:

- (a) The holder must present the bill to the drawee on a business day at a reasonable hour;
- (b) A bill drawn upon two or more drawees may be presented to any one of them, unless the bill clearly indicates otherwise;
- (c) Presentment for acceptance may be made to a person or authority other than the drawee if that person or authority is entitled under the applicable law to accept the bill;
- (d) If a bill is drawn payable on a fixed date, presentment for acceptance must be made before or on the date of maturity;
- (e) A bill drawn payable on demand or at a fixed period after sight must be presented for acceptance within one year of its date;
- (f) A bill in which the drawer has stated a date or time-limit for presentment for acceptance must be presented on the stated date or within the stated time-limit.

Relevant legislation

BEA - sections 40 and 41
UCC - sections 3-503 and 3-504
ULB - articles 2, 22 and 23

Cross references

Acceptance: article 37
Date or time-limit for acceptance: articles 45 and 46
Bill drawn upon two or more drawees: article 9

Commentary

1. In order to establish the liability of parties because of dishonour by non-acceptance, presentment for acceptance, whether optional or mandatory (cf. art. 45), must be due presentment. Article 47 specifies what constitutes due presentment for acceptance.

Paragraph (a)

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

3. In contrast to presentment for payment, which is local, i.e. where the funds are, presentment for acceptance is personal. It must be made to the drawee or his authorized agent because he must write the acceptance. For this reason, it is not necessary to set forth rules as to the place of presentment for acceptance.

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

Paragraph (b)

5. This paragraph envisages the special case of bills drawn upon two or more drawees, and follows in this respect section 3-504 (3)(a) of the UCC which eliminates the requirement, found in section 41(1)(b) of the BEA, that presentment be made to each of two or more drawees. Under paragraph (b), presentment is to be made to all drawees only when it is so indicated on the bill.

Paragraph (c)

6. This paragraph applies to cases where, for instance, the drawee of a bill is dead or insolvent or where he is incapable by reason of insanity, or where a body corporate is in liquidation or has ceased to exist. These circumstances excuse the holder from presentment for acceptance (article 48(a)) and entitle him to treat the bill as dishonoured by non-acceptance. However, presentment to a person or authority entitled under the applicable law to accept the bill is, if the other requirements of article 47 are met, due presentment and an acceptance so obtained is a valid acceptance.

Paragraphs (d) to (e)

7. These provisions lay down rules as to the time of presentment for acceptance.

Paragraph (d)

8. Presentment for acceptance of a bill with a fixed maturity date must be made on or before the date the bill is payable. It may be noted that if acceptance is obtained after maturity the acceptance will bind the acceptor (cf. art. 38(2)), though in such a case the bill is not "duly presented for acceptance" for the purposes of article 47. If the bill was one which must be presented for acceptance under article 45(2) the drawer, the endorsers and the guarantors would not be liable on the bill (cf. art. 49).

Paragraph (e)

9. A bill payable at a fixed period after sight must be presented for acceptance (cf. art. 45(2)(b)). Paragraph (e) follows the ULB by requiring that such a bill must be presented for acceptance within one year of its date. Under article 1(2)(d) a bill must be dated. The BEA and UCC provide that an after sight bill must be either presented for acceptance or negotiated within a reasonable time. Since the concept of "reasonable time" with reference to negotiable instruments is unknown outside the common law countries and might lead to difficulties of application on universal level, it has not been retained in this Convention.

Paragraph (f)

10. This paragraph covers a bill on which the drawer has stipulated that it be presented for acceptance on a specified date or within a specified period of time. Such a stipulation benefits any subsequent party.

* * *

Article 48

A necessary or optional presentment for acceptance is dispensed with:

(a) If the drawee is dead or has no longer the power freely to deal with his assets by reason of his insolvency, or is a fictitious person or a person not having capacity to incur liability on the instrument as an acceptor, or if the drawee is a corporation, partnership, association or other legal entity which has ceased to exist;

(b) When, with reasonable diligence, presentment cannot be effected within the time-limits prescribed for presentment for acceptance.

Relevant legislation

BEA - section 41(2) and (3)
UCC - section 3-511
ULB - article 54

Cross references

Necessary or optional presentment for acceptance: article 45
Time-limits for presentment for acceptance: article 47(d) to (f)

Commentary

1. Article 48 states the cases in which presentment for acceptance is dispensed with. Under article 50(1)(b) such cases constitute constructive dishonour and under article 50(2) the holder may then, subject to any necessary protest, exercise an immediate right of recourse.

2. The common law system and the Geneva Uniform Law both recognize the existence of circumstances which excuse the holder from an obligation to present a bill for acceptance or for payment, or from drawing up a protest or giving a notice of dishonour. However, there are sharp differences as to the approach adopted, on the one hand, by the BEA and UCC and, on the other hand, by the ULB.

(a) Under the English and American statutes, circumstances beyond the control of the holder excuse delay in presentment, protest or notice of dishonour. Once the cause of delay has ceased to operate presentment or protest must be made with "reasonable diligence". Presentment or protest or notice of dishonour is dispensed with when, after the exercise of reasonable diligence, it cannot be effected. Under the ULB, the existence of an insurmountable obstacle ("vis major") extends the time-limits for presentment or for protest. The holder must, on pain of losing his right of recourse against prior parties, present the bill or draw up protest "without delay" if the "vis major" ceases to operate within a period of 30 days after maturity, or, in respect of demand bills and after sight bills, within 30 days as from the date on which the holder has given notice of "vis major" to his endorser. The holder is dispensed from making presentment or protest if the "vis major" continues to operate beyond that period, and he is then permitted to exercise an immediate right of recourse.

(b) The grounds upon which presentment or protest is excused or dispensed with under the two systems also differ. The ULB mentions only "vis major", including the "legal prohibition (prescription légale) by any State", but excludes expressly "facts which are purely personal to the holder". Under the BEA and UCC, such "personal facts" can be a legitimate cause for delay or for dispensation.

(c) The BEA and UCC set forth grounds, excusing delay in presentment or protest or dispensing with these formalities, that are not expressly mentioned in the ULB, and vice versa.

3. Article 48 does not make provision for the excuse of delay. The Convention adopts a system of fixed time-limits for presentment for acceptance (article 47), as in the ULB, rather than the concept of reasonable time recognized under Anglo-American law. If by reasonable diligence presentment for acceptance cannot be made within the prescribed time-limits for such presentment, presentment is completely dispensed with.

4. If the drawee is dead, insolvent or without capacity to incur liability on the instrument as an acceptor, or is a body corporate in liquidation or having ceased to exist, the holder may either present the bill "to a person or authority other than the drawee if that person or authority is entitled under the applicable law to accept the bill" (article 47(c)) or treat the bill as dishonoured and exercise an immediate right of recourse against prior parties. The question what constitutes insolvency or incapacity is left to the applicable national law.

5. If the drawee is a fictitious person the holder is entitled to treat the bill as dishonoured and exercise an immediate right of recourse. The fact that the drawee is a fictitious person does not violate the formal requisites under article 1(2)(b).

* * *

Article 49

If a bill which must be presented for acceptance is not so presented, the drawer, the endorsers and their guarantors are not liable on the bill.

Relevant legislation

BEA - sections 39(3) and (4), and 40
UCC - sections 3-501 and 3-502
ULB - article 53

Cross references

Bills that must be presented for acceptance: article 45(2)

Commentary

If the bill is one which must be presented for acceptance (cf. art. 45(2)) due presentment for acceptance is a condition precedent to the liability of parties prior to the holder. If the bill is not so presented a refusal by the drawee to pay the bill does not constitute dishonour by non-payment and does not entitle the holder to a right of recourse against prior parties.

* * *

Article 50

(1) A bill is considered to be dishonoured by non-acceptance:

(a) When the drawee, upon due presentment, expressly refuses to accept the bill or acceptance cannot be obtained with reasonable diligence or when the holder cannot obtain the acceptance to which he is entitled under this Convention;

(b) If presentment for acceptance is dispensed with pursuant to article 48, unless the bill is in fact accepted.

(2) If a bill is dishonoured by non-acceptance the holder may:

(a) Subject to the provisions of article 55, exercise an immediate right of recourse against the drawer, the endorsers and their guarantors;

(b) Exercise an immediate right of recourse against the guarantor of the drawee.

Relevant legislation

BEA - sections 42 and 43
UCC - sections 3-502 and 3-507
ULB - article 53

Cross references

Due presentment: article 47

Presentment dispensed with: article 48

Acceptance to which the holder is entitled: article 39

Right of recourse: article 55

Commentary

1. Pursuant to article 39 the holder of a bill is entitled to an unqualified acceptance; a qualified acceptance constitutes dishonour (cf. art. 39).
2. The fact that a bill has been dishonoured by non-acceptance does not prevent the drawee from accepting it subsequently (cf. art. 38(2)).
3. Article 50(1) lays down what constitutes dishonour by non-acceptance. Article 50(2) states the legal effect of such dishonour. The exercise of the immediate right of recourse is subject to due protest (cf. art. 55). In such a case presentment for payment is dispensed with (cf. art. 52(2)).
4. Pursuant to article 42(1) payment of the bill may be guaranteed for the account of the drawee. If the guarantor of the drawee pays the bill the other parties are discharged.

* * *

Section 2. Presentment for payment and dishonour by non-paymentArticle 51

An instrument is duly presented for payment if it is presented in accordance with the following rules:

- (a) The holder must present the instrument to the drawee or to the acceptor or to the maker on a business day at a reasonable hour;
- (b) A bill drawn upon or accepted by two or more drawees, or a note signed by two or more makers, may be presented to any one of them, unless the instrument clearly indicates otherwise;
- (c) If the drawee or the acceptor or the maker is dead, presentment must be made to the persons who under the applicable law are his heirs or the persons entitled to administer his estate;
- (d) Presentment for payment may be made to a person or authority other than the drawee, the acceptor or the maker if that person or authority is entitled under the applicable law to pay the instrument;
- (e) An instrument which is not payable on demand must be presented for payment on the date of maturity or on the business day which follows;
- (f) An instrument which is payable on demand must be presented for payment within one year of its date;
- (g) An instrument must be presented for payment:
 - (i) At the place of payment specified on the instrument; or
 - (ii) If no place of payment is specified, at the address of the drawee or the acceptor or the maker indicated on the instrument; or
 - (iii) If no place of payment is specified and the address of the drawee or the acceptor or the maker is not indicated, at the principal place of business or habitual residence of the drawee or the acceptor or the maker;
- (h) An instrument may be presented for payment at a clearing-house.

Relevant legislation

BEA - section 45

UCC - sections 3-503 and 3-504

ULB - articles 34 and 38

Cross references

Holder: articles 4(6) and 14

Bill drawn upon two or more drawees: article 9(1)

Note signed by two or more makers: article 9(2)

Instrument payable on demand: article 8(1) and (2)

Commentary

1. In order to establish the liability of parties because of dishonour by non-payment, presentment for payment must be due presentment. Article 51 specifies what constitutes due presentment for payment.

Paragraph (a)

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

3. The requirement that presentment must be made "on a business day at a reasonable hour" refers to the business day and reasonable hour at the place of the drawee, the acceptor or the maker, as the case may be.

Paragraph (b)

4. Under paragraph (b) presentment is to be made to all drawees or to all makers only when it is so indicated on the instrument. If a place of payment is specified on the instrument the holder must present it to the drawee, the acceptor or maker at that place, but if two or more drawees, acceptors or makers have their residence or place of business at that place the holder may present the instrument to any one of them.

Paragraph (c)

5. In contrast with presentment for acceptance (article 48(a)) the death of the drawee or the acceptor or the maker does not dispense with presentment for payment but the holder must present the instrument for payment to the person who under the applicable law is his heir or the person administering his estate.

Paragraph (d)

6. This paragraph applies to cases where, for instance, the drawee, the acceptor or the maker is insolvent or where he is incapable by reason of insanity, or where a body corporate is in liquidation or has ceased to exist. These circumstances excuse the holder from presentment for payment (cf. art. 52(2)(d)) and entitle him to treat the instrument as dishonoured by non-payment. However, presentment to a person or authority entitled under the applicable law to pay the instrument is due presentment.

Paragraphs (e) and (f)

7. These paragraphs set forth rules as to the time at which or within which presentment for payment must be made. Presentment for payment after the business day following the date of maturity (in the case of instruments payable at a definite time) or within one year of the date of the instrument

(in the case of instruments payable on demand) deprives the holder of the right of recourse if the instrument is dishonoured and prior parties will not be liable to him on it. However, presentment for payment is unnecessary to render the acceptor liable (cf. art. 36(2)).

Paragraphs (g) and (h)

8. Since presentment for payment is "local" (cf. para. 3 of the commentary to art. 47), paragraphs (g) and (h) set forth rules regarding the proper place of presentment for payment.

* * *

Article 52

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

(2) Presentment for payment is dispensed with:

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

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

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

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

(b) If an instrument is not payable on demand, and the cause of delay in making presentment continues to operate beyond 30 days after maturity;

(c) If an instrument is payable on demand, and the cause of delay continues to operate beyond 30 days after the expiration of the time-limit for presentment for payment;

(d) If the drawee, the maker or the acceptor has no longer the power freely to deal with his assets by reason of his insolvency, or is a fictitious person or a person not having capacity to make payment, or if the drawee, the maker or the acceptor is a corporation, partnership, association or other legal entity which has ceased to exist;

(e) If there is no place at which the instrument must be presented in accordance with article 51(g).

(3) Presentment for payment is also dispensed with as regards a bill, if the bill has been protested for dishonour by non-acceptance.

Relevant legislation

BEA - section 46

UCC - section 3-511

ULB - articles 44 and 54

Cross references

Instrument payable on demand: article 8(1) and (2)

Commentary

1. Article 52 provides for the excuse of delay in making presentment of an instrument for payment and states the grounds on which such presentment is dispensed with.

Paragraph (1)

2. When delay is excused the liability of parties prior to the holder is not affected on the ground that there was no due presentment for payment. Under paragraph (1) delay is excused when the holder is prevented from presenting the instrument for payment by circumstances beyond his control which he could neither avoid nor overcome. When the cause of delay ceases to operate presentment must be made with reasonable diligence. However, if such cause continues to operate beyond 30 days after maturity (in the case of instruments not payable on demand) or after the expiration of the time-limit for presentment for payment (in the case of instruments payable on demand) presentment is altogether dispensed with and a right of recourse may be exercised against parties secondarily liable on the instrument.

Paragraph (2)

3. Paragraph (2) states the cases where presentment for payment is dispensed with. Under article 5⁴(1)(b) such cases constitute constructive dishonour and under article 5⁴(2) the holder may then, subject to any necessary protest, exercise a right of recourse.

Sub-paragraph (a)

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

Sub-paragraph (d)

5. As noted in the commentary to article 51, the death of the drawee, the maker or acceptor is not a ground for dispensation and in such a case, the holder must present the instrument for payment to the deceased's heir or to the person administering the deceased's estate. However, insolvency of the drawee, the maker or the acceptor, or the fact that he is a fictitious person or is without capacity to pay an instrument, or the fact that the drawee, etc. is a corporate body or other legal entity which has ceased to exist are grounds dispensing with the necessity for presentment for payment.

Paragraph (3)

6. Protest for dishonour by non-acceptance of a bill entitles the holder to an immediate right of recourse. Consequently, such protest dispenses with the necessity for presentment for payment. Paragraph (3) does not apply where the drawer has stipulated on the bill that it must not be presented for acceptance: refusal by the drawee to accept such a bill does not constitute dishonour (cf. art. 46(2)).

Article 53

(1) If a bill is not duly presented for payment, the drawer, the endorsers and their guarantors are not liable thereon.

(2) If a note is not duly presented for payment, the endorsers and their guarantors are not liable thereon.

(3) Failure to present an instrument for payment does not discharge the acceptor or the maker or their guarantors or the guarantor of the drawee of liability thereon.

Relevant legislation

BEA - section 45
UCC - sections 3-501 and 3-502
ULB - article 53

Cross references

Due presentment for payment: article 51

Commentary

1. Presentment for payment of a bill is one of the conditions precedent to the liability of parties prior to the holder. Therefore, non-presentment or failure to present the bill in accordance with the requirements of due presentment (article 51) deprives the holder of his right of recourse against prior parties. The drawee may of course accept the bill after maturity, and such an acceptance will make him liable to the holder and any party subsequent to the holder (article 38(2)). Presentment for payment is not necessary to render the acceptor liable (cf. art. 36(2)) or the guarantor of the drawee.

2. Presentment for payment of a note is not necessary in order to render the maker liable (cf. art. 35(1)) or his guarantor. However such presentment is a condition precedent to the liability of the endorsers and their guarantors.

* * *

Article 54

(1) An instrument 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;

(b) If presentment for payment is dispensed with pursuant to article 52(2) and the instrument is unpaid at maturity.

(2) If a bill is dishonoured by non-payment, the holder may, subject to the provisions of article 55, exercise a right of recourse against the drawer, the endorsers and their guarantors.

(3) If a note is dishonoured by non-payment, the holder may, subject to the provisions of article 55, exercise a right of recourse against the endorsers and their guarantors.

Relevant legislation

BEA - section 47
UCC - section 3-507
ULB - article 43

Cross references

Due presentment for payment: article 51
Dispensation of presentment for payment: article 52(2)
Payment to which the holder is entitled: articles 69, 70 and 71

Commentary

Paragraph (1)

1. Article 54 states when an instrument is dishonoured by non-payment. Paragraph (1)(a) deals with actual dishonour by non-payment: when payment is refused or the holder cannot obtain the payment to which he is entitled. Paragraph (1)(b) deals with constructive dishonour by non-payment: when presentment for payment is dispensed with under article 52(2).

Payment to which the holder is entitled

2. Pursuant to articles 69 and 70 the holder may refuse to take partial payment and refuse to take payment in a place other than the place where the instrument was presented for payment in accordance with article 51. Therefore, the refusal by the holder to take such payment results in dishonour by non-payment.

3. Pursuant to article 71 the refusal of the holder to take payment of an instrument, denominated in foreign currency or to be paid in a specified currency, in local currency results in dishonour by non-payment.

Paragraphs (2) and (3)

4. The effect of dishonour by non-payment is that the holder is, subject to any necessary protest (cf. art. 55), entitled to exercise a right of recourse against the drawer, the endorsers and the guarantors of the drawer and endorsers in the case of a bill and against the endorsers and the guarantors of the endorsers in the case of a note.

* * *

Section 3. Recourse

A. Protest

Article 55

If an instrument has been dishonoured by non-acceptance or by non-payment, the holder may exercise a right of recourse only after the instrument has been duly protested for dishonour in accordance with the provisions of articles 56 to 58.

Relevant legislation

BEA - sections 48 and 51(2)
UCC - section 3-501(2) and (3)
ULB - article 44

Cross references

Dishonour by non-acceptance: article 50
Dishonour by non-payment: article 54
Holder: articles 4(6) and 14
Protest for dishonour: articles 56 to 58

Commentary

1. The effect of dishonour by non-acceptance or by non-payment is that it entitles the holder to a right of recourse against the drawer, endorsers and guarantors. The making of a protest is necessary in order for the holder to be entitled to exercise that right. Protest where protest is necessary is a condition precedent to the liability of the drawer, endorsers and guarantors. The acceptor and his guarantor remain liable on a bill, and the maker and his guarantor on a note, irrespective of whether the bill or note was presented for payment or protested for non-payment.

Protest and notice of dishonour

2. Under article 44 of the ULB, non-acceptance or non-payment must be evidenced by an authenticated act (protest for non-acceptance or non-payment). Questions as to the form of protest are left to the law of the place in which the protest must be drawn up. The Geneva Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, in article 8 of annex II (reservations), permits a Contracting State to "prescribe that protest to be drawn up in its territory may be replaced by a declaration dated and written on the bill itself, and signed by the drawee, except where the drawer stipulates in the body of the bill of exchange itself for an authenticated protest".

3. Under Anglo-American law the exercise of the right of recourse consequent upon dishonour requires, as a general rule, notice of dishonour. If notice of dishonour is not given the drawer and endorsers in the case of a bill and the endorsers in the case of a note are discharged (cf. BEA section 48; UCC section 3-501, but see section 3-501(2)(b) as regards the drawer). Protest is required only in the case of foreign bills of exchange (cf. BEA section 51(1); UCC section 3-501(3)).

4. Under this Convention the exercise of a right of recourse is conditional upon effectuating protest and failure to protest results in the discharge of any endorser of a bill or note, the drawer of a bill, and their guarantors. Notice of dishonour is, under this Convention, not a condition precedent to liability of parties secondarily liable but may give rise to an action for damages suffered by a party because of not having received notice (cf. art. 64).

* * *

Article 56

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

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

(2) A protest may be made:

- (a) On the instrument itself or on a slip affixed thereto ("allonge"); or
- (b) As a separate document, in which case it must clearly identify the instrument that has been dishonoured.

(3) Unless the instrument stipulates that protest must be made, a protest may be replaced by a declaration written on the instrument and signed and dated by the drawee or the acceptor or the maker, or, in the case of an instrument domiciled with a named person for payment, by that named person; the declaration must be to the effect that acceptance or payment is refused.

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

Relevant legislation

BEA - section 51(7)
UCC - section 3-509
ULB - article 44; article 8 of **annex** II of the Geneva Convention of 1930

Cross references

Protest as a condition precedent to the liability of parties - articles 55 and 59
Dishonour - articles 50 and 54

Commentary

1. Under article 56 protest may be made (a) in the form of a written statement, on the instrument itself or in a separate document, signed by a person authorized by the law of the place of dishonour to certify dishonour or (b) in the form of a written declaration on the instrument, signed by the person dishonouring it, to the effect that acceptance or payment is refused. Paragraphs (1) and (2) deal with the protest mentioned under (a) above and paragraphs (3) and (4) with the declaration written on the instrument mentioned under (b) above.

2. The object of protest is to provide proof that the instrument was duly presented for acceptance or for payment and of dishonour by the drawee or the acceptor or the maker consequent upon such presentment. However, if presentment for acceptance or for payment is dispensed with under articles 48 or 52(2), protest for dishonour by non-acceptance or non-payment is also dispensed with (cf. art. 58(2)(d)).

3. Pursuant to article 66 the holder in a recourse action may recover from any party liable any expenses of protest.

4. If the holder of a bill takes a partial acceptance (cf. art. 39(3)) he must protest the bill as to the balance of its amount. Similarly, if the holder of an instrument takes partial payment (cf. art. 69(2)) he must protest the instrument as to the balance of its amount.

5. Protest is unnecessary to render liable the acceptor of a bill (cf. art. 36(2)) or the maker of a note (cf. art. 35(1)), the guarantor of either (cf. art. 43(1)), or the guarantor of the drawee (cf. art. 59(3)).

* * *

Article 57

(1) Protest for dishonour of a bill by non-acceptance must be made on the day on which the bill is dishonoured or on one of the two business days which follow.

(2) Protest for dishonour of an instrument by non-payment must be made on the day on which the instrument is dishonoured or on one of the two business days which follow.

Relevant legislation

BEA - sections 51(4) and 93
UCC - section 3-509(4) and (5)
ULB - article 44

Cross references

Form of protest: article 56
Dishonour by non-acceptance: article 50
Dishonour by non-payment: article 54

Commentary

Article 57 lays down the time-limits within which an instrument must be protested for dishonour. Failure to observe these time-limits deprives the holder of his right of recourse against parties other than the acceptor or the maker or their guarantors or the guarantor of the drawee.

* * *

Article 58

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

(2) Protest for dishonour by non-acceptance or 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 instrument by the drawer, binds any subsequent party and benefits any holder;

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

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

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

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

(d) If presentment for acceptance or for payment is dispensed with in accordance with article 48 or 52(2).

Relevant legislation

BEA - section 51(9)
UCC - section 3-511
ULB - article 54

Cross references

Time-limit within which protest must be made - article 57

Commentary

Paragraph (1)

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

Paragraph (2)

2. Paragraph (2) states the cases where protest is dispensed with. The effects of waiver of protest by the drawer, his endorser or guarantor on or off the instrument are, as regards the person or party waiving protest and the holder whom the waiver benefits, identical to the effects of a waiver of presentment for payment (see **para. 4 of the commentary to art. 52**).

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

* * *

Article 59

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

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

(3) Failure to protest an instrument does not discharge the acceptor or the maker or their guarantors or the guarantor of the drawee of liability thereon.

Relevant legislation

BEA - section 51(2)
UCC - sections 3-501(3) and (4), and 3-502
ULB - article 53

Cross references

Due protest - articles 56 and 57

Commentary

1. Failure on the part of the holder to make due protest under articles 56 and 57, unless excused or dispensed with under article 58, results in the absence of liability of parties secondarily liable on the instrument.

2. The liability of the acceptor, the maker, their guarantors and the guarantor of the drawee is a primary liability and no protest is necessary to render any of them liable on the instrument.

* * *

B. Notice of dishonour

Article 60

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

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

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

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

Relevant legislation

BEA - section 49
UCC - sections 3-501 and 3-508
ULB - article 45

Cross references

Dishonour by non-acceptance - article 50
Dishonour by non-payment - article 54

Commentary

1. As noted in the commentary to article 55 (paras. 2-4), the Convention follows the approach of the ULB in considering protest as one of the conditions precedent to the liability of parties secondarily liable. In line with the ULB, the duty of the holder to give due notice of dishonour is not a condition precedent to the liability of the parties entitled to notice but the holder is liable for damages which such parties may have suffered as a consequence of his failure to give due notice. Article 60 should therefore be read in conjunction with article 64 which states the consequences of failure to give **due notice of dishonour**.

2. According to **article 60 notice of dishonour must be given by the holder to any prior party secondarily liable and by any party, who has himself received notice, to the party immediately preceding him and liable on the instrument.** However, the notice operates for the benefit of any party who has a right of recourse against the party who received notice of dishonour.

Example. The payee endorses the bill to A. A endorses it to B, B to C and C to D. Upon dishonour of the bill by the drawee, D **must, under article 60,** give notice of dishonour to the drawer, the payee, A, B and C and failure to do so will render D liable for damages to the party paying the bill. When C receives notice of dishonour from D, C, **in turn, must give notice of dishonour to B.** Notice sent by D to the drawer enures for the benefit of the payee, A, B and C.

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

* * *

Article 61

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

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

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

Relevant legislation

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

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

ULB - article 45

Cross references

Notice of dishonour - articles 60 to 64

Dishonour by non-acceptance - article 50

Dishonour by non-payment - article 54

Commentary

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

2. Written notice is duly given when it is sent even though it is not received by the addressee. However, the burden of proof that due notice has been given falls on the person who, under article 60, is obliged to give notice.

* * *

Article 62

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

- (a) The day of protest or, if protest is dispensed with, the day of dishonour; or
- (b) The receipt of notice given by another party.

Relevant legislation

BEA - section 49(12)
UCC - section 3-508(2)
ULB - article 45

Cross references

Time-limit for protest - article 57
Protest dispensed with - article 58(2)

Commentary

1. Article 62 sets forth the period of time within which notice of dishonour can duly be given. It is commercially desirable that parties liable on the instrument as a consequence of dishonour be advised without delay that they have become liable. Inquiries amongst banking and trade circles have led to the conclusion that a period of three days (i.e., the day of protest or, where protest is dispensed with, the day of dishonour, and the two business days that follow) is an adequate and practicable period in which to give notice; it will, in most cases, enable the holder's agent in a foreign country where the instrument was payable to inform his principal of the dishonour and will enable the holder to give notice to prior parties. Thus, if the instrument is payable on a Monday the holder may present it not only on that day but also on Tuesday (cf. art. 51(e)). According to article 57 protest must be made on the day on which the instrument is dishonoured (on Monday or Tuesday as the case may be) or on one of the two business days which follow (on Wednesday or Thursday at the latest as the case may be). Pursuant to article 62 notice of dishonour may duly be given on Wednesday or Thursday (in the above example) or within the two business days which follow, i.e. either Friday or Monday of the following week.

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

* * *

Article 63

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

(2) Notice of dishonour is dispensed with:

(a) If after the exercise of reasonable diligence notice cannot be given;

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

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

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

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

(c) As regards the drawer of the bill, if the drawer and the drawee or the acceptor are the same person.

Relevant legislation

BEA - section 50
UCC - section 3-511

Cross references

Time-limit for giving notice - article 62

Commentary

1. Paragraph (1) sets forth the ground justifying delay in giving notice of dishonour. The provision is similar to paragraph (1) of article 52 in respect of delay in making presentment for payment and paragraph (1) of article 58 in respect of delay in protesting an instrument. When delay is excused the liability of the person who is obliged to give notice (i.e. for damages, cf. art. 64) is not affected on the ground that there was no due notice.

2. Paragraph (2) states the cases in which notice of dishonour is dispensed with. In such cases the person obliged to give notice is not liable for damages under article 64.

3. As to the legal effects of waiver on or off the instrument see the commentary to article 52 (para. 4).

* * *

Article 64

Failure to give notice of dishonour renders a person who is required to give such notice under article 60 to a party who is entitled to receive such notice liable for any damages which that party may suffer from such failure, provided that such damages do not exceed the amount referred to in article 66 or 67.

Relevant legislation

BEA - section 48
UCC - section 3-501(2)
ULB - article 45

Cross references

By whom and to whom notice of dishonour must be given - article 60
Form of notice - article 61
When to give notice - article 62
Delay in giving notice - article 63(1)
Notice dispensed with - article 63(2)

Commentary

1. The consequences of failure to give notice differ sharply between the Anglo-American law and the Geneva Uniform Law. Under the BEA and the UCC, the giving of notice of dishonour is necessary to charge parties and is thus a condition precedent to their liability on the bill to the holder or to any other party who has acquired a right of recourse against them. Under the ULB, failure to give notice does not discharge the drawer's or prior endorsers' liability on the bill, but merely makes the party who failed to give notice liable for the damages resulting from such failure. Under the ULB, therefore, a holder or any other party who acquires a right of recourse, but failed to give notice, may exercise such right of recourse upon due protest.

2. Article 64 follows the ULB approach. Due notice of dishonour is not a condition precedent to liability of secondary parties on the instrument but renders the person who failed to give notice liable for damages resulting from such failure. The amount of damages is limited to the amount of the instrument and may include the interest and expenses due under article 66 or 67.

* * *

Section 4. Amount payable

Article 65

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

Relevant legislation

ULB - article 47

Cross references

Parties liable on the instrument : Section 2. of Chapter Four
Liability of the drawer : article 34
Liability of the maker : article 35
Liability of the acceptor : article 36(2)
Liability of the endorser : article 40
Liability of the guarantor : article 43

Commentary

The liability of the parties to an instrument and the conditions in which they become liable are stated in Section 2. of Chapter Four of this Convention. Article 65 is intended to make clear that the holder in exercising his rights on the instrument may proceed against all parties together or against all parties individually or against any individual party without being required to observe the order in which they have become liable. The right of recourse against the drawer, acceptor, endorsers and guarantors (in the case of a bill) and the maker, endorsers and guarantors (in the case of a note) is conditioned upon the holder's having duly presented the instrument and protested the dishonour, except in those cases where presentment and protest is dispensed with.

* * *

Article 66

(1) The holder may recover from any party liable:

(a) At maturity: the amount of the instrument with interest, if interest has been stipulated for;

(b) After maturity:

(i) The amount of the instrument with interest, if interest has been stipulated for, to the date of maturity;

(ii) If interest has been stipulated to be paid after maturity, interest at the rate stipulated, or in the absence of such stipulation, interest at the rate specified in paragraph (2), calculated from the date of presentment on the sum specified in paragraph (1)(b)(i);

(iii) Any expenses of protest and of the notices given by him;

(c) Before maturity:

(i) The amount of the bill with interest, if interest has been stipulated for, to the date of payment, subject to a discount from the date of payment to the date of maturity, calculated in accordance with paragraph (3);

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

(2) The rate of interest shall be $\frac{2}{100}$ per cent per annum above the official rate (bank rate) or other similar appropriate rate effective in the main centre of the country where the instrument is payable. If there is no such rate, the rate of interest shall be $\frac{2}{100}$ per cent per annum above the official rate (bank rate) or other similar appropriate rate effective in the main centre of the country in the currency of which the instrument is payable. In the absence of any such rates, the rate of interest shall be $\frac{2}{100}$ per cent per annum.

(3) The discount shall be at the official rate (discount rate) or other similar appropriate rate effective on the date when recourse is exercised at the place where the holder has his principal place of business, or if he does not have a place of business his habitual residence, or if there is no such rate then at the rate of $\frac{2}{100}$ per cent per annum.

Relevant legislation

BEA - section 57
UCC - no equivalent provision, but see section 3-122
ULB - article 48

Cross references

Holder - articles 4(6) and 14
Maturity - article 4(9)
Stipulation of interest - article 6

Commentary

1. Article 66 lays down what sums of money are owed to the holder at maturity and what sums of money he may recover, in a recourse action upon dishonour, from a party liable to him, after maturity (upon dishonour by non-payment) and before maturity (upon dishonour by non-acceptance). At maturity the holder is entitled to be paid the amount of the instrument and any interest (cf. article 6). According to article 69 the holder is not obliged to take partial payment. Upon the dishonour of an instrument by non-acceptance or non-payment the holder may recover from any party liable on the instrument (cf. articles 50(2) and 54(2) and (3)). Paragraphs (1) (b) and (c) lay down what the holder may recover in these cases. After maturity the holder may recover the amount payable at maturity; delay interest at the rate stipulated or, if not stipulated, at the rate specified in paragraph (2) calculated from the date of presentment on the amount payable at maturity; and any expenses consequent upon the making of protest and the giving of any notice of dishonour. Before maturity the amount of the instrument is subject to a discount but interest, if stipulated, runs to the date of payment.
2. The expenses referred to in paragraph (1)(b)(iii) and (1)(c)(ii) do not include bank charges, costs of collection and lawyers' fees but only any legitimate and necessary expenses actually incurred with the making of protest or the giving of notice of dishonour.
3. Paragraphs (2) and (3) specify the rate at which interest is to be calculated when the holder recovers in a recourse action upon dishonour by non-payment. **The actual percentage points are placed between brackets for further consideration at a future conference of plenipotentiaries which may be called to conclude a convention on the basis of the UNCITRAL draft Convention.**

* * *

Article 67

A party who pays an instrument in accordance with article 66 may recover from the parties liable to him:

- (a) The entire sum which he was obliged to pay in accordance with article 66 and has paid;
- (b) Interest on that sum at the rate specified in article 66, paragraph (2), from the **date on which he made payment**;
- (c) Any expenses of the notices given by him.

Relevant legislation

BEA - section 57

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

ULB - article 49

Commentary

1. Article 67 lays down what sums of money a party secondarily liable who has paid an instrument may recover from the acceptor or the maker, the drawer, prior endorsers, and their guarantors. Thus, if the drawer has taken up and paid a bill he may recover from the acceptor the sum the drawer was compelled to pay pursuant to article 66 and interest on that sum from the date on which he made payment.

2. For the purposes of this article it is not necessary that when the party paid the instrument it was endorsed to him or endorsed in blank (cf. **art. 21**).

* * *

CHAPTER SIX. DISCHARGE

Section 1. Discharge by paymentArticle 68

(1) A party is discharged of liability on the instrument when he pays the holder, or a party subsequent to himself who has paid the instrument and is in possession thereof, the amount due pursuant to article 66 or 67:

- (a) At or after maturity; or
- (b) Before maturity, upon dishonour by non-acceptance.

(2) Payment before maturity other than under paragraph (1)(b) of this article does not discharge the party making the payment of his liability on the instrument except in respect of the person to whom payment was made.

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

(4) (a) A person receiving payment of an instrument must, unless agreed otherwise, deliver:

(i) to the drawee making such payment, the instrument;

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

(b) The person from whom payment is demanded may withhold payment if the person demanding payment does not deliver the instrument to him. Withholding payment in these circumstances does not constitute dishonour by non-payment under article 54.

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

Relevant legislation

BEA - sections 59 and 60

UCC - section 3-603

ULB - articles 39, 40 and 50

Cross references

Maturity : articles 4(9) and 8

Dishonour by non-acceptance : article 50

Knowledge : article 5

Claim by third person : article 25 (2,3)

Commentary

1. A person who signs an instrument assumes the obligation to pay the instrument if certain conditions are met (see Chapter Four, Section 2.). If a party pays the instrument in accordance with his undertaking, he is discharged of his liability. Article 68 lays down when payment constitutes a discharge of liability.

Paragraph (1)

"discharged of liability on the instrument"

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

3. The fact that a party is discharged of liability runs with the instrument and has effect against any person subsequent to him; however, the discharge cannot be invoked against a protected holder (cf. art. 26(1)(a)).

4. Payment discharges not only the payer of his liability but also, according to article 73(1), all parties who have a right of recourse against him. A further effect is that any guarantor of the payer or of another party to whom the payer is liable is discharged to the same extent (cf. art. 43(1)).

5. Payment of an instrument is often intended to discharge an obligation underlying the instrument. Article 68 does not deal with the effect of payment of the instrument on the underlying transaction, nor does it deal with the effect of dishonour by non-payment on the underlying transaction. Article 68 only deals with the consequences of payment on the liability of parties on the instrument itself.

"pays the holder"

6. Discharge under article 68 is consequent upon payment, i.e. by the payment of money as defined in article 4(11). Thus, it would not suffice to pay in kind or to give another negotiable instrument.

7. Payment is to be made to the person who is the holder as defined in article 14. Thus, for example, payment to the payee in possession of the instrument is payment to the holder. The same is true in respect of payment to a person in possession of an instrument on which the last endorsement is in blank and on which there appears an uninterrupted series of endorsements, even if any of the endorsements was forged. On the other hand, if an instrument on which the last endorsement is a special endorsement is delivered to a person other than the person to whom it is endorsed, payment to that person is not payment to the holder and, therefore, does not discharge the payer under article 68.

8. There is one special set of circumstances where payment to a "non-holder" constitutes discharge of liability: if a holder has lost the instrument, he may nevertheless claim payment under certain conditions (see art. 74), and payment to such ex-holder discharges the party paying (art. 79). In this context, reference should be made to article 74(2)(d), according to which, under certain conditions, payment may be effected by way of deposit with a court or other competent body.

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

9. The person receiving payment is usually the holder. If a bill is dishonoured by the drawee or acceptor, the holder has a right of recourse against the drawer, the endorsers and their guarantors. Similarly, if a note is dishonoured by the maker, the holder has a right of recourse against the endorsers and the guarantors. When the drawer of a bill, or the guarantor of a party to a bill or a note, pays, the instrument must be delivered to the payer. In the absence of an endorsement to the payer - and such endorsement is not necessary - the payer, though in possession of the instrument, is not a holder. However, such payer, if in possession of the instrument, has a right to payment against prior parties. Article 68 provides that payment by such parties to him discharges the party paying of his liability on the instrument.

"at or after maturity" (sub-paragraph (a))

10. Since the undertaking of a party is to pay at maturity, he is, accordingly, discharged if he pays the amount then due at or after maturity.

"before maturity" (sub-paragraph (b) and paragraph (2))

11. If a party pays an instrument before he is obliged to pay, i.e. before maturity, he is not discharged of his liability. However, such payment may be invoked against the person to whom payment was made.

12. If a bill was presented for acceptance and was dishonoured by non-acceptance, the holder has an immediate right of recourse against any party to the instrument. Paragraph (1)(b) provides that payment by such party discharges him of liability.

Paragraph (3)

13. Paragraph (3) deals with the question whether discharge may be affected or prevented by a claim of a third party. If the party paying had no knowledge of such claim, payment by such party constitutes discharge, provided that the other requirements of article 68 are met. Among other things the party must pay to the holder and not, for example, to a person in possession of an instrument on which there appears an interrupted series of endorsements. Even if the payer did not know that one of the endorsements was forged, he is not discharged since he did not pay to the holder. Thus, for there to be discharge, a party must examine the regularity of the endorsements but is not required to examine their genuineness.

14. If, on the other hand, the party paying had knowledge of a claim of a third party, the decisive factor is whether or not he was under an obligation to pay. Thus, he is discharged if he paid a protected holder under circumstances in which he, the payer, could not have raised the defence of ius tertii in an action on the instrument by the protected holder (cf. art. 26(2)).

15. In respect of payment of an instrument to which there is a claim by a third party, payment to the holder who is not a protected holder discharges the payer only if he cannot raise the defence of ius tertii under article 25(3) against such holder. This is so because in such a case the payer is obliged to pay and payment by him should therefore discharge him of liability.

Example A. The bill which the payee endorsed in blank is stolen from him. The thief is therefore a holder. Payment by the drawer to the thief with knowledge of the theft does not discharge the drawer.

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

Paragraph (4), sub-paragraph (a)

16. A holder who receives payment from a party or the drawee must deliver the instrument to the payer. The payer's right to possession is justified by the fact that, if the instrument remained in the hands of the person receiving payment and that person transferred the instrument to a protected holder, the payer, if a party, would be obliged to pay the instrument a second time upon presentment by the protected holder (cf. arts. 26, 68(4)(c)).

17. If the payer is a party, the person receiving payment must deliver, in addition to the instrument, a receipted account and any protest (sub-paragraph (ii)). These documents are necessary to enable the payer to exercise rights on the instrument against parties liable to him (cf. art. 67).

Sub-paragraph (b)

18. The person from whom payment is demanded is not required to pay if the instrument is not delivered to him. Withholding payment in these circumstances does not constitute dishonour by non-payment. Consequently, in such a case the person who refuses to deliver the instrument would not be entitled to exercise a right of recourse against parties liable to him. However, if the instrument is not delivered because it has been lost, the special rules on lost instruments apply (articles 74-79).

Sub-paragraph (c)

19. If the person from whom payment is demanded pays the instrument although it is not delivered to him, such payment constitutes a discharge of liability on the instrument but such discharge may not be raised as a defence against a protected holder (cf. art. 26).

Example C. The maker issues a note to the payee. The payee endorses the note to A who endorses it to B. B presents the note for payment to the maker who refuses payment. Upon protest, B asks payment from the payee. The payee pays but B retains the note. Subsequently, B requests payment from A. A may raise as a defence against B that the instrument was paid by the payee, and that he therefore is discharged of liability on the note (cf. art. 73).

Example D. The maker issues a note to the payee. The payee endorses it to A who endorses it to B. B presents the note for payment to the maker. The maker pays but B retains possession of the note. B endorses the note to C who is not a protected holder. C presents the note for payment to the maker. Because C is not a protected holder, the maker may raise the defence that he paid the note and that such payment constitutes a discharge. If, on the other hand, C is a protected holder, then payment by the maker cannot be raised as a defence, neither by the maker nor by parties prior to C.

* * *

Article 69

- (1) The holder is not obliged to take partial payment.
- (2) If the holder who is offered partial payment does not take it, the instrument is dishonoured by non-payment.
- (3) If the holder takes partial payment from the drawee or the acceptor or the maker:
 - (a) The acceptor or the maker is discharged of his liability on the instrument to the extent of the amount paid; and
 - (b) The instrument is to be considered as dishonoured by non-payment as to the amount unpaid.
- (4) If the holder takes partial payment from a party to the instrument other than the drawee, the acceptor or the maker:
 - (a) The party making payment is discharged of his liability on the instrument to the extent of the amount paid; and
 - (b) The holder must give such party a certified copy of the **instrument and of any authenticated protest.**
- (5) The drawee or a party making partial payment may require that mention of such payment be made on the instrument and that a receipt therefor be given to him.
- (6) If the balance is paid, the person who receives it and who is in possession of the instrument must deliver to the payor the receipted instrument and any authenticated protest.

Relevant legislation

BEA - section 47
UCC - section 3-507
ULB - article 39

Cross references

Discharge by payment : article 68
Dishonour by non-payment : article 54
Authenticated protest : article 56(3)

Commentary

1. A party's undertaking is to pay the instrument in full as provided in articles 66 and 67. Accordingly, a holder is entitled to receive the full amount; he is not obliged to take **partial payment which would impose on him the burden of having to claim the remaining part of the sum from another party.**

2. Consequently, if he does not accept partial payment, the instrument is dishonoured by non-payment and the holder has rights against parties liable to him for the full amount. If, however, he elects to take partial payment, any party liable is discharged pro tanto (paragraphs (3)(a), (4)(a) and article 73) and the instrument is dishonoured to the extent of the amount unpaid (paragraph (3)(b)).

3. If partial payment is made the payer is not entitled to receive the instrument since the holder needs it in order to obtain payment of the amount unpaid. In order to give the payer the protection which he would have by receiving the instrument (article 68(4)), he may require that his partial payment be stated on the instrument and that he be given a receipt for it. As regards payment of the remaining part of the instrument, the payer of it is entitled to receive the receipted instrument.

4. If partial payment is made by a person other than the acceptor, maker or drawee, that person has, as a party secondarily liable, a right of recourse. Since he does not receive the instrument (see above, para. 3), he needs some other document to exercise his right of recourse as to the amount paid by him. Therefore, the holder must give such party a certified copy of the instrument and of any protest, if protest was made as a separate document (paragraph (4)(b)).

* * *

Article 70

(1) The holder may refuse to take payment in a place other than the place where the instrument was presented for payment in accordance with article 51.

(2) If in such case payment is not made in the place where the instrument was presented for payment in accordance with article 51, the instrument is considered as dishonoured by non-payment.

Relevant legislation

BEA - section 45(4)
UCC - section 3-504

Cross references

Presentment for payment : article 51
Dishonour by non-payment : article 54

Commentary

Article 51 specifies the proper place for due presentment for payment (see paragraphs (g) and (h)). Since it is commercially reasonable to require that payment be made at such place, article 70 provides that an offer to pay the instrument in some other place may be rejected by the holder, who may then treat the instrument as dishonoured by non-payment. However, if the holder accepts payment at another place, the payer is discharged of liability on the instrument according to article 68.

* * *

Article 71

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

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

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

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

(i) Ruling at the place where the instrument must be presented for payment in accordance with article 51(g), if the specified currency is that of that place (local currency); or

(ii) If the specified currency is not that of that place, according to the usages of the place where the instrument must be presented for payment in accordance with article 51(g);

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

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

(ii) If no rate of exchange is indicated on the instrument, at the option of the holder, according to the rate of exchange ruling on the date of dishonour or on the date of actual payment;

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

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

(ii) If no rate of exchange is indicated on the instrument, at the option of the holder, according to the rate of exchange ruling on the date of maturity or on the date of actual payment.

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

(4) The rate of exchange ruling at a certain date is the rate of exchange ruling, at the option of the holder, at the place where the instrument must be presented for payment in accordance with article 51(g) or at the place of actual payment.

Relevant legislation

BEA - section 72(4)
UCC - section 3-107(2)
ULB - article 41

Cross references

Currency: article 4(11)
Rate of exchange indicated on the instrument: article 6(d)
Dishonour by non-acceptance: article 50
Dishonour by non-payment: article 54

Commentary

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

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

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

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

Paragraph (1)

2. When an instrument is drawn or made payable in a currency which is not that of the place of payment, in which currency ("foreign" or "local") should payment be made at maturity in order to discharge the payer of his liability on the instrument? In theory, one can envisage the following answers:

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

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

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

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

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

4. It follows from the rule stated in paragraph (1) that if a drawee accepts to pay the bill of exchange, denominated in a specified currency, in the currency of the place of payment such acceptance would be a qualified acceptance which the holder would be at liberty either to take or to refuse. In the latter case the bill would be dishonoured by non-acceptance. Similarly, the refusal by the holder to take payment of the bill in local currency would result in dishonour of the bill by non-payment.

5. The rule is subject to exchange control regulations imposing restrictions on payment in a currency other than that of the place of payment (cf. art. 72).

Paragraph (2)(a) and (b)

6. The drawer of a bill or the maker of a note may stipulate on the instrument that it is to be paid in a specified currency other than the currency in which the amount of the instrument is expressed. In such a case the instrument is to be paid in the specified currency. Thus if a bill is denominated in Swiss francs and contains a stipulation that it is to be paid in rubles, the instrument must be paid in rubles. Under article 6(e) the sum so payable is deemed to be a definite sum for the purposes of article 1. In such a case the question arises as to what rate of exchange should be applicable. If a rate of exchange is indicated on the instrument the amount payable is to be calculated according to that rate. Under article 6(d) the sum so payable is deemed to be a definite sum for the purposes of article 1. If no rate of exchange is indicated on the instrument the amount payable is to be calculated according to the rate of exchange for sight drafts (or, in the absence of such rate, according to the appropriate established rate of exchange) on the date of maturity. The rate of exchange is the rate ruling at the place where the instrument must be presented for payment in accordance with article 51(g) (see paragraph (2)(b)(i) and (ii)).

Paragraph 2(c) and (d)

7. Where an instrument is dishonoured by non-acceptance the holder has, upon due protest (cf. art. 55), an immediate right of recourse against prior parties (cf. art. 50(2)) and the instrument becomes due before maturity. In such a case the question arises as to what rate of exchange should prevail; the rate specified on the instrument (if so specified), that ruling on the date of dishonour, on the date of maturity (if payment is made at or after maturity) or on the date of actual payment. Similar questions arise where an instrument is dishonoured by non-payment. In this event, the holder has a right of recourse against the acceptor or the maker and, upon due protest (cf. art. 55), against prior parties (cf. art. 54(2) and (3)). Also here the question arises as to what rate of exchange should prevail when payment is made: the rate specified on the instrument (if so specified), the rate ruling on the date of maturity or on the date of actual payment. In respect of both dishonour by non-acceptance and by non-payment, the further question arises whether provision should be made for one or several possible rates of exchange or whether the holder or the payer should be entitled to exercise an option between two or more of these rates and, if so, under what circumstances. Yet another question is whether the rules applicable to the rate of exchange should be the same for all parties liable on the instrument or whether a distinction should be made between parties primarily liable and parties secondarily liable. Lastly, the question arises whether the rate of exchange should be that prevailing at the place where the instrument should have been paid upon due presentment for payment or that prevailing at the place where payment is actually made.

8. Sub-paragraphs (c)(i) and (d)(i) provide that, in both cases of dishonour, if a rate of exchange is indicated on the instrument that rate prevails. If the rate of exchange is not indicated on the instrument, sub-paragraph (c)(ii) provides that in the event of dishonour by non-acceptance the holder has the option of demanding that payment be made at either the rate of exchange ruling on the date of dishonour or on the date of actual payment. In the event of dishonour by non-payment the holder has the option of demanding that payment be made at either the rate of exchange ruling on the date of maturity or on the date of actual payment. The holder is given the option of choosing between two rates of exchange in order to protect him against any loss he may suffer because of speculation by the party liable.

Paragraph (3)

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

Paragraph (4)

10. This paragraph sets forth a rule as to the place which determines the rate of exchange if the amount payable is to be calculated according to a rate prevailing at a given date. Upon dishonour the holder has the option of choosing between the rate of exchange ruling at the place where the instrument must be presented for payment under article 51(g) and that ruling at the place of actual payment.

Article 72

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

(2) (a) If, by virtue of the application of paragraph (1) of this article, an instrument drawn in a currency which is not that of the place of payment must be paid in local currency, the amount payable is to be calculated according to the rate of exchange for sight drafts (or, if there is no such rate, according to the appropriate established rate of exchange) on the date of presentment ruling at the place where the instrument must be presented for payment in accordance with article 51(g).

(b) (i) If such an instrument is dishonoured by non-acceptance, the amount payable is to be calculated, at the option of the holder, at the rate of exchange ruling on the date of dishonour or on the date of actual payment.

(ii) If such an instrument is dishonoured by non-payment, the amount is to be calculated, at the option of the holder, according to the rate of exchange ruling on the date of presentment or on the date of actual payment.

(iii) Paragraphs (3) and (4) of article 71 are applicable where appropriate.

Cross references

Currency: article 4(11)
Dishonour by non-acceptance: article 50
Dishonour by non-payment: article 54

Commentary

Paragraph (1)

1. As noted in the commentary to article 71 (para. 5), the provisions regarding payment in a currency that is not the currency of the place of payment are subject to exchange control regulations imposing restrictions on payment in such currency. Therefore, article 72 sets forth a general provision to this effect. The regulatory provisions referred to in this article are not only those of the Contracting State itself but include those which the Contracting State is bound to enforce by virtue of international agreements to which it is a party. An example of the latter type of regulatory provisions is Article VIII, section 2(b), of the Articles of Agreement of the International Monetary Fund according to which "exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with the Fund Agreement shall be unenforceable in the territories of any member".

Paragraph (2)

2. This paragraph envisages situations where in accordance with article 71 an instrument is to be paid in a currency which is not the currency of the place of payment but where by virtue of the application of paragraph (1) of article 72 it is to be paid in local currency. For these situations paragraph (2) sets forth rules regarding the rate of exchange to be applied and on which date that are similar to the rules set forth in article 71(2), (3) and (4).

Section 2. Discharge of a prior party

Article 73

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

(2) Payment by the drawee of the whole or a part of the amount of a bill to the holder, or to any party who has paid the bill in accordance with article 66, discharges all parties of their liability to the same extent.

Relevant legislation

BEA - section 37
UCC - section 3-208
ULB - article 50

Cross references

Discharge : article 68

Commentary

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

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

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

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

* * *

CHAPTER SEVEN. LOST INSTRUMENTS

Article 74

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

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

(i) The elements of the lost instrument pertaining to the requirements set forth in article 1(2) or 1(3); for this purpose the person claiming payment of the lost instrument may present to that party a copy of that instrument;

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

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

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

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

(d) If the security cannot be given, the court may order the party from whom payment is claimed to deposit the amount of the lost instrument, and any interest and expenses which may be claimed under article 66 or 67, 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.

Relevant legislation

BEA - section 70
UCC - section 3-804

Cross references

Defences against liability: articles 25, 26
Discharge by payment: article 68

Commentary

1. Under the Convention the rights on an instrument are vested in the holder, i.e. the payee or endorsee who is in possession of the instrument (cf. arts. 4(6) and 14). Thus, a holder when losing possession of the instrument is no longer a holder. The question, then, is what are the rights of such an "ex-holder".

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

3. The latter approach has been adopted in the Convention which requires the giving of security and of a written statement by the ex-holder (article 74(2)). The institution of cancellation, as embodied in national laws of civil law tradition, seemed less appropriate in the context of an international negotiable instrument because cancellation takes place by a judicial decision which would not necessarily be known in countries other than the country in which it was rendered.

Paragraph (1)

4. Article 74, paragraph (1), expresses the idea, common to all systems, that the loss of an instrument does not result in loss of the rights on it. Loss of the instrument is to be understood in a wide sense. It includes, in addition to normal loss, any loss by destruction, theft or any other dispossession against the possessor's will.

5. Under paragraph (1), the ex-holder has, subject to the provisions of paragraph (2), the same right to payment as he would have had if he had been in possession of the instrument. Retention of his legal position means not only that he retains his rights on the instrument but also that he retains any burden, i.e. to make presentment (cf. art. 53(1)), to make protest (cf. art. 55), to give notice of dishonour (cf. art. 60(1)), and continues to be subject to the same claims and defences as before.

Example A. The drawer draws a bill payable to payee (P), P endorses it to A who loses it. Under article 74, paragraph (1), A has the right to claim payment from the drawer and P; but, before he may claim payment he must make presentment for payment and any necessary protest if payment is refused (art.77). In an action brought against the drawer and P, each party may raise any defence which he could raise if A would be in possession of the instrument. On the other hand, if the drawer or P pays, such payment constitutes a discharge and is a defence available against any holder who is not a protected holder.

6. The provisions on lost instruments are applicable only to situations where an ex-holder claims payment from a party, but not to cases where payment is sought from the drawee. This is clear from the use of the word "party" instead of

"person". The underlying reason is that, since a drawee is not liable on the instrument, payment by him would be at his own risk.

Paragraph (2)

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

Sub-paragraph (a)

8. Under sub-paragraph (a), the ex-holder must state in writing certain elements of the lost instrument (i) and certain facts (ii, iii). If he does not do so, he may not exercise his rights under article 74. This would, for example, include the case where he does not remember the sum of the instrument or the date of issue or the date of payment.

9. The procedure under the provisions on lost instruments may only be used if the instrument at the time it was lost was a complete instrument, i.e. complied with the formal requisites set forth in article 1(2) or (3). Therefore an instrument cannot be completed by the use of the written statement.

10. Sub-paragraph (ii) requires that the ex-holder show that he was a holder of the instrument. For example, he must show that, at the time of the loss of an order instrument he held it through an uninterrupted series of endorsements (cf. art. 14(1)(b)). Finally, sub-paragraph (iii) requires from the ex-holder to state that he lost the instrument and how.

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

11. In addition to the above written statement the ex-holder must give security to the person from whom he claims payment. This requirement arises from the fact that under the Convention a party must pay the ex-holder. However, the lost instrument may get into the hands of a protected holder against whom such party could not raise the first payment as a defence (cf. art. 26(1)(a)). The security is intended to provide for such contingency and to cover the risk of his being obliged to pay a second time.

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

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

13. Sub-paragraph (d) provides an alternative way of covering the risk of double payment in those cases where security cannot be given. A court may order that the party from whom payment is claimed deposit the amount of the lost instrument and any interest and expenses recoverable under article 66 or 67 with the court or with another authority or institution which is competent under national law to receive and hold such deposit. According to sub-paragraph (d), the deposit is then to be considered as payment to the claimant. Such payment has the same legal effects under the Convention as any ordinary payment.

Example C. In the situation described in example A. (above, para. 5), the drawer makes the deposit and is therefore discharged by payment. Such payment discharges also the payee (cf. art. 73(1)).

* * *

Article 75

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

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

(3) Failure to notify renders the party who has paid the lost instrument liable for any damages which the person whom he paid may suffer from such failure, provided that the damages do not exceed the amount referred to in article 66 or 67.

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

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

Commentary

Paragraph (1)

1. Article 75 imposes upon the party who has paid the instrument to the ex-holder the obligation to notify him of a subsequent presentment of the instrument for payment. The purpose of that notification is to enable the ex-holder to assert a claim to the instrument, to prevent a party from paying the instrument to a holder (cf. art. 25(3)) or to claim damages under article 23.

Paragraph (2)

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

Paragraph (3)

3. If the party who paid the lost instrument fails to give the notification he is liable for damages which the ex-holder might suffer because of that failure. Damages may result, for example, from circumstances such as these: The payee (P) loses the note and receives payment under article 74; the thief forges P's signature and endorses the note to A; A endorses the note to B who presents it for payment to the maker. Under paragraph (1) it is the duty of the maker to notify P that B has presented the note to him. Such notification may, for example, enable P to claim damages from A who, at the time of notification, is solvent. If the maker fails to notify and A becomes insolvent, P may claim damages from the maker to compensate him for not having been able to recover damages from A when he was still solvent.

4. Such action for damages based on failure to notify is an action off the instrument like, for example, the actions provided for under articles 23, 41 and 64.

Paragraphs (4) and (5)

5. Paragraphs (4) and (5) set forth the circumstances under which delay in giving notice is excused or under which notice is dispensed with, similar to the provisions of article 52.

* * *

Article 76

(1) A party who has paid a lost instrument in accordance with the provisions of article 74 and who is subsequently required to, and does, pay the instrument, or who, by reason of the loss of the instrument, then loses his right to recover from any party liable to him, has the right:

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

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

(2) The person who has given security in accordance with the provisions of paragraph (2)(b) of article 74 is entitled to obtain release of the security when the party for whose benefit the security was given is no longer at risk to suffer loss because of the fact that the instrument is lost.

Commentary

Paragraph (1)

1. This provision sets forth the circumstances under which a party who paid a lost instrument in accordance with article 74 may realize the security given to him or claim the amount deposited under article 74, paragraph (2)(d). The first of these situations is where a party had to pay a second time. The other situation is where a party who received security loses his right of recourse by reason of payment by a prior party. For example, an instrument endorsed by the payee to A and by A to B is lost by B. B asks payment from A under article 74 and is paid upon giving security to A. C acquires the lost instrument under circumstances which make him a protected holder. C demands payment from the drawer and is paid by him. Payment by the drawer discharges the payee. Therefore, because A loses his right of recourse against the payee and the drawer, A may realize the security.

Paragraph (2)

2. This provision deals with the circumstances under which an ex-holder who gave security and received payment is entitled to obtain release of the security. He may do so when the party who paid and received the security is no longer at risk to be obliged to pay a second time. This is the case, for example, where the time periods provided in article 80 have expired or where proof is brought that the lost instrument was in fact destroyed.

* * *

Article 77

A person claiming payment of a lost instrument duly effects protest for dishonour by non-payment by the use of a written statement that satisfies the requirements of article 74, paragraph (2)(a).

Cross references

Protest: article 56

Commentary

1. The fact that the instrument is lost does not dispense the ex-holder of the obligation to protest the instrument in the event of dishonour by non-acceptance or by non-payment. Article 77 lays down rules as to how protest is to be effected in this case: it is to be effected by use of the same item as used for presentment, i.e. the written statement which satisfies the requirements of article 74, paragraph (2)(a), and, as provided therein, may be a copy of the lost instrument.

2. In the lost instrument situation, in general, the ordinary rules apply except for the replacement of the lost instrument by the written statement. Thus, e.g., a declaration made in accordance with article 56, paragraph (3), is deemed to be a protest for the purpose of the Convention (cf. art. 56 (4)) also in the case of a lost instrument.

* * *

Article 78

A person receiving payment of a lost instrument in accordance with article 74 must deliver to the party paying the written statement required under article 74, paragraph (2)(a), receipted by him and any protest and a receipted account.

Cross references

Payment: article 68

Commentary

Under article 68, paragraph (4), the person receiving payment must deliver the instrument (and any protest and a receipted account) to the payer; if he does not do so, the person from whom payment is demanded may withhold payment. Article 78 makes it clear that the person obliged to pay may not withhold payment on the mere ground that the person claiming payment is unable to deliver the (lost) instrument; therefore, such withholding would constitute dishonour. However he must deliver the written statement which substitutes for the lost instrument.

* * *

Article 79

(1) A party who has paid a lost instrument in accordance with article 74 has the same rights which he would have had if he had been in possession of the instrument.

(2) Such party may exercise his rights only if he is in possession of the receipted written statement referred to in article 78.

Cross references

Right of recourse: article 67

Commentary

This provision establishes in respect of parties who took up and paid a lost instrument rights similar to those of the ex-holder under article 74. Thus, where an endorser, upon dishonour by the acceptor, pays the ex-holder, the endorser has in turn, against prior parties, those rights on the lost instrument which he would have had if he had acquired, upon payment, possession of the instrument.

* * *

CHAPTER EIGHT. LIMITATION (PRESCRIPTION)

Article 80

(1) A right of action arising on an instrument may no longer be exercised after four years have elapsed:

(a) Against the maker, or his guarantor, of a note payable on demand, from the date of the note;

(b) Against the acceptor or the maker or their guarantor of an instrument payable at a definite time, from the date of maturity;

(c) Against the acceptor of a bill payable on demand, from the date on which it was accepted;

(d) Against the drawer or an endorser or their guarantor, from the date of protest for dishonour by non-acceptance or non-payment or, where protest is dispensed with, from the date of dishonour.

(2) If a party has paid the instrument in accordance with article 66 or 67 within one year before the expiration of the period referred to in paragraph (1) of this article, such party may exercise his right of action against a party liable to him within one year from the date on which he paid the instrument.

Relevant legislation

UCC - section 3-122
ULB - article 70

Cross references

Note payable on demand: article 8
Instrument payable at a definite time: article 8
Maturity: article 4(9)
Protest for dishonour by non-acceptance: article 57(1)
Protest for dishonour by non-payment: article 57(2)
Dispensation of protest: article 58(2)
Exercise of right of recourse: article 55

Commentary

1. This article lays down special rules in respect of the period of time within which an action arising on the instrument must be brought and the point of time from which such period starts to run. The article does not deal with actions off the instrument (e.g. those arising by virtue of article 23, 41, 64 or 75(3)) nor does the article deal with other aspects of limitation or prescription such as the causes of an interruption or suspension of the limitation period.

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

Example A. A fixed term bill issued by the drawer to the payee is accepted by the drawee upon presentment by the payee. The payee transfers the bill to A who transfers it to B. Upon presentment for payment the bill is dishonoured by the acceptor. B, upon protesting the dishonour, exercises his right of recourse against A who pays the bill. Under article 80 B may (a) exercise his right on the instrument against the acceptor within four years from the date of maturity (paragraph (1)(b)); (b) exercise his right of recourse against A, the payee and the drawer within four years from the date of protest for dishonour by non-payment (paragraph (1)(d)). If B exercises his right of recourse against A within a period of three years, A in turn may exercise his right of recourse within the remaining period of time of four years. However, if B exercises his right of recourse against A after a period of three years has elapsed, A may exercise his right of recourse within a period of one year from the date on which he paid the bill to B.

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

3. Article 80 sets forth rules regarding the point of time at which an action on the instrument accrues. The basic rule in this respect is that this point of time is the date on which a party became liable on the instrument. Thus an action

- (a) against the maker of a demand note accrues on the date of the note;
- (b) against the acceptor of a bill payable on demand accrues on the date of acceptance;
- (c) against the acceptor or the maker of an instrument payable at a definite time accrues on the date the instrument is to be paid;
- (d) against parties secondarily liable accrues on the date of protest for dishonour by non-acceptance or non-payment.